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Note and Comment

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NOTE AND COMMENT

EFFECT OF TAKING POSSESSION OF MORTGAGED PROPERTY UNDER A CHATTEL MORTGAGE AS AGAINST A JUNIOR MORTGAGEE.—In the case of *Garrison et al.* v. *Street & Harper Furniture & Carpet Co.*, 97 Pac. 978, decided June 29, 1908, the Supreme Court of Oklahoma announces a decision upon a phase of the law of chattel mortgages which is of considerable interest. The facts were as follows: On Nov. 20, 1904, to secure an indebtedness, W. executed and delivered to G. a chattel mortgage upon certain personal property and "all furniture, fixtures * * * hereafter bought by the party of the first part (W.);" this mortgage was recorded December 31; and in the forenoon of Jan. 3, 1905, there having been a breach of condition of the mortgage, with consent of W., G. took possession of all the property. On Dec. 15, 1904, the S. & H. Co. sold to W. certain property of the nature included in the after acquired property clause of the above mentioned mortgage, without knowledge, however, of the mortgage to G., and took as security for the purchase price of such goods a chattel mortgage on the goods sold; this mortgage was filed in the proper office during the afternoon of Jan. 3, 1905. On January 15, 1905, default having been made in the payment of the debt secured by the mortgage to S. & H. Co., the company commenced an action of replevin

against G. to recover possession of the goods sold W. December 15. The court held that the defendant was entitled to retain possession.

The statutory provisions of Oklahoma necessary to an understanding of the case are as follows: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest." Sec. 3445, WILSON'S REV. & ANN. STATS. OKLA. 1903.

"A mortgage of personal property is void as against creditors of the mortgagor, subsequent purchasers, and encumbrancers of the property in good faith, for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated, etc." Sec. 3578, WILSON'S REV. & ANN. STATS. OKLA. 1903.

Two grounds were urged in support of the action; first, that the first mortgagee had acquired no lien upon such after acquired property as against the vendor, the second mortgagee, because the mortgagor had acquired no "interest" therein, except such as was subject to the second mortgagee's rights, and, second, that the second mortgagee had acquired its lien in good faith, without notice of the prior mortgage, for a valuable consideration, and that failure to file the first mortgage as required by statute made it absolutely void as to all "creditors, subsequent purchasers, and encumbrancers of the property in good faith."

The court disposed of the first ground very shortly by holding that before the mortgagor could give a mortgage upon the property she must have title thereto, therefore she must have had an "interest" therein and it was subject to the first mortgage. On this point compare *Hammel* v. *Bank,* 129 Mich. 176, 88 N. W. 397, and *U. S.* v. *New Orleans & O. R. Co.,* 12 Wall. 362, 20 L. Ed. 434, holding contra. In disposing of the second ground the court bases its conclusion largely upon a recent decision of the same court, *Frick Co.* v. *Oates,* 94 Pac. 682, in which the court had overruled the earlier case of *Greenville Nat. Bank* v. *Evans,* 9 Okl. 353, 60 Pac. 249, and held that under the Oklahoma statute above quoted, § 3578, possession of the mortgaged property taken after breach of condition, with consent of the mortgagor, rendered the mortgage good as against attachment and execution liens thereafter acquired, even though the mortgage had never been filed as required by law.

Under the law of practically all of our states in order to make a chattel mortgage good as against possible rights of creditors, subsequent purchasers and encumbrancers in good faith, etc., it is necessary that either possession of the mortgaged chattels be transferred, or forthwith, or within a certain time, or a reasonable time the instrument be filed or recorded, in other words, possession and filing, to that extent, are interchangeable and accomplish the same purpose. It is also generally held that a mortgage is good as between the parties though possession is never transferred and there is no recording or filing of the instrument, and that possession taken any time after the crea-

tion of the mortgage lien is sufficient to cut off and bar the rights of parties which may *thereafter* attach to the property. But it is uniformly held under the common type of filing statute, and since the decision of the Oklahoma court in *Frick Co.* v. *Oates,* supra, that state must be included in that class, that a second mortgage taken without notice, actual or constructive of a prior mortgage creates rights superior to such prior mortgage even though the second, or junior, mortgage is never recorded, or filed. In *De Courcey* v. *Collins,* 21 N. J. Eq. 357, there was a contest of this nature, though no question of possession was involved, and the court held the second mortgage to be the prior lien. BEASLEY, C.J., speaking for the court, said that "a first chattel mortgage unregistered is absolutely void against a second mortgage taken in good faith; and such second mortgage need not be recorded at all to give it priority over such first mortgage." To the same effect see also *Bank of Farmington* v. *Ellis,* 30 Minn. 270, 15 N. W. 243, and JONES, CHATTEL MORTGAGES, (5th. Ed.), § 246 and cases cited. The court in the principal case distinguished these cases on the ground that the question of possession had not entered into them. But the mortgages, the liens of which were postponed, were recorded subsequent to the time of the creation of the junior mortgage liens; if recording and possession are interchangeable and accomplish the same results, it would seem that those cases were not properly disposed of on the ground indicated by the court in the principal case. *Weatherbee* v. *Taft,* 51 App. Div. 87, 64 N. Y. Supp. 347, is a case even closer, if possible, in point. In that case a chattel mortgage was given on a canal boat, but never properly filed as required by New York law; later possession was taken by the mortgagee; sometime between the time of giving the mortgage and the taking of possession, a second mortgage was given to another party, which also was never filed. The holder of the second mortgage, who claimed to have taken his mortgage in good faith, upon default in payment of the debt due him brought action against the first mortgagee for the purpose of recovering possession of the property, and it was held that he should recover. It was argued that the failure of the second mortgagee to file his mortgage prevented his recovering, but the court said that "The fact that the transfers to Bristol (the second mortgagee) and to plaintiff were not filed as chattel mortgages in the proper office does not deprive them of the protection of the statute. The priority of the subsequent mortgage is not made to depend on whether it is ever filed." On this point generally see also *Vining* v. *Millar,* 116 Mich. 144. It should be noticed that possession in the principal case was not taken within a reasonable time, as that expression is used with reference to the time within which instruments must be recorded or filed. *Wilson* v. *Milligan,* 75 Mo. 41.

The court in the principal case also places considerable reliance upon the decision of the Kansas court in *Cameron, Hull & Co.* v. *Marvin,* 26 Kan. 612, and quotes the following language used by Mr. Justice VALENTINE in that case: "* * * If the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, or takes possession of the property with the consent of

the mortgagor, his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint act of both parties, and hence must be held to be valid from that time on, as against all persons." But the court did not say, much less hold, that intervening rights were thereby cut off.

It is believed that the court ascribed to possession an effect which is entirely unwarranted and which finds no support either in reason or authority.

R. W. A.

THE EFFECT OF THE REUNION OF THE CUMBERLAND PRESBYTERIAN CHURCH WITH THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA UPON THE PROPERTY OF THE FORMER.—Following the reunion of the Cumberland Presbyterian Church with the Presbyterian Church in the United States of America in 1906, it was not unnatural that controversies in regard to the ownership of the church property should arise between the dissenting minority opposing the union, and those in favor of the change. A case of this character recently came before the Court of Appeals of Kentucky. The case, decided Jan. 21, 1909, is *Wallace et al.* v. *Hughes et al.* — Ky. —, 115 S. W. 684. The action was brought to recover possession of the church building and the lot upon which it stood, by the plaintiffs who described themselves as elders, members, and communicants, of the local congregation of Cumberland Presbyterians. Their claim was that the property belonged to them because the majority had abandoned the ancient doctrines of the Cumberland Presbyterian Church. The defendants claimed title and right of possession to the property to be in themselves as trustees of the local Presbyterian Church, the lawful successor to the Cumberland Presbyterian Church, as a result of the reunion of 1906. It will thus be seen that the question at issue was the effect of the reunion, on the property formerly held by the Cumberland Presbyterian Church. The lower court decided that the plaintiffs were entitled to it. The Court of Appeals (one judge dissenting) reversing the decision of the lower court, held that the property had passed to the defendants.

It will be remembered that the Cumberland Presbyterian Church originated in a schism in the Presbyterian Church in the United States of America, in 1810, as a result of differences of opinion concerning certain religious doctrines. In 1903 the creed of the Presbyterian Church in the United States of America was revised in such a way as to remove the main differences existing between the two branches of the church. As a result a joint committee on fraternity and union was appointed by the General Assemblies of the two churches. A plan of union was agreed upon, was adopted by the General Assemblies, and was ratified in the prescribed manner by both churches.

The form of government of the Cumberland Presbyterian Church was of the prebyterial type, that is, it consisted of a general government, with its ecclesiastical power distributed among various tribunals, the lowest of which

was the church session, having charge of the affairs of a single congregation, the highest being the General Assembly, which was the repository of all the ultimate ecclesiastical power of the church.

In the present case the court held that when a single congregation belonging to a church organization with a government like that just described, acquires property for the purpose of religious worship, not charged with any specific religious trust, it is entitled to hold it only because the congregation is a part of the general eccelesiastical government; that its right to so hold it continues only as long as the congregation can be identified as an integral part of the general government; that in case of a schism and a dispute as to the ownership of the property the civil court will look into the question only so far as necessary to decide which of the claimants is identified with the general church government; that if the identification turns upon a decision of an ecclesiastical court having authority to make it, the decision of that court will be followed by the civil tribunal; and that in this case, the right of the General Assembly to agree to the reunion was an ecclesiastical question within its jurisdiction. The court rests its decision upon the fact that a religious organization is a voluntary association, and that by joining the association, the members agree to conform to its rules and to be bound by the decrees of the governing power of the association when acting within its proper limits.

In *Mack* v. *Kime,* 129 Ga. 1, the identical question decided in the present case, as to the effect of the reunion of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, was under discussion. The Supreme Court of Georgia there held that the right of the General Assembly of the Cumberland Presbyterian Church to unite that organization with the Presbyterian Church in the United States of America, was an ecclesiastical question, the decision of which was exclusively in the highest judicatory of that church, and that tribunal having decided in favor of the power and its consummation, the civil tribunal would acquiese and award the church property in accordance therewith.

Undoubtedly the leading American case on the subject is *Watson* v. *Jones,* 13 Wall. 679, decided by the Federal Supreme Court in 1871. The case arose as a result of a dispute as to church property, following a schism in the Presbyterian Church over certain phases of the slavery question. Mr. Justice MILLER in deciding the case, classifies disputes as to property held by ecclesiastical bodies, and the rules which are to apply, as follows:

1. When the property in controversy has been devoted by the donor to the teaching and support of some specific form of religious doctrine or belief, the court will see that the property is not diverted from the object for which it was donated.

2. When property is held by a religious congregation, which by the nature of its organization, is strictly independent of other ecclesiastical associations, and owes no fealty to any higher authority, the ordinary principles governing voluntary associations, will govern the disposition of the property and in general it will be given to that faction which constituted the majority of the members of the congregation.

3. Where the property is held by a religious congregation which is a subordinate member of some general church organization in which there are superior ecclesiastical tribunals, having a more or less complete control over the whole membership of the general organization, and the highest of these tribunals to which the matter has been carried, has passed upon some ecclesiastical question affecting the property, then the legal tribunals must accept such decision as final and binding on them in their application to the case before them.

The facts of the present case bring it within the third division and the decision was in fact in accord with the rule there laid down. Previous cases in Kentucky also are in accord with *Watson* v. *Jones,* supra, and with the present case. The case of *First Presbyterian Church of Louisville* v. *Wilson,* 14 Bush 252, arose over a dispute as to church property. It was there held that the individual members and congregations were bound by the action of the general organization, and the property was awarded in accordance with the decision of the church courts on the ecclesiastical question involved. In *Gibson* v. *Armstrong,* 7 B. Mon. 481, it was held that in general organizations of united churches, the law of the united organism is binding on all the individual churches, and that even a majority, seceding, lose all their rights in the church property. The case of *McGinnis* v. *Watson,* 41 Pa. St. 9, was a dispute as to the ownership of church property, following a reunion of two synods of different branches of the Presbyterian Church. The court there upheld the party acting in conformity with the decision of the synod. For other cases in accord with the present case, see *John's Island Church Case,* 2 Rich. Eq. (S. C.) 192; *McBride* v. *Porter,* 17 Iowa 204; *White Lick, Etc.,* v. *White Lick, Etc.,* 89 Ind. 136; *Lamb* v. *Cain,* 129 Ind. 486; *Den* v. *Pilling,* 24 N. J. L. 653; *Smith* v. *Swormstedt,* 16 How. 288.

In England the law on this point is not in accord with the American cases already cited. The present case and *Watson* v. *Jones,* supra, would apparently have been decided differently if the decision had been based upon the English law. In 1813 Lord ELDON laid down the rule that a congregation's title to property depended upon its adherence to the opinions and principles in which it had been originally united. *Craigdallie* v. *Aikman,* 1 Dow's Rep. 1. And as to whether there has been an adherence to such opinions and principles, the civil tribunals do not accept as final the decisions of the church courts. The leading English case on this point is *Free Church of Scotland* v. *Overton,* [1904], A. C. 515. In 1900 a union was brought about between the Free Church of Scotland and the United Presbyterian Church, neither of which was a state church. To this union a small minority of Free Church ministers refused to consent. These latter claimed the whole property formerly held by the Free Church of Scotland. After these claims had been denied by all the courts of Scotland, it was recognized by the House of Lords and it was decreed that they were entitled to all the property, consisting of eight hundred churches and £1,000,000 of invested funds. The decision of the House of Lords was based on the theory that the Free Church of Scotland, although it had separated from the Established Church in 1843, still stood for the principle of Establishment until its union with the United Presbyterian

Church in 1900; furthermore that the gifts it had received, from the mere fact that they were made while the Free Church stood for the principle of Establishment, were made in view of that fact, so as to create a trust relation, which was violated by an abandonment of that principle by the church. In a review of this case in 4 MICH. L. REV. 639, the writer endeavors to show that the decision is not opposed to *Watson* v. *Jones*, supra, but comes under the rule in the first class of cases laid down by Mr. Justice MILLER. Perhaps this is so in theory, but in practice the English rule may certainly be said to be, as stated by Prof. Peck in 15 YALE L. J. 258, that in Great Britain no church can unite with another church from which it differs in any point of faith or polity, without abandoning its entire property to a protesting minority, however insignificant. This is certainly in direct opposition to the American law on the subject. We cannot help but agree with Prof. Peck when he says that this country is to be congratulated on the view the American courts have taken of the law on this point. P. S. D.

THE EXCLUSIVE USE OF PART OF RAILROAD STATION GROUNDS BY HACKMEN.—No court denies to the railroad the right to make reasonable rules and regulations for the conduct of its business, provided they are consistent with the purposes of the corporation and not inconsistent with the interests of the public. Indeed it is its duty to provide proper regulations for the convenience and safety of its patrons. A railroad corporation is quasi-public in its nature, established to serve a public purpose, and is therefore subjected to public control. Its stations and depots, being held in the same right as its roadway, are subject to the same control. Its regulation of stations and depots must therefore be consistent with the public purpose of the railroad. Is the granting to a single hackman of the exclusive right to enter the station grounds and solicit business a proper regulation, consistent with the public purpose of the railroad?

There is a line of eminent authorities on either side of this question, the great weight of which supports an affirmative answer. It is said that "for all purposes not connected with the operation of the road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of any owner of real property not burdened with public or private easements or servitudes." *Pittsburgh, Etc. R* v. *Bingham*, 29 Ohio St. 364. It follows, under this theory, that if the hack business is not connected with the operation of the road, hackmen may be entirely excluded, or an exclusive privilege granted to one. *Donovan* v. *Penna. Co.*, 199 U. S. 279. It is further held that a hackman stands in a position no better than that of any other person seeking to carry on his business within the station grounds, because his business is not connected with the operation of the road. *Snyder* v. *Union Depot Co.*, 19 Ohio Cir. Ct. Rep 368; *Brown* v. *N. Y. etc. R. R.*, 75 Hun 355. The courts holding to this doctrine, while admitting that the carrier cannot prohibit the entrance of a vehicle belonging to, or employed by a passenger (HUTCHINSON, CARRIERS, § 944), vigorously deny

that "unemployed teamsters have an equal right to enter the station for the purpose of seeking employment." *Hedding* v. *Gallagher,* 72 N. H. 377. This rule has been adopted by the Federal Courts and in the following states: Colorado, Connecticut, Georgia, Massachusetts, Minnesota, New Hampshire, New York, Ohio, Rhode Island, and Utah. *Donovan* v. *Penna. Co.,* 199 U. S. 279; *Union Depot & Ry. Co.* v. *Meeking,* — Colo. —, 94 Pac. 16; *New York etc. R. R. Co.* v. *Scovill,* 71 Conn. 136; *Kates* v. *Atlanta etc. Co.,* 107 Ga. 636; *Old Colony R. Co.* v. *Tripp,* 147 Mass. 35; *Godbout* v. *St. Paul etc. Co.,* 79 Minn. 188; *Hedding* v. *Gallagher,* 72 N. H. 377; *Brown* v. *New York etc. R. R.,* 75 Hun 355; *State* v. *Union Depot Co.,* 71 Ohio St. 379; *Griswold* v. *Webb,* 16 R. I. 649; *Oregon etc. R. Co.* v. *Davidson,* — Utah —, 94 Pac. 10.

In *Palmer Transfer Co.* v. *Anderson* (1909), — Ky. —, 115 S. W. 182, the opposite view is taken. The railroad granted to the defendant the exclusive right to the use of the most advantageous stand on the station grounds, so that it was necessary for passengers to walk 150 feet, past the vehicles of the defendant, in order to reach those of the plaintiff. In granting to the plaintiff an injunction restraining the defendant from interfering with him in the use of such part of the grounds, the court, following *McConnell* v. *Pedigo,* 92 Ky. 465, held "that a regulation of a railroad that discriminates by driving from its depot those who are engaged in a public employment and whose duty it is to provide for their guests and traveling public, resulting in a monopoly of the particular business, is unauthorized by the charter of the railroad company, and in palpable violation of the rights of others." The courts taking this view admit the right to exclude all hackmen from the grounds as a reasonable regulation, but hold that, "if it opens the door to one, all must enter and have equal facilities one with the other." *Kalamazoo Hack & Bus Co.* v. *Sootsma,* 84 Mich 194. The theory of this doctrine is that the hackman is a connecting carrier, the conveyance of passenger and baggage from the station to a local destination being a necessary incident to travel, and in its nature a public employment, and that a railroad by granting an exclusive privilege to one hackman creates a monopoly, which the state itself could not do. In *Craven* v. *Rodgers,* 101 Mo. 247, the court said, " * * if better facilities are afforded to one carrier than another by the connecting carrier, competition is discouraged, a monopoly is created, and the traveling public are apt to receive a slow, uncomfortable, slovenly, negligent and expensive service. Monopolies are obnoxious to the spirit of our laws and ought to be discouraged." The view of the principal case is the rule in Indiana, Kentucky, Michigan, Mississippi, Missouri, and Montana. *Ind. Union Ry. Co.* v. *Dohn,* 153 Ind. 10; *McConnell* v. *Pedigo,* 92 Ky. 465; *Kalamazoo Hack & Bus Co.* v. *Sootsma,* 84 Mich. 194; *State* v. *Reed,* 76 Miss. 211; *Cravens* v. *Rodgers,* 101 Mo. 247; *Montana Union Ry.* v. *Langlois,* 9 Mont. 419.

It seems clear upon the authorities that there is no duty upon the railroad to provide accommodations to hackmen in the way of space, at the station grounds. They may all be excluded. Therefore when permission is granted, it is in its nature a privilege and not a right. The minority courts, while admitting this, hold that permission to one imposes the duty of allowing equal

facilities to all. It does not, however, seem to follow that the granting of a privilege in favor of one creates a right in favor of all. *State* v. *Union Depot Co.*, 71 Ohio St. 379. Whence then the right of the hackman? It exists when he is employed by a passenger and represents him as his agent, being derived from the passenger's right to reasonable means of transportation. But this does not give to the unemployed hackmen the right to enter for the purpose of soliciting business. *Hedding* v. *Gallagher*, 72 N. H. 377. "It is not bound to so use its property that others, having no business with it, may make profit to themselves." *Donovan* v. *Penna. Co.*, 199 U. S. 279.

It must be conceded that a railroad has a right to grant to a single hotel runner the exclusive privilege of soliciting business on the premises (*Landrigan* v. *State*, 31 Ark. 50), or to grant the exclusive privilege of selling lunches on the trains, or of establishing news stands in the depots. *Fluker* v. *Ga. R. R. & B. Co.*, 81 Ga. 461. There seems to be no good reason for the operation of a different rule in the case of hackmen. *Godbout* v. *St. Paul etc. Co.*, 79 Minn. 188. To be sure the hackman is a common carrier when he so holds himself out, and it is said that as a corollary, "there ought to be a corresponding right upon the part of each to have the same facilities afforded them to obtain passengers * * *." *Cravens* v. *Rodgers*, 101 Mo. 247. The fact cannot be overlooked, however, that the unemployed hackman does not stand in any contractual relation with the railroad or its passengers and is not bound to take a stand at the station and await passengers. He is not there in the performance of any duty he owes to the public, but is merely seeking an opportunity to make a contract. It seems therefore upon reason, that the hackman has no ground of complaint because an exclusive privilege is granted. Though discriminating in its nature, it deprives the hackman of no rights. Discriminating contracts are not necessarily illegal, but only when they are intended to deprive or do deprive others, or the public, of legal rights. *Hedding* v. *Gallagher*, 72 N. H. 377. If a right has been invaded it is a right of the public, and complaint should be from them. The right of the public is, at most, to be well served. If satisfactory service is provided it is not material, so far as the public is concerned, who provides it. *Express Cases*, 117 U. S. 1. The public does not suffer ipso facto, because a railroad grants the exclusive privilege to one hack company in order to promote its own business. It should therefore be a question in each case, as between the public and the railroad, as to whether under the circumstances the regulation is reasonable and the public convenience and comfort satisfied. *Donovan* v. *Penna. Co.*, 199 U. S. 279. That such contracts do, in many cases, promote the comfort and convenience of the public, cannot be doubted. The Supreme Court of the United States has said, "We cannot say that the arrangement was either unreasonable, unnecessary or arbitrary, on the contrary, it is easy to see how, in a great city, and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business." *Donovan* v. *Penna. Co.*, supra. "If the public is entitled to the best service at railroad terminals, and if it provides such service, it would be a

palpable absurdity to say that it must, upon the grounds of public policy, permit that service to be crippled and paralyzed by the admission to its station of large numbers of irresponsible men clamorously seeking the privilege of performing the same service." *Hedding* v. *Gallagher*, 72 N. H. 377. A. C.

CONFLICT OF JURISDICTION IN BANKRUPTCY CASES BETWEEN FEDERAL AND STATE COURTS.—Plaintiff brought suit in the Circuit Court of Jackson County, Missouri, to recover from the defendant for lumber sold and delivered, and summoned the Union Avenue Bank of Commerce as garnishee. The defendant did not deny the indebtedness but sought to bar the proceeding by alleging that a petition in involuntary bankruptcy had been filed in the District Court of the United States for the Northern District of Illinois, Southern Division, and that that court had issued its injunction restraining the plaintiff in the prosecution of this action. This injunction had been granted without notice of the application being given to plaintiff. The District Court had not adjudged the defendant to be bankrupt, but, defendant insists, had not dismissed the petition. The affairs of the defendant were being conducted by a creditors' committee, with the assent of the District Court. The Supreme Court of Missouri held that the filing of the petition in the District Court of the United States for the Northern District of Illinois, not having been followed by an adjudication, did not place the property of the defendant in custodia legis, and that the Circuit Court of Jackson County had jurisdiction over the funds in the hands of the garnishee with power to render judgment concerning the same. Furthermore, the Supreme Court held that the injunction issued by the District Court did not bind the plaintiff as plaintiff was not within the jurisdiction of the court and had no notice of the application for such injunction. (WOODSON, LAMM and GRAVES, JJ., dissented.) *Beekman Lumber Co.* v. *Acme Harvester Co.* (1908), — Mo. —, 114 S. W. 1087.

Two important questions are presented by this case; first, whether the filing of a petition in involuntary bankruptcy in the United States District Court operates, before an adjudication of bankruptcy, to exclude the jurisdiction of the state courts over the property of the alleged bankrupt, and second, whether the United States District Court may enjoin a party outside of its jurisdiction from interfering with a bankruptcy proceeding pending in such court, without notice to such party of the application for injunction.

There is some conflict of authority on these points, but the conclusion reached by the majority of the court in the principal case seems most consonant with equity and justice, and, we think, will be found to be supported by the weight of authority.

It does not seem just, nor in accordance with the reason and spirit of the bankruptcy laws, whose purpose is to treat all creditors alike and protect their interests, to say that by filing a petition in bankruptcy, a party's property may be placed out of reach of his creditors, no matter how long the petition may be kept pending in the courts, and the court kept from rendering a final adjudication. In the principal case the petition has been pending for five years and no final adjudication has been made. A committee of the defend-

ant's creditors is in charge of the defendant's business, conducting the same, and seeking to impose terms upon the other creditors. We may fairly say that such was not the object sought to be accomplished by the bankruptcy laws.

All authorities admit that when one court gets actual possession of property within its jurisdiction all other courts of concurrent jurisdiction must allow that court to determine the rights to that property. *In re Wells,* 114 Fed. 222. In that case the proposition was advanced that the bankruptcy statutes did not require that the Federal courts must get physical possession of the property of the alleged bankrupt in order to prevent the state courts from obtaining jurisdiction over it, and that the filing of the petition in bankruptcy was notice to the world, and any proceedings by the state courts would be avoided by the subsequent adjudication. The court held, however, that this contention was not sound and that the filing of the petition did not place the property in custodia legis. See also, *McFarlan Carriage Co.* v. *Wells et al.* 99 Mo. App. 641, 74 S. W. 878.

In *Keegan* v. *King et al.,* 96 Fed. 758, 3 Am. B. R. 79, the court says, "The bankruptcy act does not generally impair in any way the jurisdiction of the state courts; and in cases where the officers of state courts, prior to an adjudication in bankruptcy, have seized property of the bankrupt under state process, such levy cannot be interfered with by a federal court." But the court further adds that from the moment of the adjudication, the title to the bankrupt's property vests in the trustee and from that moment it is in the custody of the court. See BRANDENBURG, BANKRUPTCY, Ed. 3, § 250, *Carter* v. *Hobbs,* 92 Fed. 594.

In re Weinger, Bergman & Co., 126 Fed. 875, seems to be in irreconcilable conflict with the above cases, but that case dealt with a state of facts very different from that involved in the principal case, and had the equities been different, perhaps that would have had some effect on the decision.

Then as to the right of the bankruptcy court to enjoin interference; this right is given by the statute in rather general terms. It has been contended that these provisions do not require notice of the application for injunction to be given to the party sought to be enjoined. *In re Wallace,* 2 N. B. R. 134 (Quarto. 52), Fed. Cas. No. 17094; *In re Smith,* Fed. Cas. No. 12994. The latter case cites *Calendar's Case,* Fed. Cas. No. 2308, as laying down the same doctrine, but that case expressly says that only those can be enjoined who have had notice of the application. In *In re Ogles,* 93 Fed. 426, 1 Am. B. R. 671, it was held that the bankruptcy statutes give no right to enjoin a party unless he has notice of the proceedings, and that to do so would be depriving him of his rights without due process of law. In the absence of any express provision that notice is unnecessary, and that for purposes of injunction in bankruptcy proceedings the jurisdiction of the District Court shall be extended beyond its usual limits, it would seem advisable not to extend those doctrines. It is difficult to see why a man's rights are any less sacred in a bankruptcy proceeding than in any other, and why, in such a case, he is not entitled to his day in court just as he would be in any other case.

Upon the whole it would seem that the holding of the majority of the court in the principal case is best suited to attain the ends of justice and to bring about the results which the bankruptcy statutes were designed to produce, as well as being supported by the weight of authority. J. F. B.

RIGHT OF THE LEGISLATURE TO AMEND CORPORATE CHARTERS UNDER THE RESERVED POWER.—Acting along the line suggested by Mr. Justice STORY in his concurring opinion in the case of *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L.Ed. 629, that if a state wished to alter a charter it must reserve the right to do so, nearly every state has inserted a clause in its constitution, providing that the charters of corporations subsequently granted shall be subject to alteration, suspension and repeal. A question involving one phase of this right has been recently determined in the case of *Lord* v. *Equitable Life Assurance Society of United States* (1909), — N. Y. —, 87 N. E. 443.

The directors of defendant corporation sought to so amend its charter as to give the policy holders the right to vote for a majority of the directors and to limit stockholders to a right to vote for a minority only, under the authority of Laws 1906, p. 771, c. 326, § 13, providing in substance, that any stock life insurance company may by the vote of a majority of the directors, when authorized by the stockholders holding a majority of the capital stock, confer upon its policy-holders the right to vote for all or any less number of the directors. Plaintiff who was a stockholder in defendant corporation brought action to restrain the directors from making said amendment. The court held that the Legislature had the right to pass the act of 1906, under the reserved power in the N. Y. constitution, and that the amendment was valid except as to the limitation of the stockholders to the right to vote for the minority of the directors only.

The court was undoubtedly right as to the primary question, regarding the validity of the act of 1906. A power reserved to a Legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure either that object or any public right. *Sinking Fund Cases*, 99 U. S. 700, sub. nom. *Union P. R. Co.* v. *U. S.*, 25 L.Ed. 496; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 36 L.Ed. 963, 13 Sup. Ct. 90; *Greenwood* v. *Union Freight R. Co.*, 105 U. S. 13, 26 L.Ed. 961; *South Bay Meadow Dam Co.* v. *Gray*, 30 Me. 547; *Shields* v. *Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Inland Fisheries Com'rs.* v. *Holyoke Water Power Co.*, 104 Mass. 446, 6 Am. Rep. 247; *Iron City Bank* v. *Pittsburgh*, 37 Pa. 340; *Wilmington City Ry. Co.* v. *Wilmington & B. S. Ry. Co.*, 8 Del. Ch. 468, 46 Atl. 12; *Harper* v. *Ampt*, 32 Ohio St. 291; *Gregg* v. *G. M. & S. Co.*, 164 Mo. 616, 65 S. W. 312.

The legislature has the power to amend the charter, either directly, or by authorizing the corporation itself to make the change. *Pratt Institute* v. *City of New York*, 183 N. Y. 151, 75 N. E. 1119; *People ex rel. Cooper Union*

v. *Gass*, 190 N. Y. 323, 83 N. E. 64; *People ex rel. Rooscvelt Hospital* v. *Raymond*, — N. Y. —, 87 N. E. 90; *Citizen's Savings Bank* v. *Owensboro*, 173 U. S. 636.

A stockholder is as much bound by a constitutional provision as though it was contained in the articles of incorporation. *Parker* v. *Metropolitan R. R. Co.*, 109 Mass. 506; *Market St. R. Co.* v. *Hellman*, 109 Cal. 571, 42 Pac. 225; *Greenwood* v. *Union Freight R. Co.* and *Hamilton Gaslight & Coke Co.* v. *Hamilton*, (supra).

Under ordinary circumstances the Legislature cannot deprive the stockholder of the right to vote or materially alter the effect of his vote, as the right to vote is a right of property involved in the ownership of the stock. *Stokes* v. *Continental Trust Co.*, 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969. Also see *Talbot J. Taylor & Co.* v. *Southern Pac. Co.*, 122 Fed. 147; *Lucas* v. *Milliken*, 139 Fed. 816; *Blinn* v. *Gillett*, 208 Ill. 473, 70 N. E. 704, 100 Am. St. Rep. 234. In the principal case, however, the original charter authorized the directors by a vote of three-fourths of their number, to enfranchise policy-holders holding not less than $5,000.00 of insurance, so that the change brought about under the act of 1906 is rather of detail than of substance and, though no authority directly in point can be cited, is clearly within the tendency of authorities. In the case of *Maynard* v. *Looker*, 111 Mich. 498, 69 N. W. 929, 56 L. R. A. 947, affirmed 179 U. S. 46, 21 Sup. Ct. 21, 45 L. Ed. 79, the facts were somewhat similar and therein an act, providing for the cumulative voting system in the election of directors, in place of the system whereby each stockholder had a right to one vote for each share of his stock, was held valid. Similarly *Miller* v. *State*, 15 Wall. 478, 21 L. Ed. 98; *Grobe* v. *Erie Co. Mut. Ins. Co.*, 169 N. Y. 613, 62 N. E. 1096; *Hinckley* v. *Schwarszchild & S. Co.*, 86 N. E. 1125; *Wright* v. *Minn. Mut. Life Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; *Polk* v. *Mutual Reserve Fund Life Assoc. of N. Y.*, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222; *Berea College* v. *Commonwealth of Kentucky*, 211 U. S. 45, 29 Sup. Ct. 33.

The final question in the principal case was as to the power to disfranchise the stockholders as to the majority of the directors, and the act of 1906 is itself a sufficient authority for denying the power. The act provides for the enfranchisement of the policy holders but it does not authorize the disfranchisement of the stockholders, hence what was done in that respect was not valid. The consideration that the stockholders would seemingly be in a better position voting for a minority than for all does not affect the case since the mere offering of a better for a poorer condition does not carry with it the necessary acceptance of the person to whom the better position is offered, if he does not want it. The directors had the power to limit the policy holders, but not the stockholders, as the statute does not authorize it.

D. B. S.

CAN A PURCHASER FROM A TENANT ACQUIRE TITLE BY ADVERSE POSSESSION?—In a recent decision the Supreme Court of Wisconsin holds that where a tenant in possession assumes to sell the property of his landlord and thereupon quietly and in accordance with his contract of sale surrenders the pos-

session which he holds by virtue of his tenancy to his vendee, the latter, entering under his deed of conveyance, becomes an adverse occupant without any knowledge or notice to the landlord of his hostile claim. *Illinois Steel Co.* v. *Budzisz et al.* (1909), — Wis. —, 119 N. W. 935. The decision is made in the light of statutory provisions which declare that if one takes possession of realty claiming the same under a written conveyance, as being a conveyance thereof to him, and exclusive of any other right, he becomes an adverse possessor, and that adverse possession for a period of ten years shall constitute a bar to an action for the realty, making the exception, however, that whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy. §§ 4211, 4212, 4216, Wis. St. 1898.

The general rule of law is that possession however long continued of a tenant whether for years, from year to year, at will, or by sufferance, is not adverse but is in subordination to the title of the landlord, and that all persons claiming under a tenant and deriving their possession from him are precluded from relying upon their possession for the purpose of barring the title of the landlord. 1 AM. & ENG. ENC. OF LAW 811, 1 CYC. 1062. The decision in the principal case refuses to extend the rule further than to the tenant in fact. The Wisconsin statute was borrowed from the New York statute and the rule of the latter state is exactly at variance with the doctrine here pronounced. The rule of the New York court was stated in *Jackson* v. *Davis* (1825) 5 Cow. 123, 15 Am. Dec. 451, that when the relation of landlord and tenant is once established it attaches to all who may succeed to the possession, through or under the tenant, either immediately or remotely. This doctrine has been uniformly upheld in the later cases. *Jackson* v. *Harsen*, 7 Cow. 323, 17 Am. Dec. 517; *Tompkins* v. *Snow*, 63 Barb. 525; *Sands* v. *Hughes*, 53 N. Y. 287; *Jackson* v. *Scissam*, 3 Johns. 499; *Bradt* v. *Church*, 110 N. Y. 537, 18 N. E. 357. It has been held to apply in the case of a grantee of the tenant in fee, though the grantee takes the deed in ignorance of the fact that his grantor stood in the relation of tenant. *Ballow* v. *N. Y. Floating Dry Dock Co.*, 112 N. Y. 263, 19 N. E. 800, 2 L. R. A. 629.

The principle of estoppel applies to the relation between landlord and tenant and those holding under him, and operates in full force to prevent a tenant from violating that contract by which he obtained and holds possession. He cannot change the character of the tenancy by his own act merely so as to enable himself to hold against his landlord, who reposes under the security of the tenancy believing the possession of the tenant to be his own, held under his title and ready to be surrendered by its termination by lapse of time or demand of possession. *Willison* v. *Watkins*, 3 Pet. 43, 7 L. Ed. 596. If a person enters into land under a tenant who is in possession and with his consent, he cannot impeach the title of the landlord. *Harker* v. *Gustin*, 12 N. J. Law 42. In *Phillips* v. *Rothwell*, 4 Bibb. (Ky.) 33, the court held that one who enters upon land as a tenant cannot controvert the title of his landlord and, if a tenant, make a deed of bargain and sale to

another in fee, the alienee would be in no better condition than the tenant. This rule has been applied to sublessees of the tenant. *Brown* v. *Keller,* 32 Ill. 151, 83 Am. Dec. 258; *London etc. R. Co.* v. *West,* L. R. 2, C. P. 553; to assignees of the lease *Tompkins* v. *Snow,* 63 Barb. 525 (supra); *Stagg* v. *Eureka Tanning etc. Co.,* 56 Mo. 317; to heirs of the tenant, *Lewis* v. *Adams,* 61 Ga. 559; to the wife of the tenant living on the premises, *Russell* v. *Erwin,* 38 Ala. 44; or widow of the tenant, *Mitchell* v. *Murphy,* 43 Fed. 425; *Frazer* v. *Naylor,* 1 Metc. (Ky.) 593. Under statutes of the same import as the Wisconsin statute, other states have held that all persons who come in under, or derive possession from, the tenant in any manner, however remotely, are precluded from relying on their possession to bar the landlord. See *Campbell* v. *Shipley,* 41 Md. 81; *Swann* v. *Thayer,* 36 W. Va. 46, 14 S. E. 423; *Ehrman* v. *Mayer,* 57 Md. 612; *Propagation Society* v. *Sharon,* 28 Vt. 603. This also is the English rule. *Saunders* v. *Lord Annesly,* 2 Sch. & Lef. 73.

The whole doctrine of adverse possession rests upon the presumed acquiescence of the party immediately affected by such possession. Therefore it is that when possession of property is originally held and acquired in subordination to the title of the true owner, to constitute the continued possession adverse there must be a disclaimer of title of him from whom the possession was acquired and an actual hostile possession of which he has notice, or which is so open and notorious as to raise a presumption of notice. We are inclined to believe with the dissenting opinion of BARNES, J., in the principal case that "If a tenant who is let into possession of property by the owner for a nominal consideration may the day following convey such property to a party who knows, or ought to know that he has no title and such grantee by entering into possession can at the end of ten years assert absolute title to the property, much fraud and injustice may be practiced."

The decision in the principal case is supported by those of but one state, Pennsylvania, and there they are not harmonious. LANDLORD AND TENANT, CENT. DIG. §§ 199-209. In *Dikeman* v. *Parrish,* 6 Pa. 210, 47 Am. Dec. 455, the rule of the principal case was declared and the decision is approved in *Townsend* v. *Boyd,* 217 Pa. 386, 66 Atl. 1099, 12 L. R. A. (N. S.) 1148. The former decisions of the Wisconsin court do not support this doctrine and the case of *Pulford* v. *Whicher,* 76 Wis. 555, 45 N. W. 418, holding that once the relation of landlord and tenant is established, any person holding through the tenant is bound by the acts and admissions of his predecessor as if they were his own, is directly in conflict.

The foregoing cases show that the rule adopted in the principal case is one lacking in authority and based, as the majority opinion states, on the letter of the statute. The common law rule seems the safer and sounder one, and again to quote from the dissenting opinion, such a decision "places a premium on piracy not warranted by the statute, not sanctioned by the former decisions of this court and certainly not in harmony with the decisions of any other courts in this country, except those of Pennsylvania."' L. T. C.

CAN A MORTGAGOR AFTER THE EXECUTION OF THE MORTGAGE CREATE AN EASEMENT IN THE MORTGAGE SECURITY?—The case of *Foote* v. *Yarlott et al.* (1908), — Ill. —, 87 N. E. 62, recently decided by the Supreme Court of Illinois, presents a question which is somewhat unusual. Yarlott owned an apartment house with a hall in the center dividing the building into what was called the north-half and the south-half. He borrowed five thousand dollars and gave his note therefor secured by a trust deed on the south-half; he borrowed another sum of five thousand dollars from a different person and as consideration for this gave his note secured by a trust deed on the north-half.

After the execution of these trust-deeds, Yarlott installed a heating plant in the building; the generating apparatus was in the north-half, but the pipes extended through the south-half as well as the north. Yarlott defaulted in the payment of the note secured by the trust-deed on the south-half; the holder of the trust-deed then filed a bill to foreclose it, and asked that an easement for the beneficial use of the heating plant be declared, upon the owner of the south-half paying a reasonable cost of its operation.

As the Illinois court divided by a vote of four to three in rendering their decision as to the easement, it is evident that a close point of law was involved. It seems to be conceded that had the heating plant been in the building before the execution of the trust-deed, an easement would have existed. But as it was not installed until after the execution of the trust-deeds, the exact question presented was whether or not an easement could subsequently be created in the security of the holder of the trust-deed on the north-half.

The judges who dissented gave as their reason for so doing that the trust-deed on the north-half gave to the holder as security the north-half free from any incumbrance; and that Yarlott could not afterward impose upon such north-half the burden of an easement in favor of some other property. The theory of the opinion derives some support from the dicta in *Martin* v. *Murphy et al.*, 221 Ill., 632, and *Lampman* v. *Milks*, 21 N. Y. 505, which are cited by the minority of the court.

A search through the English and American authorities has disclosed but one case containing a legal proposition analogous to the one under discussion. In *Murphy* v. *Welch*, 128 Mass. 489, the owner of two adjoining lots mortgaged one of them and subsequently conveyed the other, and attempted to create a right-of-way over the mortgaged premises in favor of the grantee. The court held that the owner of the equity of redemption could not create an easement against the mortgagee. WASHBURN'S EASEMENTS AND SERVITUDES, Ed. 4, p. 47, in an editor's note states the rule "A mortgagor in possession cannot impose an easement upon the mortgaged premises * * * which will bind the mortgagee." The editor cites but one case, *Murphy* v. *Welch*, supra, to support this statement.

The majority of the Illinois court conceded that no easement could be created to impair the security of the holder of the trust-deed on the north-half. Their theory was that the installation of the heating plant subject to the easement increased the security. This increase in the value of the security, together with the fact that the heating plant was installed as much for the

benefit of the south-half as for the north-half, incline the writer to believe that the case was correctly decided. However, it would seem, that the holder of the trust-deed on the north-half should be allowed to reject the heating plant altogether, and take his security as it was when the trust-deed was executed. No mortgagee should be compelled to accept a different security against his will; but under the circumstances, if it was accepted, it should be subject to the easement for the beneficial use of the heating plant.

F. O.

THE OHIO BULK SALES LAW.—In a note on the Bulk Sales Laws in the last number of this Review (pp. 504-507), reference was made to the fact that the Ohio law of 1902, entitled "An act to prevent fraud in the purchase, disposition or sale of merchandise," (95 O. L., 96) had been held to be invalid in the case of *Miller* v. *Crawford*, 70 Ohio St. 207, but no mention was made of the new law enacted in 1908. This new law was passed April 30th, 1908, and is entitled "An Act to Amend Sections 6343 and 6344 of the Revised Statutes of Ohio Relating to the Transfer of Stocks of Merchandise other than in the Usual Course of Trade." (99 O. L., 241). The act of 1902 made every sale in bulk of stocks of merchandise absolutely void, unless the parties to the transaction had complied with every one of the requirements stated severally in the six sub-divisions of the first section of the act. (See 70 Ohio St. 215-216). The new act makes such transfers presumptively fraudulent, and avoids some of the court's objections to the former act by an omission of many of the restrictive requirements contained in that act. The act of 1908 has not as yet, we believe, come before the courts of Ohio.