OHIO

CIRCUIT COURT REPORTS

NEW SERIES. VOLUME XIV.

CASES ADJUDGED

IN

THE CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1912.

JUDGES OF THE CIRCUIT COURTS OF OHIO.

HON. THOMAS A. JONES, *Chief Justice*, Jackson.
HON. LOUIS H. WINCH, *Secretary*, Cleveland.

FIRST CIRCUIT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

SAMUEL W. SMITH, JR., ... Cincinnati
PETER F. SWING ..... Cincinnati
EDWARD H. JONES ..... Hamilton

SECOND CIRCUIT.

Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene, Madison, Miami, Montgomery, Preble and Shelby.

CHARLES W. DUSTIN ..... Dayton
JAMES I. ALLREAD ..... Greenville
H. L. FERNEDING ..... Dayton

THIRD CIRCUIT.

Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin, Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca, Union, Van Wert and Wyandot.

MICHAEL DONNELLY ..... Napoleon
W. H. KINDER ..... Findlay
PHILLIP M. CROW ..... Kenton

FOURTH CIRCUIT.

Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson, Lawrence, Meigs, Pickaway, Pike, Ross, Scioto, Vinton and Washington.

THOMAS A. JONES ..... Jackson
FESTUS WALTERS ..... Circleville
EDWARD D. SAYRE ..... Athens

FIFTH CIRCUIT.

Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark, Tuscarawas and Wayne.

RICHARD M. VOORHEES ..... Coshocton
L. K. POWELL ..... Mt. Gilead
R. S. SHIELDS ..... Canton

SIXTH CIRCUIT.

Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky, Williams and Wood.

SAMUEL A. WILDMAN ..... Norwalk
REYNOLDS R. KINKADE ..... Toledo
S. S. RICHARDS ..... Clyde

SEVENTH CIRCUIT.

Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey, Harrison, Jefferson, Lake, Mahoning, Monroe, Noble, Portage and Trumbull.

WILLIS S. METCALFE ..... Chardon
JOHN POLLOCK ..... St. Clairsville
MYRON A. NORRIS ..... Youngstown

EIGHTH CIRCUIT.

Counties—Cuyahoga, Lorain, Medina and Summit.

LOUIS H. WINCH ..... Cleveland
ULYSSES L. MARVIN ..... Akron
FREDERICK A. HENRY ..... Cleveland

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OHIO

CIRCUIT COURT REPORTS

NEW SERIES—VOLUME XIV.

CAUSES ARGUED AND DETERMINED IN THE CIRCUIT COURTS OF OHIO.

BANKER HELD TO HAVE ACTED AS AGENT IN PURCHASE OF STOCK FROM A CUSTOMER.

Circuit Court of Cuyahoga County.

WILLIAM E. TELLING v. J. J. SULLIVAN AND CORLISS SULLIVAN.

Decided, February 14, 1911.

Agency—Banker Pretending to Sell Stock for a Customer, Purchases It Himself—Identity Not Having Been Disclosed, He is Held to Have Acted as Agent—Equity of Customer Not Barred by Lapse of Less than Four Years Time.

1. A bank official who gratuitously engages to find a purchaser for certain stock owned by a customer of the bank, thereby becomes the agent of said customer and can not thereafter himself become the purchaser of said stock without full disclosure of that fact to his principal and the latter's assent thereto.
2. Mere lapse of time, short of four years from the discovery by the principal that the agent bought the stock for himself, will not bar an action in equity for the restoration of the stock, notwithstanding meanwhile it has greatly increased in value.

Smith, Taft & Arter and *Shirley H. Tolles*, for plaintiff.
White, Johnson & Cannon, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

By this action, which is brought here on appeal, the plaintiff seeks to effect a rescission of the sale, which was made by him to the defendants, May 20, 1908, of 170 shares of stock in the Peerless Motor Car Company. The purchase price of $90 per share, or $15,300 in all, has been tendered back, and the plaintiff prays for the restoration to him of said stock and for an accounting of the dividends meanwhile paid to the defendants thereon. He contends that the defendant, J. J. Sullivan, while acting for the plaintiff, as his agent to sell said stock, purchased the same for himself and his son Corliss, without disclosing to plaintiff their identity as such purchasers. The defendant, J. J. Sullivan, was president of the bank where plaintiff and his firm, the Telling Brothers, did some, at least, of their banking business, and it is admitted that plaintiff consulted him about the sale of this stock; but Colonel Sullivan now denies that he undertook to act for plaintiff in that behalf. His first answer filed herein is, however, significant as setting forth in detail, on oath and over his own signature, his version of the conversation had between plaintiff and himself. This answer is superseded, as a pleading in the case, by the amended answer subsequently filed on leave obtained. But its admissions are in evidence, and the language used by the parties in their interviews is so carefully and minutely rehearsed, in contradistinction to plaintiff's version thereof as alleged in his petition, that we can not acquiesce in the suggestion now made, of a misconception by defendants' counsel as to the words used by his client, and of an oversight by the latter in signing and verifying the same when embodied in the answer.

It is worth while to quote the averments of the original answer at length:

"He denies that he had with plaintiff the conversations set forth in said petition, or that he ever, in any way, acted as agent for plaintiff in and about the sale of the stock mentioned in said petition, or any part of it, or as the representative of plaintiff in and about such sale; he denies that he ever advised plaintiff to sell said stock, or any of it, or was, in any way, responsible or the cause of his making said sale.

"He avers that the statements contained in said petition, in manner and form as therein stated, are untrue, and avers that the facts in reation thereto are these:

"About the 5th day of May, 1908, plaintiff told this defendant that he thought of selling his stock in the Peerless Motor Car Company, which he said had cost him par, and said he thought he ought to get that for it. This defendant replied to plaintiff that he would see what could be done about it. About the 15th day of May, 1908, plaintiff asked defendant if he had heard of any probable buyer, and defendant told him that he knew of a person who would give him ninety ($90) dollars a share cash. Plaintiff said he did not like to sell it for less than it cost him, but would think about it. About the 20th of May plaintiff informed defendant that he had made up his mind to let his stock go at $90. This defendant asked plaintiff: 'Why do you want to sell it'? Plaintiff said: 'Oh, I want to raise a good deal of money at present.' Defendant replied: 'I would be glad to loan you all you want,' to which plaintiff answered: 'I would rather sell some things I have than go in debt so much.'

"This defendant did not advise said sale, but instead sought to dissuade plaintiff from making it.

"In the interval between plaintiff's first speaking to this defendant on the subject, and said 20th day of May, this defendant had made inquiries as to what could be got for the stock, and had not been able to find anyone who would give more than $90 per share, and that offer was made by said defendant, Corliss E. Sullivan, the son of this defendant. Said defendant, Corliss E. Sullivan, was a director in the Peerless Motor Car Company, having nominally fifty shares of stock in his name, which had been loaned to him by this defendant to qualify him to act as a member of the board of directors. He authorized this defendant to pay $90 per share for said stock, and this defendant paid plaintiff on said 20th day of May, 1908, at said rate for said one hundred and seventy shares of stock. Thereafter, when said Corliss E. Sullivan settled with this defendant for said purchase, he, for the first time, requested this defendant to keep seventy shares of said stock, as he did not want to borrow the amount he would have to if he paid for the whole stock, and he also repaid this defendant the fifty shares of stock which had been loaned to him by this defendant.

"This defendant denies that said stock was worth more than $90 per share, or that this defendant had any knowledge that said stock was worth more than $90 per share, and avers that $90 per share was as much as could then be got for said stock. The statement made to plaintiff by this defendant, that the best offer that

he had been able to get of $90 per share, was true. He denies that he made any statement to plaintiff which was false or untrue, or made for the purpose of deceiving plaintiff, or which did deceive plaintiff, or that plaintiff relied upon any statement made by this defendant, or that this defendant was the banker of said the Peerless Motor Car Company, or fully, or at all informed as to the condition of said company, or that the book value of said stock at the time of said transfer was more than $90 per share, or that, at that time, large profits had been made, or that either of said defendants had any knowledge of the making of large profits by said the Peerless Motor Car Company, or that the book value of said stock was more than $90 per share, or that either of these defendants had any knowledge, either as to the profits made by said the Peerless Motor Car Company, or the book value of said stock, which was not disclosed to plaintiff, or that was not equally as accessible to plaintiff as to these defendants, or either of them.

"Defendant avers that he and said Corliss E. Sullivan dealt with plaintiff at arms' length, and not in any respect as agents or trustees, or in a confidential relation.

"The probabilities of dividends being declared on said stock were as much within the knowledge of plaintiff as of this defendant.

"He avers that the transfer of the property of said corporation, and the issuance of stock in payment thereof, was entirely the result of matters and negotiations not known to exist, or existing, at the time of said purchase."

It will be noticed that in this answer the defendant, J. J. Sullivan, declares that when the sale of the stock was broached, he "replied to plaintiff that he would see what could be done about it." Again, he says, that he later "made inquiries as to what could be got for the stock and had not been able to find any one who would give more than $90 per share." Still further he avers, that, "The statement made to plaintiff by this defendant that the best offer that he had been able to get of $90 per share, was true."

With these allegations the original answer, though it perhaps repelled the ascription of actual fraud to the defendant, J. J. Sullivan, clearly fixes upon him both the obligation of a fiduciary. and the breach of such obligation. But apart from the original answer, it is perfectly evident from Colonel Sullivan's own testi-

mony that the plaintiff at least conceived their relation to be one of confidence reposed and accepted.

While it requires no citation of authorities to establish the proposition that the relation of banker and client is not necessarily of a fiduciary character, it is nevertheless evident that the relation may easily assume that character. The circumstances here were such as to make this transition easy. The plaintiff was not only a depositor in, but a borrower from, the defendant's bank. The stock which he sold was in a company which not only occupied a like relation to the bank, but in which Colonel Sullivan, its president, was a stockholder and represented by his son upon the board of directors, the son having been qualified for that office by the loan to him of some of his father's stock. Under these circumstances an express form of words would hardly be necessary to characterize any effort on Mr. Sullivan's part to comply with the plaintiff's expressed wish to find a purchaser for his stock, as efforts made on behalf of the plaintiff and as his agent.

Their second interview was begun, according to Colonel Sullivan's own testimony, with the inquiry by plaintiff: "Have you heard of anyone who would be apt to buy my stock in the Peerless Company?"

"I said, 'I know a man who will give you $90 a share for it.' He said 'Will it be in cash'? I said 'yes, certainly.' He then said 'It cost me par and I would like to get that for it.' And with that remark he left the bank.

"Q. Is that all that was said on the occasion of this visit? A. That was all that was said on the occasion of this visit.

"Q. Prior to that time had you talked with anybody about buying the Peerless stock other than with Corliss? A. No, sir.

"Q. And you never did try to sell his stock to anybody other than to Corliss? A. That question is not a correct question; I didn't try to sell it to Corliss.

"Q. Well, you never told anybody else but Corliss that Telling was willing to sell his stock? A. I don't recall now having made a statement about it to anybody else."

At page 182 of the transcript of testimony Colonel Sullivan testifies again concerning this interview with the plaintiff:

"On or about the 15th of May he called at the bank, and I am not sure which bank it was in, I think it was the Central National

Bank. I was sitting at my desk and he said, 'Have you heard anything about the stock of the Peerless Motor Car Company'? I said 'I know a man—a person, I believe is what I said—who will give $90 a share for it. Mr. Telling didn't ask me who it was. He didn't ask me my advice as to the propriety of selling, but he said, 'Will it be in cash'? and I said, 'Certainly.' He then said, 'Well, it cost me par and I would like to get that for it, but I will think it over,' he said, and he then left the bank."

Thus it appears by the testimony of Colonel Sullivan himself that the plaintiff did not consider himself to be dealing at arms' length, but the contrary.

The relationship was one of trust and confidence, and Colonel Sullivan's undertaking, though gratuitous and by no means absolute, was that of agency for the sale of plaintiff's stock.

The obligations arising from such a relationship are fully set forth by Boynton, J., in *The United States Rolling Stock Company* v. *The Atlantic & Great Western Railroad Company,* 34 Ohio St., 450, at page 460:

"The rule that an agent or trustee in matters touching his agency, or pertaining to the trust, can not bind the principal or *cestui que trust,* without his consent, by a contract in which the former is adversely interested, rests upon a very satisfactory foundation, and is supported by a great weight of authority. *Wade* v. *Pettibone,* 11 Ohio, 57; *Morison* v. *Thompson,* L. R., 9 Q. B., 480; 1 Leading Cases in Eq., 210.

"In *Story on Agency,* Section 210, the rule is said to be founded 'upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interest of his principal as far as he lawfully may.' And, in *2 Kent's Com.,* 618, the same principle is asserted, in the following language: 'An agent, acting as such, can not take upon himself, at the same time, an incompatible duty. He can not have an adverse interest or employment. He can not be both buyer and seller; for this would expose his fiduciary trust to abuse and fraud.' In *Bennett ex parte,* 10 Ves., 393, Lord Eldon, commenting on a sale of the trust property to the trustee, stated the reason of the rule denying the right of the trustee to buy the trust property to be, 'that it would not be safe, with reference to the administration of justice in the general affairs of the trust, that a trustee should

be permitted to purchase; for human infirmity will, in very few instances, permit a man to exert against himself that providence which a vendor ought to exert, in order to sell to the best advantage, and which a purchaser is at liberty to exert for himself, in order to purchase at the lowest price.' The rule which prevents the agent or trustee from acting for himself in a matter where his interest would conflict with his duty, also prevents him from acting for another whose interest is adverse to that of the principal; and, in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal way avoid the transaction, at his election.

"No question of its fairness or unfairness can be raised. The law holds it constructively fraudulent, and voidable at the election of the principal."

It is evident from the foregoing that Colonel Sullivan being the agent for the plaintiff, his purchase of the stock, if he did purchase it, was constructively fraudulent, and voidable at the election of the plaintiff.

This brings us to the second question in the case: Did Colonel Sullivan become the purchaser of the stock, or was he merely executing the order of his son Corliss for the purchase thereof? On this point, Colonel Sullivan testifies at page 181, that having talked the matter over with his son at the dinner table in their home, the latter finally said "that while he would give $90 a share for it, he didn't think it would be a great buy at that, owing to the general uncertainty in which the industrial world was enveloped at that time."

"Q. Did he say anything about the amount of money and number of shares of stock? A. Yes.

"Q. What? A. He said, 'It is a good deal of money to raise in these times; and he said 'if I get it why I will have to fall back on the bank.'

"Q. Yes, and what else did he say? A. Well, that is about all that I can recall now."

At page 184 Colonel Sullivan testifies to his final interview with the plaintiff, as follows:

"He called at the Superior Savings & Trust Company, of which company I am president, on the 20th of May, 1908, and the first salutation was, 'Well, I have made up my mind to let my stock go at $90 a share.' And I said, 'Why do you want to

sell it'? He said, 'I want to raise a good deal of money at this time.' I said, 'Very well, I will be glad to loan you all the money you want.' He said, 'I would rather sell some things I have than to go in debt so much.' I said, 'Very well, if you have made up your mind to sell your stock, I will settle for it here and the party can pay me.' He didn't ask my advice; he didn't ask my opinion. We are frequently asked advice and opinions in matters of that sort, but as a rule, the general rule in our bank, each of the banks, we never advise people as to the sale or purchase of stocks. Our experience teaches us that there are apt to come up, as the result of such advice, pro and con, conplications such as this. Hence the rule is that we do not offer advice.

"Q. What else occurred at that time? A. I said to him. 'Have you got the stock with you'? He said, 'I have some of it and I can get the balance very shortly. Then I called Mr. Darling, the secretary of the Superior Savings & Trust Company, and I said, 'Mr. Darling, you settle with Mr. Telling for 170 shares of stock of the Peerless Motor Car Company at $90 a share.' Mr. Darling was in my room at that time and he then stepped out into his room which is connected by an open door, and he and Mr. Telling settled for the stock in Mr. Darling's room. There was somebody waiting for me at that time and he came into my room and took up another subject. Mr. Darling prepared the checks for Mr. Telling in manner and form and in amounts as he desired, brought them to me and I looked them over, put the footing together so as to be sure that they aggregated the right amount, and I signed the checks and Mr. Darling handed them to Mr. Telling.

"Q. Have you now told all that was said between you and Mr. Telling on that occasion? A. Yes.

"Q. Did you at that time communicate to him in any way anything that had been said to you by Corliss? A. No.

"Q. Did you say anything to him about the value of the stock? A. Not a word."

Again at page 186, Colonel Sullivan testifies:

"Q. Returning to the 20th of May, 1908, what talk was there between you and Corliss Sullivan that night? A. I believe the matter first came up—I don't want the court to infer that we only talk business at my table—but as a matter of fact, we have discussed the incidents of the day quite frequently at the dinner table. I told Corliss that Telling had called at the bank and said that he had made up his mind to let his 170 shares of stock in the Peerless Motor Car Company go at $90 a share.

"Q. Go on. A. Corliss remarked, 'Well, I will have to depend on you to help me out a little in furnishing the money,' and I said, 'Now that is a good deal of money at this time.' He said, 'I know it is.' I said, 'How much would you want?' Well,' he said he 'wouldn't know until tomorrow morning, I will figure up and see where I stand.' And I said to him, 'I paid for the stock, I gave Mr. Telling my checks for the stock so that whenever you are ready you come down to my office and settle for it.' He said, 'All right, I will go down to the bank in the morning and I will pay you for it.'

"Q. Is that all that occurred that night? A. That was about all that occurred that night."

Again at page 188 Colonel Sullivan testifies:

"The next morning Corliss called at the bank about, as near as I can remember, ten o'clock, and he said, 'I have been figuring over that matter and I am a little afraid that it will involve me in debt too much if I should borrow all the money required to pay for all the stock. I then laughed at him. I said, 'I thought you were over-reaching yourself a little,' and he said, 'Well, I have made up my mind that I don't want to go in debt to the extent that I would be required to go in debt to pay for the 170 shares,' and he said, 'I wish that you would take seventy shares of it off my hands.'

"Q. What did you say? A. I said, 'I don't want the stock'; I said, 'I could have bought it all from Mr. Telling if I wanted any of it, but I didn't want any of it and don't want any of it now.' He said, 'Well, of course, if you feel that you don't want it, I will have to arrange for it, but I would a little rather not take it all.' So I then said, 'Very well, if you feel that way about it, and you don't want it all and you want me to take seventy shares of it, I will do it.'

"Q. Is that all? A. That is about all, except that I turned the stock over to Corliss. Mr. Darling, I believe, held the stock over night in his possession for me. I turned the stock over to Corliss.

"Q. Will you state whether this was the first time that there had been any talk about your taking any of the stock? A. That was the first time that any talk had been between Corliss and me relative to my taking any portion of the 170 shares of stock which Mr. Telling had sold."

Corliss testifies on the same subject: "I said I would give $90 a share for this stock." And again: "I said that $90 a share was what I could give for the 170 shares that Mr. Telling had."

Detailing the conversation between himself and his father at some length, and in substantial accord with his father's testimony, Corliss Sullivan adds:

"There was nothing unusual in my father's speaking to me about money matters and the occurrences of the day. We do it quite frequently. Daily, practically."

Corliss further testifies:

"The third time I had a talk with father about Telling's stock was a week or ten days after the second time. Father came home in the evening, and in going over the news of the day mentioned this matter to me; that Telling had been in, and said that he would sell his stock at $90 a share, and I said all right. I said what shape is it in? Did he deliver the certificates, and father said: 'yes, he left them with me, and I paid him for them.' I said, 'all right, I will be down tomorrow morning and fix up the matter with you.'"

The next day, "I said to my father, I will have to get $9,300 in order to pay for it and I would much rather not borrow that much money at this time; I would like to have you take about seventy shares of this and I will take the one hundred." His answer to that was: "Well now, you went ahead and bought this; I thought you were going pretty strong on it, but it is too late now, and if you will only take the one hundred, I will have to take the seventy."

From the foregoing it is apparent first, that although Corliss authorized the statement that he would buy the stock, he gave no express directions to his father either to purchase it for him or to pay for it in his behalf.

Colonel Sullivan advised Telling that he knew of a person who would purchase the stock, and thereafter he received and paid for the same, without further disclosing the purchaser's identity. This undisclosed person was his own son, a member of his own family, with whom he constantly maintained the closest and most confidential relations. In settling the transaction with his son the following day, he found himself constrained to keep a large part of the stock, which he did accordingly; and for the son's purchase of the remainder, the father, through the bank, of which he was president, loaned the purchase price to

the son. These were not separate transactions; they were all parts of a single transaction. Under the circumstances that existed, Colonel Sullivan not only had no right, without full disclosure of the fact, to purchase the stock, or any part of it himself, but he could not act as plaintiff's agent in the sale of the whole or any part thereof to his son, except with plaintiff's full knowledge and consent. In fact, he himself became the purchaser when he paid the purchase price, and the division of the stock between himself and his son does not alter the case.

The whole transaction was constructively fraudulent and voidable.

The only question remaining is the defense of laches. The plaintiff discovered the identity of the real purchasers of the stock in August, 1908. Petition was filed in this case on January 18, 1910.

The defendants claim that this lapse of time is sufficient in an action in equity to bar a recovery, though were the action at law the statute of limitations, four years from the discovery of the fraud, would apply. It is asserted that we have here a stale equity. This defense also assumes the form of a claim of ratification of the transaction by acquiescence therein.

In the Ohio cases on the subject, the doctrine is variously stated as follows:

In *Larrowe* v. *Beam,* 10 Ohio, 498, at page 503, Judge Gimke says:

"If the party be guilty of such *laches* in prosecuting his title as would bar him *if his title were solely at law,* he shall be barred in equity."

Read, J., in *Gibler* v. *Trimble,* 14 Ohio, 323, at page 343, says:

"Stale equities will not be enforced when a party, having an equity, neglects to enforce it, for a period which would constitute a bar at law, under the statute of limitations— in analogy to the statute—it will also be barred in equity."

In the case of *Longworth* v. *Hunt et al,* 11 O. S., 194, at page 201, Brinkerhoff, C. J., says:

"In cases of which courts of equity, and courts of law, have concurrent jurisdiction, the former act in obedience to statutes

of limitation, but in cases of which equity has exclusive jurisdiction, they act only in analogy to them. This case is of the latter kind; for, the bar of the statute being complete at law, a court of equity, alone, can give relief. The statute of limitations does not, in terms, apply to this proceeding; and we are, therefore, left to the exercise of a sound legal discretion as to whether or not we will hold a lapse of time correspondent to the time constituting a statutory bar at law, to be a bar to this proceeding.

"An attempt of *Benjamin* v. *Hunt* to set up the lapse of time in defense to the claim of Piatt's heirs in view of the relation which he sustained to them when the survey was made, would be most unconscionable; and, being at liberty to close our ears against it, we are unwilling to listen to it when it comes from those who represent him."

In the case of *Mack* v. *Brammer,* 28 O. S., 508, at page 516, the court say:

"But it is said the plaintiff's claim is barred by lapse of time; not that it is barred by the statute of limitations, but that it can not be enforced in equity, for the reason that it has become stale. It is only necessary to say upon this point, that it is questionable if the plaintiff had a distinct knowledge of her rights until near the time the action was brought."

In the case of *Paschall* v. *Hinderer,* 28 Ohio St., 569, the Supreme Court Commission, speaking by Johnson, J., at page 580, say:

"What constitutes a stale equity is a vexed question hardly susceptible of an accurate definition. Length of time *alone* is not a test of staleness."

The doctrine of laches, merging into ratification, is nowhere more forcibly expressed than in the case of *Rolling Stock Co.* v. *Railroad, supra,* wherein Boynton, J., says at page 462:

"Mr. Wharton, in his work on Agency, Section 244, says: 'So, also, a principal, when fully knowing the facts, can ratify the agent's action, though tainted with employment by an opposing party.'

"The doctrine is equally well settled that the option to avoid the contract must be exercised by the principal within a reasonable time after being fully apprised of the circumstances of the agent's engagement.

" 'Where the principal is informed of what has been done, he must dissent, and give notice of it within a reasonable time; and if he does not, his assent and ratification will be presumed.' *2 Kent's Com.,* 616; *Paley on Agency,* Section 172.

"What constitutes a reasonable time must largely, if not wholly, depend on the circumstances of the particular case. Where the consequences of delay are or may prove injurious to the other contracting party, especially where large expenditures, to the knowledge of the principal, are being made, on the faith of the validity of the contract, the law requires prompt action on his part, if he would avoid responsibility for the acts of the agent. His right to avoid being one arising in equity is governed by the rules upon which that court administers justice. He must speak when he should, or he will not be permitted to speak when he would. In *Smith* v. *Clay,* 3 Bro. C. C., 639 (n), Lord Camden, adverting to the principles which govern a court of equity, where a party has slept upon his rights, said: 'A court of equity has always refused its aid to stale demands, where a party has slept on his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith. and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced.' "

A fair summary of the Ohio law on the subject is found in the opinion of a federal judge in another state. Farrington, District Judge, in the case of *Bissell* v. *Knapp,* 155 Fed. Rep., 809, says:

"The rules controlling the application of the doctrine of laches are among the most characteristic in equity jurisprudence. If unreasonable delay in seeking relief is the only element to be considered, courts of equity will usually follow the statute of limitations, if there be one which is applicable. The statute of limitations is an arbitrary rule. The doctrine of laches is flexible. Its application depends upon the circumstances of each case. It will not, save in exceptional cases, be applied unless there are conditions other than mere lapse of time which render the maintenance of the suit inequitable and unjust. Laches is not merely a matter of time. It is a question of equity or inequity, of justice or injustice. *Kelley* v. *Boettcher,* 85 Fed., 55, 62; 29 C. C. A., 14; *Williamson* v. *Monroe* (C.C.), 101 Fed., 322, 330. 'Laches' says the Supreme Court of the United States in *Galliher* v. *Cadwell,* 145 U. S., 368, 373 (12 Sup. Ct., 873, 875, 36 L. Ed., 738), 'is not, like limitation, a mere matter of time, but prin-

cipally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.'

"The questions which must be asked and answered in deciding each case are: Has the delay been unreasonable? If so, have the conditions or the relations of the property, or of the parties, so changed that it would be inequitable and unjust to permit the plaintiff to enforce his claim? If, during the long delay, important testimony has been lost or destroyed, and the memory of the original transaction becomes hazy and indistinct, a court of equity may refuse to grant relief because of its inability to do certain and complete justice. *Speidell* v. *Henrici* (C. C.) 15 Fed., 753, 756; *Selden's Ex'r* v. *Kennedy,* 32 S. E., 635; 104 Va., 826, 4 L. R. A. (N.S.), 944. If during the delay, the property in dispute has passed into the hands of innocent purchasers, or the defendant has been lulled into doing something which he would not have done, except he had been led to believe that the claim was abandoned, the rule of laches may be applied. *Tazewell's Ex'r* v. *Saunders,* 13 Grat. (Va.), 354, 362.

"If the defendant has risked large sums of money developing the property, as a result of which it has greatly increased in value, and the plaintiff has suffered this to be done, intending if the venture proved profitable to assert his claim, but, if unprofitable, to allow the defendant to pay all the losses, then in such a case the court will be justified in saying to the plaintiff: 'You have been guilty of laches, your delay was not without a motive, and that motive was not good. You were silent while the defendant was risking his money and his labor, but now, when there are no chances to take, you are willing to come in and share the profits.' The dominant idea in cases where the doctrine or laches has been applied is that the delay has been productive of changes which render it unjust and unfair to prosecute the suit. If the delay has not prejudiced the defendant, there is no laches. *Pacific R. R. Co.* v. *Atlantic & P. R. Co.* (C.C.), 20 Fed., 277; *Bartlett* v. *Ambrose,* 78 Fed., 839, 24 C.C. A., 397; *Williamson* v. *Monroe* (C.C.), 101 Fed., 322, 329; *London & San Franciso Bank* v. *Dexter Horton & Co.,* 126 Fed., 593. 601 (61 C. C. A., 515); *Galliner* v. *Cadwell,* 145 U. S., 368. 373 (12 Sup. Ct., 873, 36 L. Ed., 738); *Cahill* v. *Superior Ct.,* 78 Pac., 467, 469 (145 Cal., 42); *Cook* v. *Ceas,* 82 Pac., 370 (147 Cal., 614); *Hawley* v. *Von Lanken* (Neb.), 106 N. W., 456; *Daggers* v. *Van Dyck,* 37 N. J. Eq., 130; *Rozell* v. *Chicago Mill & Lumber Co.,* 89 S. W., 469 (76 Ark., 525); *Demuth* v. *Bank,* 37 Atl., 266 (85 Md., 326; 60 Am. St. Rep., 322)."

If the application of the doctrine of laches depends upon the circumstances of each case, the inquiry arises: What are the circumstances of this case?

The transaction here in question occurred May 20, 1908. The stock continued to rise in value thereafter. Rumors of this came to Telling. In the neighborhood of a couple of months afterward Telling met Sullivan in the middle of the floor as he was walking in the bank and said: "Colonel, haven't I made an awful mistake in letting this Peerless stock go?" He said, "Yes," and walked away without telling who the real purchaser of the stock was.

Kittredge, president of the Peerless Company, testifies that in August Telling came to his office and they discussed matters. Telling said "Who got my stock?" Kittridge replied: "Colonel Sullivan got some of it." Telling said, "The hell you say?" "We then drifted into lighter vein."

The lighter vein was to the effect that Telling said: "Of course I would like the Peerless stock, and probably made a mistake in selling it, but I am satisfied."

Cameron, assistant cashier of the Central National Bank, testifies to a conversation with Telling several months after the transaction (probably in August) in which Telling said he had made a hell of a mistake selling that Peerless stock and added:

"Of course I can't blame anybody but myself, and I took the money I got out of that and did very well with it in other matters, and while I had better have disposed of something else than that, as they are doing a very fine business out there—he thought it was a great mistake."

Telling admits the profane remarks attributed to him by Kittredge and Cameron but denies that he said to either of them that he was satisfied and his expletives quoted lead us to the conclusion that he was not satisfied.

Telling further testifies:

"Anyway I knew that Colonel Sullivan had this stock in the summer of 1908. I knew it when I saw Kittredge for the first time, positively. That was in the summer of 1908. (We knew from Kittredge that it was in August.) That was the first time

I heard it positively; I had heard rumors before. I wanted to be sure, so I went to Mr. Kittredge and asked it. Mr. Siddell asked me why I had not come to see him before I sold him; that he would have told me what it was worth. I did not go to see Colonel Sullivan after the sale of the stock because I thought he was too slick for me; I always patted him as he patted me, with a glad hand. I knew I would have to bring suit some day, when my attorney from New York got back, but he is there yet."

His attorney was B. B. Avery, who went to New York on traction matters and remained there. After waiting for his return, he finally sought another lawyer, but not until the middle of September of the next year, when he retained Judge F. L. Taft to look after his interests. It is questionable whether the plaintiff had a distinct knowledge of his rights until he consulted Judge Taft. Judge Taft appears to have used due diligence in investigating the facts and took the matter up with Colonel Sullivan, writing him a letter October 18, 1909. The latter put him off until the day after election in November, when Taft made a formal tender of the amount paid by Mr. Sullivan to Mr. Telling with interest down to that time.

Judge Taft then heard from Mr. Cannon, attorney for Mr. Sullivan, and gave to him a petition he had prepared, "in order that he might file an answer at the same time the petition was filed." This was at Mr. Cannon's request.

"Later the South Cleveland Bank failed and Mr. Cannon telephoned to me," says Judge Taft, "and requested that he might delay filing the petition. Shortly before the South Cleveland Bank failed, the Werner Company had gone into the hands of the Superior Savings & Trust Company, as receiver, and Mr. Cannon suggested that it was not a good thing to be filing suits against bankers, and would I let the matter stand a few days. It did stand then until I called Mr. Cannon up and urged him to file the petition, or else I would have to get another copy and file it myself, as considerable delay had taken place. And finally the petition was filed at the time indicated, in January."

The petition was verified December 17, 1909, and filed January 18, 1910.

It thus appears that Telling did nothing but await the return of Avery, from August, 1908, to September 1909, thirteen months.

The testimony discloses that the stock commenced going up in August, 1908, and after the election of that year it went up enormously, the full effects of the increased business not being ascertained until December, 1908. Before September, 1909, the value of the stock was doubled and large dividends were paid.

It seems apparent from the record that Telling kept track of the value of the stock from and after his talk with Kittredge in August, 1908.

There has been no change in the position of the defendants. They still retain the stock in question and the defendant, J. J. Sullivan, in now a stockholder in the Peerless Motor Car Company to the extent of more than the number of shares in controversy. The only change has been in the value of the stock. The defendants have not incurred any expense, but have received large dividends.

It thus appears that the mere lapse of time is the only thing upon which the defendants rely as establishing their defense of laches. Counsel points out a single inequity resulting therefrom —that the delay enabled the plaintiff to speculate upon the transaction. It is said that plaintiff would not have brought this action if the stock had not gone up. That may be conceded. All suits are brought because the plaintiff anticipates some advantage therefrom.

But is it not inequitable to allow the defendant to realize this large profit from a transaction which the law says was at least constructively fraudulent? Good morals would not interpose this defense, but would suggest that at the time the transaction occurred, the defendant might himself have limited any delay and obviated any speculation by candidly stating who the purchasers were and calling upon the plaintiff to ratify or rescind the sale within what *he* considered a reasonable time. He had the opportunity to do so, but passed it by. He should not now be heard to claim that thirteen months was too long a time for the defendant to take to make up his mind.

Longer time was not held to create a stale equity in the following cases: *Pacific R. R.* v. *Atlantic & P. R. R. Co.*, 20 Fed., 277; *Bogan* v. *Mortgage Co.*, 63 Fed., 192; *Ide* v. *Carpet Co.*, 115 Fed., 137; *Brun* v. *Mann*, 151 Fed., 145.

It is doubtless true, however, that where mere lapse of time has been relied upon, the statute of limitations alone has been raised and the defense of stale equity has not even been suggested. Hence, while many cases have been cited where other circumstances than mere lapse of time have led to the court's applying the doctrine of laches, few are found where this defense has been denied. See the case of *Moore* v. *Central National Bank,* decided by this court a year ago—a case very similar to this, yet the defense of laches was not raised. The statute of limitations alone was relied upon.

It has been well said that "the profitableness of a fraudulent transaction can never be its justification, and it can never shorten the arm of the court."

The parties in this action are in almost exactly the same situation they were in at the time the wrong complained of was committed, and relief can be given the plaintiff, without doing any injustice whatever to the defendant.

We find that the defendant, J. J. Sullivan, is in a position to turn over to the plaintiff, 170 shares of stock in the Peerless Motor Car Company and receive therefor all the money he parted with, with interest to date, and such is the order of the court.

This conclusion addresses itself to the sound discretion of the court in the premises and conforms not alone to good morals, but to the equities of the case. Indeed, the two should be, and usually are, synonymous.

Judgment for the plaintiff. Of course there must be an accounting of the dividends. Certain rulings on evidence have been requested which will be indicated on the bill of exceptions.

BUILDING INJURED BY EXPLOSION OF DYNAMITE.

Circuit Court of Hamilton County.

CATHERINE MORRISSEY v. CITY OF CINCINNATI.

Decided, March, 1911.

Negligence—Doctrine of Respondeat Superior as Applied to a City Contractor—Use of Dynamite in City Streets—Liability of the Municipality for Injury to Surrounding Buildings.

1. Under a contract for city work, where the specifications provide that "the work is to be commenced at such time after date of contract as the board of public service may order and carried on in such places and in such manner as the engineer or inspector shall direct," the relation between the parties is not independent and the rule of *respondeat superior* applies.
2. In an action for damages on account of injury to a building from the explosion of dynamite in the street, the question of negligence in the amount of dynamite used and the effects of its explosion upon surrounding buildings, and particularly that of the plaintiff, should be submitted to the jury.

Rogers Wright, Nathaniel Wright and *John E. Fitzpatrick,* for plaintiff in error.

Constant Southworth, Assistant City Solicitor, contra.

JONES, J.; SMITH, P. J., and SWING, J., concur.

The plaintiff in error, Catherine Morrissey, filed her petition in the court of common pleas against the city of Cincinnati and John E. Mahoney.

She asks for damages against the defendants, alleging that while they were engaged in constructing a sewer in Kineon (now Bowman) avenue in said city, they "negligently and without the observance of proper care and caution exploded a large and excessive amount of dynamite, and that by reason of said explosion the foundations and walls of said plaintiff's house were shattered, the house walls were cracked," etc.

A demurrer was filed by Mahoney, which was afterward sustained without objection from plaintiff, and the case proceeded to trial against the city only. At the close of plaintiff's evi-

dence, and upon motion of defendant the court directed the jury to return a verdict in favor of defendant. Later a judgment was entered upon said verdict, and it is to reverse this judgment that error is prosecuted in this court.

It appears that the ground upon which the court below granted the motion for a verdict was that the work was being done by an independent contractor (Mahoney) for whose acts the city was not liable. The contract between the city and Mahoney is in writing, and is a part of the bill of excepions herein.

Where the entire contract is in writing, and the question of "independent contractor" is raised, it is doubtless within the province of the court to determine the relations of the contracting parties with respect to that question before submitting the case to the jury, as was done in this case.

The plaintiff in error contends that the lower court erred in holding that Mahoney was an independent contractor; and further, claims that the judgment below must be affirmed because there was no negligence shown by the evidence.

This leads us to a consideration of the two questions presented by the petition in error, and the able and exhaustive briefs of counsel in this case:

First. Was Mahoney an independent contractor?

Second. If not, is there any evidence, as shown by the bill of exceptions, tending to prove negligence on the part of Mahoney or his employes?

As has been said, the first question depends upon the written contract between the city and the contractor, and it must be determined from the language of that instrument whether or not Mahoney was an "independent contractor," as that term has been defined by the courts of this and other states.

From a careful examination of the authorities cited, there appears to be little or no conflict as to the proper tests and principles to be applied and followed in determining whether the relation created by a given contract is an independent one or that of master and servant.

The American & Eng. Encyclopdia, Vol. 16, page 187 (2d Ed.), says:

"The chief consideration which determines one to be an independent contractor, is the fact that the employer has no right of control as to the mode of doing the work contracted for, * * *. If the employer has the right of control, it is immaterial whether he actually exercises it."

It is true that contracts have in numerous instances been held to be independent where the right of inspection and supervision by engineers and inspectors is frequently reserved throughout the instrument, but in all of such cases the courts hold that from a reading of the whole contract it is apparent that the only purpose of such supervision is to bring about a satisfactory result, rather than to control the means used to bring about that result.

Section 51 of the general specifications, which are made a part of the contract in the case under consideration, is as follows:

"The work is to be commenced at such time after date of contract as the board of public service may order, and carried on in such places and *in such manner* as the engineer or inspector shall direct."

The excavation for the sewer was part of the work contracted for, and we think it clear that, under the provision just quoted, the city engineer or inspector had the right to control the manner of making the excavation, and to determine whether same should be by pick and shovel, blasting, steam shovel or otherwise, such right to be exercised reasonably and with a proper regard for the welfare of persons and property likely to be affected as well as for the advantage of the contractor in the adoption of such method or manner as would cheapen and facilitate the execution of the contract.

It seems to us that the contract secures such right to the city without ambiguity. If any aids to construction were necessary, we think all the circumstances—the character of the ground, depth of excavation, power and duty of the city with reference to streets, contiguous buildings—all make such reservation on the part of the city appear reasonable and necessary.

In the case of *Cincinnati* v. *Stone*, 5 O. S., 38, the court in its syllabus says:

"Where the employer retains the control and direction over the *mode* and *manner* of doing the work, and an injury results,

from the negligence or misconduct of the contractor, or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent."

The language upon which the city was held liable in the Stone case was as follows:

"The work to be done under the direction of the civil engineer, who shall have entire control over the manner of doing and shaping all or any part of the same, and whose directions must be strictly obeyed."

It might be claimed that this is a greater control than given the employer in the case under consideration, but we are of the opinion that the contract in the present case gives the city the same right as was given the same city in the Stone case, and that the two clauses must be construed to mean the same.

In the case of *Hughes* v. *Railway Co.*, 39 O. S., 461, where it was sought to hold the railway company for the negligent acts of an employe, the Supreme Court affirmed the lower courts in holding the relation to be one of independent contractor, for the reason as stated in the opinion, that the company retained no control over the mode and manner of doing the work. In that opinion the court incorporates a copy of the contract, and no such right of control over the manner of doing the work, as is found in the case at bar, is reserved.

We are of the opinion that the relation between the parties to the contract in this case was not an independent one and that the rule of *respondeat superior* applies.

With reference to the second proposition we think there was evidence of negligence sufficient to warrant a consideration by the jury. Before trial the plaintiff amended her original petition reaffirming the allegations thereof, and adding the allegation that: "The use of dynamite for making the excavation in said street was negligence on the part of the defendant."

This court has since held that the use of dynamite for blasting is not negligence *per se,* which decision was affirmed by the Supreme Court, without report. *Armstrong* v. *Cincinnati,* 12 C.C.(N.S.), 76; affirmed, 82 O. S., 454.

Accordingly, the plaintiff added nothing to her case by the amendment. Neither did she substract anything, and the allegation of negligence in the petition, as quoted above, remained. The defendant was charged with negligently using an excessive amount of dynamite, which, fairly construed, must be taken to mean that there was negligence on the part of the defendant in the quantity of the explosive used.

Other things being equal the jar or concussion produced by dynamite is in exact proportion to the amount of dynamite used.

Negligence is the want of care. It is the violation of a duty which one owes to so conduct himself and his business as not to injure others in person or property. In other words, it is a want of such a degree of care as a person of ordinary prudence and foresight would exercise under like circumstances.

The use of a given quantity of dynamite, for instance, in the open country, clearing land of trees and stumps, might be proper and harmless, while the use of the same quantity in a populous city for blasting would be grossly negligent or even criminal.

The evidence in this case showed the use of one and a half or two sticks of dynamite; showed where and for what purpose it was used. Also, showed the effect of the discharge upon adjacent houses, especially that of plaintiff.

We find nothing in the Armstrong case or other cases on the same point cited by counsel for defendant in error which will excuse the use of dynamite in such quantity as will do substantial injury to adjacent owners where such injury could have been foreseen as the natural result of such act.

The position taken by the city in presenting this phase of the case seems to be that under the rule laid down in the Armstrong case, holding that the use of dynamite is not negligence *per se*, the user of such explosive is only required to use care with reference to preparations for the explosion without any reference to quantity used or consequential injury to others.

That case does not so decide, and the proposition needs but to be stated to show the dangers and absurdities to which it would lead.

The language of the court in *Cherryvale* v. *Studyvin*, 76 Kan., 285, is in point:

"Negligence will not be presumed from the jarring of the earth or the concussion of the air, but the burden is upon the claimant to make it appear that the explosion was unnecessarily violent and carelessly prepared for, *having regard to the place and the surroundings.*"

In this case, plaintiff's evidence shows the amount of dynamite used, the place and surroundings, the damage to plaintiff's property, and the question of negligence is one of fact to be determined by the jury.

The judgment of the court of common pleas will be reversed.

SCOPE OF A DECREE OF DIVORCE WHERE JURISDICTION WAS NOT OBTAINED OVER THE DEFENDANT.

Circuit Court of Cuyahoga County.

THE BARBERTON SAVINGS BANK COMPANY v. ETHAN ALLEN BELFORD AND ANNA S. BELFORD, AND ETHAN A. BELFORD v. ANNA S. BELFORD.

Decided, April 12, 1911.

Husband and Wife—Rights of Wife in Property of Husband—Where a Decree of Divorce Has Been Granted Against Her by a Court Without Jurisdiction—Section 11993.

A decree of divorce granted to a husband by an Ohio court, which was without jurisdiction over the wife or over certain property standing in the name of the husband, does not determine the right of the wife to either alimony or dower in said property.

F. A. Decker, for the bank.

J. V. Walsh, for Ethan A. and Anna S. Belford.

F. A. Decker, for Ethan A. Belford.

W. E. Pardee and *J. V. Walsh,* for Anna S. Belford.

MARVIN, J.; WINCH, J., and HENRY, J., concur.

Heard on appeal.

The rights of the parties in these two actions grow out of the same state of facts. A sum of money, resulting from the sale

of real estate upon foreclosure of a mortgage given by Ethan A. Belford and Anna S. Belford to the Barberton Savings Bank, and which sum is a surplus above the payment of the amount due to the bank upon the debt secured by such mortgage, is now in the hands of the sheriff of this county, where it is remaining until the issues between Ethan A. Belford and Anna S. Belford are determined.

Ethan A. Belford and Anna S. Belford were husband and wife. Both resided in Summit county while that relation subsisted between them, and each had resided there for a considerable period before they were married to each other. A separation took place between them, and then Ethan A. Belford removed to Guernsey county in this state, where he brought suit against his wife, Anna, and obtained a divorce from her. She, at the time, was not living in Guernsey county, and the only service obtained upon her in the divorce proceeding was by publication, the plaintiff in that action, Ethan A. Belford, having filed an affidavit there that he did not know where she resided, nor could he by reasonable diligence ascertain where her residence was. The decree for such divorce was entered in the court of common pleas of Guernsey county on the 17th day of December, 1906, and the court decreed "that the defendant has been guilty of gross neglect of duty towards the plaintiff, and by reason thereof the plaintiff is entitled to a divorce as prayed for. It is therefore adjudged and decreed that the marriage contract heretofore existing between Ethan A. Belford and Anna S. Belford be, and the same is hereby dissolved and both parties are released therefrom. It is further ordered and decreed that the defendant be hereby barred and divested of all claim, title and interest by dower or otherwise in any real estate belonging to said Ethan A. Belford, by reason of the aggressions of said Anna S. Belford."

The petition in No. 962 is filed by Anna S. Belford against Ethan A. Belford and sets out that she is a resident of the state of Ohio and now has a *bona fide* residence in the county of Summit; she says that on the 1st day of November, 1906, the defendant abandoned her without due cause. She says while she was his wife he neglected his duty towards her and illtreated her. Then she sets out his ownership of certain real estate in the

village of Kenmore, Summit county. She further says that there is in the hands of the sheriff of Summit county, subject to the order of the court, a considerable sum of money, to-wit, about $1,000, which belongs to the defendant, said money arising from the sale of real property in the case of the Barberton Savings Bank Company against Ethan A. Belford and Anna S. Belford (this is the same money already mentioned in this opinion), and she prays for alimony.

In the suit for foreclosure by the savings bank company she answered, setting out that she was entitled to dower in the real estate, the mortgage upon which was foreclosed in that action, and she prays in that action to have allowed to her the value of her dower interest in the premises.

In his answer to the petition in No. 962, Ethan Allen Belford denies all allegations of wrongdoing on his part towards his wife, and sets up the decree of divorce granted to him in Guernsey county, as hereinbefore set out. To this answer the plaintiff replies, setting out that if the defendant obtained a divorce from her in Guernsey county, the same was obtained without notice to her and without her knowledge. She says that the time he filed his petition in the court in Guernsey county and at the time he filed his affidavit for service by publication upon her, he knew that she was a resident of Summit county, Ohio, and that if he did not know it, he could readily have found by the exercise of reasonable diligence that she did then reside in Summit county, and that therefore any divorce which he obtained in Guernsey county was by the perpetration of a fraud and imposition upon the court which granted the same; denies the jurisdiction of the court to grant the divorce; that she never had an opportunity to defend said divorce; that she never had her day in court, and repeats her allegation that she was not in the wrong in any difference between the plaintiff and the defendant, but that the *defendant* was wholly in the wrong.

The defendant, Ethan Allen Belford, offers in evidence a transcript of the proceedings of the court in Guernsey county. From this transcript it appears that the divorce was granted, as already said; that service was obtained by publication, after an affidavit was filed by the plaintiff in that action; that he did

not know and had not the means of knowing where his wife then resided, and it shows this further fact that on the 25th day of April, 1907, which was at a term of the court subsequent to that in which the divorce was granted, Anna S. Belford filed a motion in that court and in that case, asking that the court open and set aside and hold for naught the judgment, orders and decrees that had before that time been entered in the case. She sets out in that motion the facts as contained in her reply here, that she had no notice of the filing of the petition or the hearing of the case, and that she has had no day in court, and at the same time she filed and caused to be forwarded a notice to the defendant that she would make an application on the 6th day of May, 1907, to have the judgment and decree of divorce set aside, denying all wrong doing on her part, and asking that the petition against her be dismissed. Thereafter, on the 27th day of May, 1907, the court entered an order in these words:

"The motion of the defendant to open and set aside and hold for naught the judgment, orders and decrees heretofore made and rendered against defendant herein was heard, refused and overruled. To which ruling the defendant excepts, and fifty days are allowed to prepare and file a bill of exceptions."

On the part of the defendant it is urged here that the plaintiff ought not to be permitted to pursue her action for alimony, nor to pursue her claim for dower, or for an allowance in lieu of of dower in the foreclosure case. First, it is said, that whether the plaintiff could have any rights in reference to such dower or alimony, if she had not filed her motion and answer in the Guernsey county case, she is precluded now from proceeding here, because, it is said, she has had her day in that court which granted the divorce.

The reasoning for this contention is not in accord with the holdings of this court.

In the case of *Walter B. Solomon* v. *Anna A. Solomon,* 25 C.C. Rep., 307 (4 C.C.[N.S.], 321) it is said in the syllabus:

"A decree for divorce procured through the fraud of plaintiff, which consisted in his obtaining service by publication upon defendant under a false affidavit that her whereabouts were unknown, can not be opened up after the term and defendant

allowed to come in and defend under favor of Sec. 5355, R. S. Said statute is not applicable to actions for divorce."

The reasons for this holding are discussed in the opinion and this language is quoted from the statute in reference to divorce. "No appeal shall be allowed from the decree, but the same shall be final and conclusive." And then this language is quoted from the opinion in the case of *Parish* v. *Parish,* 9 Ohio St., 535. where the foregoing provision of the statute is under consideration:

"This statutory provision is nothing more than a legislative recognition of the principle of public policy which has been repeatedly affirmed by the courts that a judgment or decree which affects directly the status of married persons by sundering the marital tie and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well-being of those who innocently relying upon the stability of a court of competent jurisdiction, have formed a connection with a person who wrongfully, perhaps, procured its promulgation."

Besides this quotation from *Parish* v. *Parish* many other authorities are cited and quoted in the opinion in *Solomon* v. *Solomon,* and we reach the conclusion that the action of the court in Guernsey county in overruling the motion there made by the plaintiff in that action settles nothing so far as the present case is concerned. The court necessarily overruled the motion because it had no jurisdiction to open up the decree, which it was by that motion sought to have opened up. This case, therefore, stands here as though this plaintiff had never made any motion in the case in Guernsey county. The language of the court in the decree of divorce which declared that the defendant in that action was barred from any claim for dower added nothing to that decree. If the court had the jurisdiction to make the order, it was because the case was so in that court that the defendant in that action would have been barred of dower without the court saying anything about it.

The provision of law in regard to this matter is found in R. S., 5700, Section 11993 of the Gen. Code, and reads:

"When the divorce is granted by reason of the aggression of the wife, she shall be barred of all right of dower in the lands of which her husband is seized at the time of filing the petition for divorce, or which he thereafter acquires, whether there is issue or not."

So that if this section applies to the present case, the wife is barred of her dower, because the statute says so. If this section does not apply, then the language of the court does not bar her, because if the court had jurisdiction to bar her dower she was barred by the statute itself, and this brings us to the question urged with vigor by the plaintiff, that since no service, except by publication, was had upon the wife and that she had no knowledge of the proceeding in Guernsey county until after the court had entered its decree, her property rights could not be affected by such decree. That the inchoate right of dower is recognized as a property right by our supreme court is shown in numerous cases. Among others, the case of *Mandell* v. *McClave*, 46 Ohio St., 407, where in the syllabus it is said:

"The contingent right of a wife during her husband's life to be endowed of his real estate at his death, is property, having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively."

In that case the matter is thoroughly discussed, and the result reached as announced in the syllabus.

To the same effect is the case of *Black* v. *Kuhlman*, 30 Ohio St., 199.

We agree with counsel for the plaintiff who says in his brief that Section 5700, Revised Statutes (Section 11993, Gen. Code), presupposes and intends that a judicial hearing shall be had in which the court either had jurisdiction of the person of the wife or that the court had jurisdiction of the property itself in which dower might be or had attached, and in the absence of such jurisdiction of the wife or property, or both, the court could not affect the property rights of the wife without her day in court. And this view is supported by the case of *Doerr* v. *Forsythe*, 50 Ohio St., 726, the syllabus of which case reads:

"A divorce obtained by a husband from his wife in another state, after service therein by publication and she being at the time a citizen of and residing in this state, does not in any way affect her property rights in this state."

In the opinion, which is very brief, on page 730, the court gives, among other reasons, why a decree in Indiana could not affect the wife's property rights in Ohio; that it is possible that the divorce was granted in Indiana upon some ground which would not be a ground for divorce in Ohio, and then follows with this language:

"But, if it were otherwise, as she had no opportunity to defend, all that can be claimed for that decree is that it dissolved the marriage relation between the parties and restored the husband to the status of an unmarried man. This the court could do, but as it had no jurisdiction of the person of the wife, it was not competent to the Indiana court to affect such rights as she had acquired in the property of the husband under the laws of this state."

The same reason which prevents the decree in a foreign state from affecting the property rights of the wife in this state appears to us equally strong upon the proposition that a decree rendered in this state, where the court had no jurisdiction of the person of the wife nor of the property in which she was interested, her property rights could not be affected.

The reasons why the marital status of the parties can be fixed by a court having jurisdiction of the person only of the plaintiff are founded upon public policy, as applicable especially to the marriage relation, and are fully discussed in the opinion in the case of *Solomon* v. *Solomon, supra.*

We reach the conclusion then that neither the right of Anna S. Belford to dower or to alimony is determined by the decree for divorce obtained in Guernsey county, and the court will hold the cases to hear evidence on the question of her rights in this regard.

IRREGULARITY IN PROVING CORPUS DELICTI.

Circuit Court of Hamilton County.

HARRY KOHN v. STATE OF OHIO.

Decided, April 15, 1911.

Arson—Failure to Establish Corpus Delicti Before Incriminating Evidence was Introduced—Procedure in Criminal Cases.

1. In a prosecution for arson a judgment of guilty will not be reversed because of failure to establish the *corpus delicti* before evidence tending to incriminate the defendant was introduced, where the burning of the property was not disputed and the same evidence which established criminal agency also bore upon the question of the guilt of the accused.
2. The question of the competency of evidence will not be considered, where no exception was taken to its admissibility.

Littleford, James, Frost & Foster, for plaintiff in error.
Henry T. Hunt, contra.

JONES, J.; SMITH, P. J., and SWING, J., concur.

Plaintiff in error was convicted at the April term, 1910, of the common pleas court of the crime of arson.

The main point relied on for reversal of the judgment below is that evidence was allowed to be offered by the state of alleged suspicious and incriminating conduct of the defendant before the *corpus delicti* was established.

It is true, as a general rule, that the *corpus delicti* must be proven in a criminal case before any evidence is offered as to the guilt of the accused.

But this rule has its exceptions as all rules have, and we think this case furnishes one of them.

There is no question about the burning of the property. The same evidence which shows a criminal agency as to the fire also shows the guilt of the accused and in such case the evidence may be offered at the same time. *State* v. *Davis,* 48 Kan., 1; *State* v. *Potter,* 52 Vt., 33; *Best on Evidence* (Am. Ed., 1883), Section 442.

The burning being admitted, the second element in the crime of arson, that of *criminal agency,* remained to be proven. This was proven to the satisfaction of the jury by the same evidence which fastened the crime upon Kohn—namely, his conduct and statements before and after the fire, which were not only suspicious and reprehensible, but wholly inconsistent with any theory other than his guilty knowledge of and criminal connection with the origin of the fire.

We think, therefore that the *corpus delicti* was properly proven and that the record shows no error prejudicial to plaintiff.

It is contended with force and ability that the testimony of witness Hazel Helvey as to a conversation had with one Levison was inadmissible. No exception was taken to its admission and hence we do not feel called upon to determine its competency.

We find no error in the record and the judgment below is affirmed.

SCOPE OF INQUIRY IN AN ELECTION CONTEST.

Circuit Court of Putnam County.

K. L. SMITH ET AL v. HENRY F. RAUH ET AL. *

Decided, March Term, 1910.

Elections—Contest of Result as Declared Under the Rose Law—Probate Judge Can Not be Compelled by Mandamus to Certify Case to Common Pleas—Right of Trial Court to go Behind the Returns—Judges and Clerks of Election Called to Impeach the Accuracy of Their Own Certificate.

1. In a contest of election under the Rose County Option Law, the court may go behind the face of the returns and inquire into the facts and correct mistakes.
2. Where there are conflicting certificates signed by the same officers of election, parol evidence may be received to impeach the accuracy of the tally sheets and to explain errors therein or in the certificates relating thereto.

E. R. Eastman, Malone & Griffith, D. N. Powell, J. S. Ogan, Wayne B. Wheeler and *B. A. Unverferth,* for plaintiff.

Straman & Straman, Watts & Moore and *H. & R. Newbegin,* contra.

HURIN, P. J.; DONNELLY, J., and KINDER, J., concur.

This action was brought originally in the probate court to contest a local option election in Putnam county, which county, on the face of the returns, was declared to have voted "dry" on the 13th of October, 1908.

Soon after filing the petition to contest the election a motion was also filed by the contestors asking the probate judge to certify the case over to the court of common pleas on the ground that he was prejudiced against the side of the contestors as shown by his activity in the campaign preceding the election. The motion being overruled by the probate court, an action in mandamus was commenced in the circuit court seeking to compel the probate judge to so certify the case.

* Affirmed by the Supreme Court, May 2, 1911, In Re Contest of Election Petitioned for H. F. Rauh, 84 Ohio St., p. ——.

A majority of this court, believing that such an action would lie, granted such writ, and while exceptions were taken to this action and a proceeding in error was prosecuted to the Supreme Court, which resulted in that court's denial of the right to compel, by mandamus, a probate court to certify to the common pleas court a case in which it claimed jurisdiction, yet while such proceedings were pending in the Supreme Court, the probate judge obeyed the mandate of this court, and having done so, it was held by the Supreme Court that he had waived the right to rely upon his right of jurisdiction, and the Supreme Court therefore refused to take further action in the case.

In the meantime the case had been tried on its merits in the court of common pleas. That court found on the evidence that the results of the election in the south precinct of the village of Ottawa had been erroneously certified to the board of elections and that the vote had been improperly tabulated by the clerks of election; in this respect, that the number of voters voting for the prohibition of the sale of intoxicating liquors had been recorded on the line designated for those voting against such prohibition and that those voting against such prohibition had been recorded on the line designated for those voting for such prohibition, so that, in that precinct, the vote which had been recorded as 119 against prohibition, or "wet," and 196 for prohibition, or "dry," as it is commonly called, should have been recorded as 196 "wet" and 119 "dry" and that, as a consequence of that error, the vote of the whole county was changed, and instead of there being a majority of 21 votes in the county for the prohibition of the sale of intoxicating liquors, there was, in reality, a majority of 133 votes against such prohibtion.

In a very able, learned and painstaking opinion the judge of the court of common pleas found that such was the actual result of such vote as shown by the evidence and that a trial court on the trial of a contest of an election could and should go behind the first returns and, having found the results of the election to have been improperly recorded, should set aside such return and cause a correct return to be recorded.

From this decision error is prosecuted to this court.

It is evident that there are but two important questions in this case, and that we must first inquire whether, on a contest of an election, the trial court had the power to go behind the face of the returns and inquire into the facts, and, second, if we find that the court had such power, we must inquire whether the evidence in this case justified the conclusion reached by the trial court.

The law providing for a county local option election also provides for a contest of such election.

By Section 9 of the so-called Rose law (99 O. L., 38), it is provided that "any qualified voter of the county * * * may contest the validity of such election by filing a petition in the probate court within ten days after the election, setting forth the grounds of contest."

It further provides that "the probate court shall have final jurisdiction to hear and determine the merits of the proceedings, and in other respects in the procedure of the hearing he shall be governed by the law providing for the contesting of an election of a justice of the peace so far as such law is applicable."

By referring to the law applicable to the contesting of an election of a justice of the peace we find that, among other things, it provides, Section 572, for a notification to the probate judge by the contestor specifying the points on which the contest shall be based.

It provides further, Section 574, for the summoning of witnesses.

It provides further, Section 576, that "no election * * * shall be set aside because illegal votes were cast at the election, if it appears that the person whose election is contested has the greatest number of legal votes given at such election."

These provisions point to contests on various grounds which, as is also required by the Rose law, shall be specified in the notification of contest, and they also specifically refer to illegal votes as a ground of contest—a question not raised in this case.

Some light may be obtained by way of analogy from other similar statutes relating to other contests of election.

Section 3001, Revised Statutes, which relates to the contest of an election of a county officer provides that "on the trial either party may introduce oral testimony or depositions of witnesses taken as provided in civil actions; and whenever any omission, defect or error occurs in the proceedings of an officer in declaring or certifying that a person was duly elected to an office, it may be corrected by oral or other testimony, offered at the hearing of any preliminary proceeding or at the trial;" while Sections 2997, 2998 and 3000 give specific authority for the taking of testimony and the compelling of the production of books, papers, etc.

And Section 3018, which relates to the contesting of the validity of a vote on the removal of a county seat provides for a commissioner to take testimony in writing as to the *validity of the votes cast* at such election upon such question and *as to the validity of the result thereof.*

Provision is made for a review of the commissioner's report by the judge of the court of common pleas, and by Section 3020 it is provided that "if, upon the hearing, the court or judge finds that illegal votes were cast at the election upon such question by reason whereof, or for any other reason found by the court or judge, the result of election or vote so returned and certified is contrary to what it would have been but for such illegal votes or other reason, the court or judge shall enter and certify such findings on the records of the court."

By these last three sections it appears that in other contests of elections the Legislature has clearly provided for going behind the face of the returns in order to arrive at an understanding of the facts.

The section last cited provides for setting aside the result of an election either because illegal votes were cast or for any other reason; and Section 3001 (just read) provides that "any omission, defect or error in the proceedings of officer in declaring or certifying that a person was duly elected to an office, may be corrected by oral or other testimony * * * offered at the trial."

It thus clearly appears that. in similar contests, errors in certifying returns may be inquired into by oral testimony.

By analogy, then, the same rule would seem to apply to contests of local option elections, although the specific statute providing for such contests does not in terms so declare.

The Constitution of the state (Article II, Section 21) has provided that "the General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted."

This the General Assembly has done in the statute previously quoted.

It is apparent at once that there is a sharp distinction between the powers and duties of the board of deputy supervisors of elections in declaring the results of the election and the powers and duties of a court in considering a contest of election. The board of deputy supervisors has ministerial powers only. The court has judicial powers. The board of deputy supervisors is without authority to hear evidence to contradict or explain the tally sheets; while a court, on a contest of the election, is clothed with such authority. See *State, ex rel,* v. *Tanzey,* 49 O. S., 656. And this distinction is clearly recognized by Section 2982, Revised Statutes, which specifically provides that "in making the abstract of votes, the board shall not decide on the validity of the returns, but it shall be governed by the number of votes stated in the returns."

The Supreme Court of Ohio in the famous case of *Dalton, Clerk,* v. *State, ex rel Richardson,* 43 O. S., 652, a case where there seemed to be no doubt that the most infamous frauds had been practiced in an election in Cincinnati, held that the duties of canvassers of election returns under Section 2981, Revised Statutes, now Section 2982, were ministerial merely, and that *they* had no power to decide such returns invalid by reason of fraud at the election or in the returns thereof as made to the clerk, and that the court could not *by mandamus* compel *such canvassers* to omit certain votes from the abstracts and that the court could not *in the mandamus proceeding,* decide on the valid-

ity of such returns but that the remedy in such case was *by contest* as provided by law.

The statute there under consideration expressly forbade the canvassers to decide on the validity of the returns, and the court held that in a mandamus proceeding it could not compel the canvassers to perform a judicial duty when the law made them ministerial officers only.

In a later case growing out of the same election, *Ex Parte Dalton,* 44 O. S., 142, the court again emphasized the fact that in a contest of election the facts could be thoroughly inquired into, and referring to the contest then in progress before the House of Representatives over the election of some of its members, the court repeats this strong assertion:

"In a contest in either House, the broadest range is given contestants to purge the ballot and returns of the consequences of neglect, mistake, fraud and crime, from the opening of the polls to the final declaration of the result."

And in the contested election case of *Howard* v. *Shield,* 16 O. S., 184, Judge Welch in the opinion, p. 189, says:

"The policy of the law seems to be, that until the contrary is shown, the tally sheet shall be taken and considered as a true statement of the number of legal votes cast for each candidate. Of course, it is open to be impeached by the other party."

And further on in the same opinion the court said:

"The question is, can the court, in trying a contested election, go behind the poll books and tally sheets, to supply and correct mere *omissions* and *mistakes* in them, by parol evidence? We have no hesitation, either upon principle or authority, in answering the question in the affirmative. * * * We apprehend the true rule to be that both the abstract and the poll books and tally sheets when substantially correct upon their face, are *prima facie* sufficient, *but may be impeached* by *evidence aliunde,* showing their falsity or sufficiency; and that when not so substantially correct upon their face, they may be sustained in the same way. To hold that, when an election has been in fact held, and the majority of the legal voters have in fact, and according to the prescribed forms of law, cast their ballots for the candidates of

their choice, the constitutional rights of the voters and of their candidates can be defeated by a mere misprision or omission of the judges or clerks, would be manifestly unjust and contrary to the plain intent and spirit of our election laws."

And in the case of *Ingerson* v. *Berry,* 14 O. S., 315, the Supreme Court, per Scott, J., declares that the court of common pleas is "clothed with full power * * * to judge of the validity of the returns as shown by the poll books, and to go behind them and inquire into the legality of every vote which they exhibit."

The case of *Phelps* v. *Schroder,* 26 O. S., 549, is to the same effect.

There would seem, then, to be no room for doubt that the statutes of Ohio, relating to contests of election generally, passed in pursuance of the authority vested in the General Assembly by the Constitution of Ohio, and as interpreted by our Supreme Court, do give to courts, in contested election cases, the power to go behind the face of the returns and inquire into any neglect, mistake, fraud, or crime which has interfered with the true expression of the will of the people and that, in such inquiry, oral testimony may be received to support either side of the contest.

But in the case at bar the contestors rely in part upon the testimony of the judges and clerks of the election in the south precinct of the village of Ottawa to prove that *their own certificate* as to the results of the election was erroneous—and that therefore the result of the election was the reverse of what they had officially certified it to be.

In other words, these contestors seek to have these judges and clerks of elections impeach their own certificates by their oral testimony. Can this be done?

We have little hesitancy in saying that, as a general rule and as applied to officers generally, this can not be done. The authorities are overwhelmingly against their power to do so.

In the early case of *Hill* v. *Kling,* 4 O., 136, the court held that "the sheriff can not be permitted, either in pleading or by evidence, to falsify his return, citing *Gardner* v. *Hosmer,* 6 Mass. R., 325, and *Purrington* v. *Loring,* 7 Mass. R., 388."

The case of *State, ex rel,* v. *Moffit,* 5 O., 358, while not strictly analagous, decided that the record of an election by the Legislature where it was claimed that by mistake the record showed that Samuel Moffit had been elected judge whereas it was in fact Lemuel Moffit who was elected, could not be corrected by parol, because members of the Legislature could not be heard to prove what the action of that Legislature had really been, as against the actual record of that action.

The case of *Sinks* v. *Reese,* 19 O. S., 306, was a contested election case wherein the tally sheet, poll-book and ballots might have been offered in evidence but were not so offered, and oral evidence was offered to prove an error was made in the count.

The court held that this could not be done because of the rule requiring the best evidence to be produced where it is possible to produce it.

The case of *Taylor* v. *Wallace,* 31 O. S., 151, was a case involving the election of state and county officers. The court held that the declaration of the clerk and justices showing who were duly elected ought to be certified in writing and the certificate ought also to show the day on which the declaration was made in order to fix the time for taking an appeal. The court then held that:

"If, taking the certificate in connection with the returns and abstract, there is no ambiguity or uncertainty as to the date of the declaration, parol evidence, in the absence of fraud, is inadmissible for the purpose of fixing the time for taking an appeal."

In a case decided by the Court of Appeals of Kentucky it was held that:

"An officer of election will not be permitted to contradict his solemn certificate to the returns signed by him at the close of the election by parol testimony in an election contest." *Browning* v. *Lovett,* 94 S. W., 661.

But the court in that case cites an earlier Kentucky case where the parol evidence of such an election officer was admitted to explain how an error in the additions had been made on the poll books which were in evidence.

In a few cases, such as *Hamilton* v. *Young,* 81 S. W., 685, we find that the courts of other states have permitted officers of

elections to testify orally as to the circumstances attending the preparation of their certificates, so that it appears that this exact question has arisen in very few cases and the courts are not at all uniform in holding for or against the admissibility of the parol testimony of an officer of election, impeaching his own certificate. The rulings appear to be governed more by the circumstances of each case than by any clearly defined principle of law; and in most of the cases where such parol evidence was admitted, it appears to have been admitted to explain discrepancies in the certificates and returns or to explain errors alleged to exist in them, their admission being based on claims of fraud or mistake.

With the question thus undecided by the courts of our state and with no definite rule to be derived from the adjudicated cases in the courts of other states, we must resort to the general principles of law in the decision of this case.

It may be said to be well established that the certificates and returns of election officers are *prima facie* evidence of the fact certified to. *Cooley on Constitutional Limitations,* p. 940; *Ewing* v. *Thompson,* 43 Pa. St., 372; *Hartman* v. *Young* (Oregon), 2 L. R. A., 596; *Elliott on Evidence,* Section 1294, Volume 2, and many other authorities so declare.

This is equally true of the tally sheets. *Howard* v. *Shields,* 16 O. S., 184-189; *State, ex rel,* v. *Doniworth,* 21 O. S., 216.

In the case at bar the tally sheets, certified to by the officers of election, show one state of facts; the five other certificates of the same officers of election show exactly the contrary state of facts. Both are, as we have seen *prima facie* evidence of the facts therein recited. But neither the tally sheets nor the certificates are conclusive. Both are signed and certified as correct by exactly the same officers. If either is correct, the other must be wrong.

It is of the greatest importance that the question as to which is more probably right shall be settled. In this dilemma the court must look to whatever evidence is available to aid it in its determination.

Where the same men have signed two contradictory certificates one of which must be wrong, sound sense would seem to demand

that they should be permitted and required to explain the discrepancy.

This court is interested not so much in what the certificates say as in what the people actually did at the polls. Courts of law and courts of equity both are compelled to allow a wide latitude where questions of mistake or fraud are involved and there is a large class of cases which hold that in cases of fraud and mistake a certificate, otherwise binding, may be contradicted by parol, and even by the oral testimony of the person making the certificate, where such certificate appears to be clearly a mistake or fraudulent. See *Elliott on Evidence,* Section 594; *Young* v. *Duvall,* 109 U. S., 573.

In view of these principles we have read and reread, with the greatest care, the evidence offered in this case—looking first to evidence other than that of the election officers and finally to that of the officers themselves.

What actually took place at the voting place of the south precinct of Ottawa, on the 13th day of October, 1908, can only be known to eight persons—four judges, two clerks and two inspectors.

The judges and clerks all signed two absolutely contradictory sets of certificates, two of them attached to the tally sheets, and five of them purporting to state the facts disclosed by those tally sheets.

The tally sheets themselves are, of course, the best evidence for they are the record of the votes as originally called off and noted before the final result could possibly be known. They were kept by the clerks, and both show that 196 votes were cast for the prohibition of the sale of intoxicating liquors and 119 votes were cast against such prohibition.

Immediately after these were signed five other certificates were filled out and distributed as provided by law, though it appears that these had been somewhat irregularly signed before being filled out. These five other certificates all agree in stating the resulting as exactly contrary to the tally sheets.

Of the eight witnesses to the events of that evening only two—the inspectors—did not sign the certificates. Of these two men

A. M. Brown represented the dry side and Andrew Brinkman represented the wet.

Mr. Brinkman testifies that he was present at the counting of the votes, watched the count, saw the record made and knows that the ballots were then burned; that, after the count, the number of votes was called off and that 196 votes were called off as "wet"; that a certificate of the result was made out after the count was over and given to him, as inspector—being certificate known as exhibit "I" and that it showed then, as it does now, that there were 196 wet votes and 119 dry votes. He says that in counting the votes, there were first seven bunches of five wet votes each before there were any drys; that they put the wet votes in the dry column, and afterwards put the dry votes on the line below.

Mr. A. M. Brown testified that he was an inspector for the dry side, was present during all the time of the count, but did not see how the votes were being tallied by the clerks and did not see any inspection, either by any of the judges or by the other inspector of the tally sheets as they were made by the clerks, and that he made none himself; that all in the room were busy with the particular work assigned to each. He says that he, too, received a certificate being exhibit "J," which exhibit is in exactly the same form as the other four certificates in evidence; that is, it shows 196 "wet" votes and 119 "dry" votes.

Strange to say, neither the attorneys for the contestors nor for the contestees asked Mr. Brown whether, as a fact, the wet votes were recorded on the dry line and the dry votes on the wet line; nor did they ask him whether he knew on the evening of October 13th that there was a difference between the two kinds of certificates.

Later on Mr. Brown was again called as a witness and testifies that on the morning of the election one of the judges was absent and his place was filled by election and that Mr. Bennett received all the votes for that office, but one, which was cast by Mr. Brown himself. An attempt was made, and we think was improperly prevented by the court to show, that the complexion of the board and that of the crowd that elected Mr. Bennett

was plainly "wet." That the crowd was composed in part at least of saloon-keepers and bar tenders and that Mr. Brown was the only "dry" man present. But whether this was improperly excluded or not is now immaterial.

Of all those present at the counting of the ballots on the night of the election, Mr. Brown was the one most interested in seeing that the vote of the "drys," if in fact the larger, was properly recorded. He is unable to tell anything about the way the record was made, or whether the votes were recorded on the proper lines of the tally sheet or on the wrong lines. He, like the other inspector, received a certificate showing that the "wet" side had received 196 votes to 119 for the "dry." His attention was thus immediately challenged to the announced result. He made no protest, made no claim that this was an error and appears to have been perfectly satisfied with this statement of the result. If it was wrong, it was his plain duty to see that it was at once corrected. That is what he was there for. His silence carries with it an almost overwhelming presumption that the result was correctly announced, that he understood it, and that he was satisfied with that announcement. As to what the tally books actually showed he appears to have been absolutely ignorant. He was not asked by either side to state from his own knowledge what the vote actually was. He had not watched the tally made by the clerks, being engaged in watching the ballots as they were called off, and he was not asked to testify as to whether the statement of his fellow inspector was true, that is, that the wet votes were first recorded on the line reserved for the dry.

If there were no other evidence than these two inspectors, neither of whom could possibly be held to be an incompetent witness, for neither of them had signed the certificates or poll books, the court of common pleas would probably have been justified in deciding as it did.

But if we give any credence at all to the testimony of the judges and clerks, the proof is overwhelming that the five certificates were right and that the tallies were erroneously recorded on the tally sheets. Every one of these six officers testifies. While

there are some discrepancies in the details of their testimony, they substantially agree on all of the important facts.

Four of these six officers swear that the first thirty-five votes counted, which were apparently the first votes cast, were "wet" votes, thus agreeing with the testimony which was sought to be brought out on the other side, and was excluded, to the effect that all of those who organized the polls in the morning were "wet" sympathizers. The other two officers were not asked this question.

Four of these six officers testify, the others not being asked the question, that these first thirty-five wet votes were recorded on the first line of the tally sheets where the dry votes should have been recorded, and that from that time on, all the wet votes were recorded on that line and that the totals were always about the same number ahead of the total dry votes.

All but one of these six judges and clerks, the other not being asked the question, swear that at the conclusion of the count public announcement was made at the door of the voting place and that in this announcement the vote was publicly declared to be 196 wet and 119 dry.

Five of these six witnesses, the other not being asked as to this, declare that a certificate stating this as the result was immediately tacked on the outside of the door of the voting place, and that certificate is identified and attached to the bill of exceptions as exhibit "F," and it like all the other certificates (except those on the tally sheets), shows 196 wet votes and 119 dry votes.

All of these officers of election testify that in fact there were 196 wet votes cast and only 119 dry votes. The testimony of these six officials is thus overwhelmingly in support of that of Mr. Brinkman, the wet supervisor, to the effect that the wet vote was actually recorded on the line intended for the dry vote, and that the dry vote was recorded on the line intended for the wet vote. It further substantiates the statement which neither Mr. Brown, nor any other witness denies, that the result of the vote was understood by all present to be and was certified to be and was publicly announced to be 196 wet and 119 dry, and that

Mr. Brown as well as all others entitled to them, were that night given certificates showing this result, and that no protest was made and no one questioned the truth of this certificate.

The clearest explanation of the whole matter is given by Mr. Crawfis, one of the clerks. He testifies as follows, pp. 88 and 89, and I quote his testimony on this point in full. He says:

"In the early part of the day I looked over the tally book as usual, investigating the form of it, read what was in it and paid no more attention to the printing on the left hand side. When the votes were counted out there was no one called for the two clerks; we were instructed not to tally any votes till called off by a certain judge who was to call them off in batches of five at a time; and there was seven batches of wet votes called off before there was a batch of dry votes; for some reason I know not what it is, any more than we can explain any other error that we make day by day, I started in on the top line putting the first ones down there and of course continued to do that until I had seven batches of fives; that thoroughly fixed in my mind which I was going to use for the wets without referring whatever to the printing on the left; and then after the seven batches had been called off, one batch of drys, making thirty-five at the top and five at the bottom; from that time on till after the top line had gone above 100 there remained just thirty between the two; the other clerk and myself remarked several times during the tally the peculiar coincidence of the remaining just five apart after this thirty-five wet votes and then five dry and then there was five wet votes and then five drys and I went from the top to the bottom and the top to the bottom without any reference whatever to the printing on the left."

The other clerk, Roy Deck, merely says that he tallied the wet votes on the upper line and the dry votes on the lower line.

Mr. Crawfis says that they called off their totals to each other and they agreed. The explanation is a simple one, and not unnatural. It is easy to believe that such a mistake could have occurred.

The hard thing to understand is how it could possibly remain undiscovered. That eight presumably intelligent men could stand by all evening and see such a mistake carried out, and then in addition see those figures erroneously copied into the state-

ment at the bottom of each tally sheet; that six of these men could deliberately sign those erroneous statements which were directly contrary to their understanding of the facts, seems almost incredible.

Yet they all say that they did it, and Mr. Brown, who was certainly interested in proclaiming the truth, if those two statements were true, accepted in silence a certificate directly contradicting them in the very vital matter of the whole day's work, heard that new certificate, which is now called false, proclaimed in public as the truth, and saw it tacked to the door to further proclaim that truth, and all without a word of protest.

Apparently all of these men relied entirely on the accuracy of two clerks, and must now ask us to believe that they signed the clerk's report without reading it. If the clerks and judges were careless, the inspectors were almost equally careless.

If the clerks and judges were deliberately falsifying the returns, as we are asked by the other side to believe, then they at least gave due notice of their design to the very man who was there to prevent such trickery, and he took no action to prevent it.

We are loath to believe that these men would deliberately perpetrate such a fraud against the public, or that they would presume to carry out such a fraud by perjury on the witness stand. But whether we could believe it or not, the evidence does not prove it.

That they were grossly careless—astonishingly careless—is the only other alternative. The evidence, if believable at all, admits of no other conclusion. It is clear, explicit and without any contradiction. Such carelessness is more than unfortunate. It has been expensive, not only in money but in the reputations of all who participated in the transaction. It has kept the whole community in turmoil and has aroused suspicion and bitterness among citizens who ought to be on terms of cordial friendship. Such things are not good for a community. It is to be hoped that this unfortunate strife will now cease and that what can not be cured will be forgotten.

The judgment of the court of common pleas will be affirmed.

PETITIONER FOR STREET IMPROVEMENT BARRED FROM OBJECTING TO ASSESSMENT.

Circuit Court of Hamilton County.

CHARLES C. BREUER AND H. W. MORGENTHALER v. JOHN H. GIBSON ET AL. *

Decided, May 19, 1906.

Streets—Improvement of, by Petition—Abutter Estopped from Objecting to the Assessment, When.

An abutting property owner, who petitioned for improvement of the street and that the improvement be made in a certain manner, can not thereafter enjoin collection of the assessment on the ground that the improvement was made in an improper and negligent manner, where it was made in the way designated in the petition.

Horstman & Horstman, for plaintiff.
City Solicitor, contra.

Per Curiam.

This action was commenced to enjoin the collection of certain assessments levied upon the plaintiff's lots for a street improvement, on the ground that the street was improperly and negligently constructed. The amended answer contains the averment that plaintiff petitioned the city through its proper boards to make said improvement in the manner in which it was afterwards made, and wherein they agreed to pay for the whole cost of such improvement except two (2) per cent. of the entire cost of the improvement and the cost of the intersections. This averment is nowhere controverted by reply, and hence the court did not err in refusing to hear testimony tending to prove that the street was negligently and improperly constructed.

* Affirmed by the Supreme Court without report, 77 Ohio St., 602.

LIABILITY FOR RUNNING DOWN A LICENSEE ON AN INTERURBAN RAILWAY TRACK.

Circuit Court of Hamilton County.

CINCINNATI, GEORGETOWN & PORTSMOUTH RAILROAD COMPANY v. WILLIAM E. DAMERON, ADMINISTRATOR.

Decided, April 15, 1911.

Negligence—Weight of Evidence where a Licensee was Run Down by an Interurban Car—Error—Charge of Court.

1. Damages having been awarded against an interurban railway company for the death of a licensee upon its track who was struck by a car, the judgment will not be reversed on the weight of the evidence, where the testimony for the plaintiff was to the effect that the decease had caught his foot and could not get off the track and others with him were signalling the motorman to stop, and the motorman himself testified that he saw persons on the track in ample time to have stopped the car but did not see any signal to stop or become aware of the peril of the decedent until too late to avoid the accident.
2. A charge to the jury in such a case, that it was the duty of the company to keep a lookout to see if there were licensees upon the track and if a licensee was on the track to use reasonable care not to run him down, may have been too broad, but in view of the testimony of the motorman in this case was not prejudicial.

Frank F. Dinsmore, for plaintiff in error.
S. O. Bayless, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

The main error relied upon by plaintiff in error to secure a reversal of the judgment of the court of common pleas rendered in favor of defendant in error, is that the verdict is against the weight of the evidence and the court should have instructed a verdict in favor of plaintiff in error.

In this connection we can not agree with counsel for plaintiff in error. The evidence offered on behalf of plaintiff below not only would be sufficient to sustain the finding of the jury, but we think it is very materially strengthened by the evidence in-

troduced by the defendant below through its agent, the motorman of the car that ran over the decedent.

It was distinctly admitted in this court that the decedent was a licensee upon the track of plaintiff in error, and the evidence on his part shows that he and his companion were using all possible means to notify the motorman of the car of the situation. It is further disclosed from the motorman's own testimony, that he saw the boys some distance up the track as he approached them, that upon passing the station at Koehlers, the speed of his car was fifteen miles an hour, that the power had been thrown off and he was coasting along the track, during all of which time he saw the boys. He says he did not see them make any sign of distress and did not know they were in distress until he got so near that when he saw the boy was caught it was too close for him to stop. This is the only material difference between the evidence of the plaintiff and defendant on this point, and we think that where the evidence of the plaintiff below showed to such a marked degree the signalling to the motorman to stop, and under his own evidence, that he saw the boys at such a great distance from them he must be mistaken in this statement; at any rate, this was the matter to be determined by the jury and it having come to a conclusion in favor of plaintiff in error, which we think justifiable, the verdict should not be disturbed.

The second ground of error urged is that the court in its general charge told the jury, that it was the duty of the traction company to keep a lookout to see if there be licensees on its track and in the event there be a licensee on its track be ready to use reasonable care not to run such licensee down.

It may be that this charge of the court is too broad as compared with the rule laid down in *Elliott on Railroads,* Volume 3, Section 1250, but if so, we do not think under the pleadings and the evidence disclosed in the record, that such charge, if erroneous, is prejudicial.

As said above, the evidence of the motorman was, that he saw these licensees upon the track quite a distance from the place where the accident occurred, therefore, according to the rule of Elliott, he should not have willfully or wantonly injured them, but his duty was to use reasonable care to avoid injury to them

after the danger was discovered. His evidence in this respect is, that when he got so near that he could see if the boy was caught, it was too close for him to stop, but he immediately pulled the sand-lever and reversed the car. The determination of this question of negligence on the part of the motorman was found by the jury against him, and we can not say but that this finding is correct.

As there is no error in the record the judgment will be affirmed.

PROCEEDINGS IN FORECLOSURE OF MORTGAGE.

Circuit Court of Lucas County.

OHIO SAVINGS BANK & TRUST CO. v. IDA E. STRAUSZ ET AL.

Decided, 1910.

Mortgages—Foreclosure of—Jurisdiction as to Second Mortgagee, Where First Mortgagee Has Dismissed His Action—Second Mortgagee Not Bound to Pay Off First Mortgage before Proceeding to Foreclose.

1. The voluntary dismissal of a cause of action by a plaintiff mortgagee asking to have its mortgage foreclosed will not oust the jurisdiction of an equity court to grant relief to a second mortgagee of part of the land, asking to have the cloud of the first mortgage removed by a sale in parcels.
2. A second or junior mortgagee may maintain an action to foreclose his mortgage, without first paying off the debt of the first mortgage.
3. A second mortgagee who has been brought into a foreclosure suit by a first mortgagee, may be granted relief upon a cross-petition to have the cloud of the first mortgage removed from the property, even though the first mortgagee voluntarily dismisses his cause of action, and a third party who has purchased the equity of redemption desires to have the first mortgage remain on the property.

Charles K. Friedman, for the Ohio Savings Bank & Trust Co. and Willard F. Robison.

Orville S. Brumback, for the Mutual Aid Building & Loan Co.

WILDMAN, J.; KINKADE, J., and RICHARDS, J., concur.

Appeal from Common Pleas Court.

This case has been submitted to us on the demurrers of the plaintiff, the Ohio Savings Bank & Trust Company, and Willard F. Robison, to the amended and supplemental cross-petition of the Mutual Aid Building & Loan Company.

The original action was a suit by the Ohio Savings Bank & Trust Company to foreclose a mortgage which it held on certain property owned by Ida E. Strausz and her husband.

The Mutual Aid Building & Loan Company was made a party, having a supposed interest in the property, and on June 3, 1910, filed a pleading in the case. The case on motion of plaintiff company was ordered dismissed by the court without prejudice.

The Mutual Aid Building & Loan Company excepted to this order, and thereafter attempted to proceed with its claims as to the property in controversy.

It seems, without a full review of the circumstances (which are somewhat complicated) out of which this litigation has grown, that the Mutual Aid Building & Loan Company had at one time itself a junior mortgage upon the property of the Strauszs, which mortgage covered a small part of the same property that is described in the petition of the plaintiff company, and which required some corrective instrument or instruments to be made by the Strauszs to the Mutual Aid Building & Loan Company to make this apparent. This was done and ultimately the Mutual Aid Building & Loan Company obtained title to the same property subject to whatever interest the plaintiff company, the Ohio Savings Bank & Trust Company, had by virtue of its prior encumbrance.

In the pleading first filed by the Mutual Aid Building & Loan Company it asked for the protection of its interests by a prayer which seeks to compel the Ohio Savings Bank & Trust Company to make sale of the property in parcels so as to subject first to the lien of its encumbrance the property not covered by the mortgage of the Mutual Aid Building & Loan Company, and to which the Mutual Aid Building & Loan Company ultimately obtained title.

The prayer was that the court would determine the validity of the notes and mortgages set forth in the petition, and if same should be found a valid and subsisting lien against the property owned by the Mutual Aid Building & Loan Company, that the property described in the petition might be ordered sold in parcels.

It prayed also for all relief to which in equity and good conscience the defendant company was entitled.

After the dismissal of the Ohio Savings Bank & Trust Company from the case, a so-called amended and supplemental petition was filed by the Mutual Aid Building & Loan Company, in which they alleged that the Strauszs had made conveyance to Willard F. Robison and had him brought in as a party, and alleged further in its pleadings that there was a conspiracy between Robison, who was an officer of the plaintiff company, and the plaintiff company, to defeat the claims of the Mutual Aid Building & Loan Company by the dismissal of the plaintiff company out of the case and preventing the Mutual Aid Company from litigating its claims therein.

Motion was made to strike the amended and supplemental petition from the files, both by the Ohio Savings Bank & Trust Company and by Willard F. Robison, and these motions were by the court overruled.

Demurrers were also filed by both plaintiff company and Willard F. Robison and subsequently withdrawn, and afterwards demurrers were again filed and heard and sustained by the court. The Mutual Aid Building & Loan Company, not desiring to plead further, its claims were dismissed by final judgment and order.

From these proceedings and final judgment, an appeal was taken to our court, and the case is presented to us upon the demurrers of the Ohio Savings Bank & Trust Company and Willard F. Robison to the claims asserted by the Mutual Aid Building & Loan Company.

It is insisted that after the dismissal of the plaintiff's case there was no proceeding remaining in court in which the defendant company could have its rights litigated, and it is insisted

by Willard F. Robison that he is not properly brought into the case under the circumstances, and that the court has no jurisdiction to render judgment against him; and I suppose the plaintiff company is asserting substantially the same thing, that there is no jurisdiction now in court to grant the asked for relief, or any relief, to the Mutual Aid Building & Loan Company.

Without dwelling too long on the question of jurisdiction, it suffices to say that we are of the view that the Mutual Aid Building & Loan Company after having been brought into court by the suit of the Ohio Savings Bank & Trust Company had the right to file its cross-petition as to matters touching claims in the plaintiff's petition, and ask the relief which it did ask.

In other words, when a first mortgagee brings suit to foreclose his mortgage, a subsequent mortgagee may properly ask, if the mortgage is on part of the same property, that the land be sold in parcels in such a way as first to subject that property which is not covered by the second mortgage, on the principle of equity that where one creditor has recourse to two funds, although his equity be prior, he must exhaust the fund upon which he has the exclusive right, so as not to prejudice the equity or right which is held by the other party.

As to Willard F. Robison, by invoking the jurisdiction of the court in his motion and demurrer, he gave the court full jurisdiction of his person. I will not stop to cite authorities. We think that under the law in Ohio it is quite clear that Willard F. Robison got himself into court, so that if the court had no original jurisdiction to entertain a suit of the Mutual Aid Building and Loan Company to quiet its title as against Willard F. Robison, or indeed, as against the Ohio Savings Bank & Trust Company, yet after the Mutual Aid Building & Loan Company was brought in as a defendant, and the court acquired original jurisdiction of the subject-matter to determine the right of the parties in such an action, the court below had jurisdiction to go on and determine the case, and that the filing of the demurrers by the Ohio Savings Bank & Trust Company and Willard F. Robison to the subsequent pleading of the Mutual Aid Building

& Loan Company substantially kept all the parties in court, and gave the court jurisdiction to determine the matters in controversy.

One of the questions involved in this case we have had a good deal of trouble in determining, viz., whether a person who has become the owner of property, a part of which is covered by a mortgage, which the mortgagee does not desire at present to foreclose but which has become absolute, can compel its foreclosure so as to prevent the lien from remaining upon his property for an indefinite time, perhaps in the end growing by reason of accrued interest to such an amount as to endanger the property of the person who has become the owner, when otherwise it would be saved, and also at all times preventing his sale of the property by reason of the cloud upon it. The assertion is made in this supplemental and amended cross-petition, that this mortgage of the Ohio Savings Bank & Trust Company is a cloud upon the title which the Mutual Aid Building & Loan Company has obtained from the Strauszs, and that the claim made by W. F. Robison by virtue of his deed from the Strauszs is also a cloud, and the Mutual Aid Company is endeavoring to have these clouds removed so that it may be in shape to give a perfect title to a purchaser in case it desires to sell.

We think the Mutual Building & Loan Company is right in its contention that it may compel foreclosure of the mortgage which covers a part of its property and have a sale of the property covered by the Ohio Savings Bank & Trust Company mortgage in parcels, so as to protect the interests of the Mutual Aid Building & Loan Company. If it is right in that contention at all, it may do so in this suit.

After a great deal of doubt in the courts of this state for many years, it has been settled conclusively that a junior mortgagee may bring a suit to foreclose even if the land has been sold upon the suit of a first mortgagee and has gone into the hands of the purchaser at a judicial sale. The junior mortgagee is not now, under the decisions in Ohio, compelled to redeem from the first mortgage by paying off the debt secured thereby; he is not com-

pelled either to redeem, or bring suit to procure redemption. He may bring a suit asking to foreclose his mortgage, making the mortgagor and prior mortgagee parties so that the rights of such first mortgagee may be asserted.

Bearing upon these questions I will cite one of the cases in Ohio, the case of *Holliger* v. *Bates,* 43 Ohio St., 437. I read from the first and second paragraphs of the syllabus:

"Where a senior mortgagee forecloses his mortgage, and sells the property, without making a junior mortgagee a party, or giving him notice, the purchaser at such judicial sale, whether it be the senior mortgagee or a stranger, acquires his title subject to the right of redemption by the junior mortgagee, and the same rule applies where the junior mortgagee has assigned all his interest in the mortgage, and the notes secured thereby to a third person who is not a party and is without notice of such proceedings and sale.

"In such a case, the owner of the notes and junior mortgage, not being a party to said proceedings to foreclose and sell, is not affected thereby, and may maintain an action against such purchaser to foreclose his mortgage."

Now, as I stated, for many years it was contended that the only right of a junior encumbrancer was to compel redemption; that is, to compel the acceptance of his offer to redeem. He could, if the first mortgagee refused to accept from him the amount of the indebtedness, bring proceedings in equity to compel such an acceptance.

I remember while at the bar many years ago of being an attorney in a case where this question was raised, that there was no power except to redeem the property from the prior mortgagee; the court, however, held otherwise and subsequently the Supreme Court made holding in *Stewart* v. *Railway,* 53 Ohio St., 168, expressing the same rule as expressed in *Holliger* v. *Bates, supra.* So that it was established in Ohio, and has been repeatedly held since, that the junior mortgagee has the power to foreclose, which is not affected even by the sale of the property under the prior mortgage.

Now, if the Mutual Aid Building & Loan Company were still mortgagee and were asserting its right to foreclose there would be no question of its power to do so. There is, however, a dictum by Chief Justice Day in the case of *Stewart* v. *Johnson,* 30 Ohio St., 24, 31, in which he says as matter which he seems to take for granted, that while the mortgagee could do that, a person who gets his title from a second mortgagee can not do anything of the kind. That is, that the power to foreclose a mortgage resides only in the person who holds the mortgage, and an owner of the property has no power except to redeem; but this question was not involved in the case in which the opinion was announced by Judge Day, and we think that the rule is inequitable when applied to a case like the one at bar, and also in conflict with an earlier decision of the Supreme Court which seems to have been overlooked, or if not overlooked no mention of it is made in that case, viz:

The *Miami Exporting Co.* v. *Bank,* Wright, 249. I read from two paragraphs of the syllabus.

It is said in paragraphs 9 and 11 that "such purchaser (that is, a purchaser who has acquired title to the property), as well as a subsequent mortgagee, has a right in equity to compel a prior mortgagee who has other security, to exhaust the other security, before the resort to the fund on which they have a joint claim."

It is held in the case that "it is not essential that there should be an offer to redeem, or to pay the money into court. A prayer for general relief is sufficient * * * if the other property is sufficient to pay the debt, and sometimes relief will be granted more extensive and beneficial than the prayer."

I will not stop to read the case, but I think it applies to the case at bar, and there is a certain equity which commends itself to the conscience of the court in the application of this rule, since under the circumstances of this case no substantial prejudice will result to the plaintiff company by compelling it either to cancel its mortgage upon this small piece of land which is covered by the title of the Mutual Aid Building & Loan Com-

pany, or else to foreclose its mortgage and sell the property in parcels. This position is supported by *Miami Exporting Co.* v. *Bank, supra.*

Now, where the second mortgagee has, as is the undoubted law of Ohio, the right to foreclose his mortgage, not simply to redeem, it would seem that where a person has purchased his interest, in the subsequent protection of that interest so purchased, the purchaser should for the purpose of subrogation step into the shoes of the second mortgagee.

In this case it happens that the person who gets the title, the Mutual Aid Building & Loan Company, is the same person originally holding a mortgage. In other words, the title is given to the junior mortgagee, and it seems to be asserted here, or at least is a logical question, as to whether that power which existed in the junior mortgagee is lessened when the legal title for the security of the debt is added to the complete equity of redemption. It does not seem in equity he ought to have less power when he has taken, in addition to the interest he had as mortgagee, the interest of all that the grantors were able to convey. In other words, the condition of the mortgage was practically extinguished; it is no longer a mere mortgage, but is the absolute title.

In the case of *Frische* v. *Kramer,* 16 Ohio, 125, I find on page 139 this language by Judge Hitchcock:

"And it seems clearly to the court, that when it is sold, the purchaser takes the interest, not only of the defendants in the case, but the interest of the mortgagee."

That is, in the case at bar the Mutual Aid Building & Loan Company acquired not only the interest of the Strauszs, but the interest of the mortgagee; and again quoting:

"So far as the land is concerned, he (it) is subrogated to all the rights of the mortgagee."

There are other cases in which this principle of subrogation is applied, cases that are quite similar in some respects to some

of the conditions pertaining to this case. I will not stop further to consider them.

It does not seem to us that the Mutual Aid Building & Loan Company by its acceptance of title from the Strauszs parted with any right which it had to protect its interest by compelling the prior mortgagee to grant such relief as is sought here in the alternative. We think the court is not powerless to protect what seems so manifestly just a claim as that asserted by the Mutual Aid Building & Loan Company.

As to Robison: It is clearly asserted in this answer and supplemental pleading that he is conspiring with the Ohio Savings Bank & Trust Company to the injury of the Mutual Aid Building & Loan Company. All this is admitted by his demurrer. He not only admits that he is an officer of the Ohio Savings Bank & Trust Company, but he admits the conspiracy and purpose.

We think that these demurrers should be overruled and such will be the judgment of the court.

ACTION ON A BOND FOR PERFORMANCE OF A CONTRACT.

Circuit Court of Franklin County.

SUMNER PHOSPHATE CO. v. JARECKI CHEMICAL CO. AND AMERICAN SURETY CO.

Decided, November 26, 1910.

Amendment—Denied for Laches in Making the Application—Notice to Surety of Default as to a Part of the Contract—Surety Not Released by Slight Deviation from Terms of the Contract—Evidence as to Market Value.

1. Having admitted by answer the execution of the bond sued on, a surety company will not be permitted, three years thereafter, to amend its answer by denying liability under the bond because of alterations therein, where it appears that during the interval

depositions were taken upon notice to the surety and the original bond was exhibited, and especially when to interpolate the condition in the bond alleged to have been altered would have the effect of making the bond and contract inconsistent.

2. Failure of the payee of a bond for the performance of a contract to notify the surety of default by the principal as to a part of the contract does not, in the absence of actual prejudice shown, release the surety as to defaults as to which notice was duly given.
3. A surety is not released by slight deviations as to amount and time of delivery of the article contracted for, where by request of the payee of the bond securing the contract and not affecting the period of liability.
4. Admission of evidence as to market value at other nearby points of the article forming the subject of the contract, in the absence of such evidence as to market value at the place of delivery, is not prejudicial to the interests of the surety on the bond.

Addison, Sinks & Babcock and *D. H. Sowers,* for plaintiff in error.

Arnold, Morton & Irvine and *M. R. Waite,* contra.

ALLREAD, J.; DUSTIN, J., and ROCKEL, J., concur.

The Jarecki Chemical Company brought suit in the common pleas court against the Sumner Phosphate Company and the American Surety Company for damages for breach of contract for delivering of phosphate rock according to the terms of a written contract of the phosphate company with the Jarecki company upon which the American Surety Company became surety for due performance by the phosphate company.

The Jarecki company obtained judgment against the phosphate company for $12,000 and against the surety company for $10,000

The phosphate company prosecutes error here to reverse this judgment and the surety company is made party and files a cross-petition in error.

The errors complained of and argued here relate more especially to the defense of the surety company.

The surety company complains of the court's refusal to permit it to amend its answer so as to deny its execution of the bond sued on.

This question was made for the first time after the trial began.

The plaintiff in the opening of its case offered the original bond in evidence. The bond showed upon its face evidence of an alteration. Condition four of the bond requiring the Jarecki company to withhold 15 per cent. of the value of all work performed and materials furnished until complete performance or expiration of time for filing liens, etc., was erased.

Upon inspection of the original bond and discovery of the alteration leave was sought on behalf of the surety company to amend its answer so as to deny the bond because of the alterations. This amendment was refused by the trial court because it came too late.

It is urged that the amendment was offered as soon as discovered and that terms might have been imposed but that an absolute refusal was an abuse of discretion.

This contention of counsel as a general proposition need not be controverted here.

The petition contained a copy of the bond with three conditions. These conditions were set out in the body of the petition. A demurrer was filed and argued by counsel for the surety company and overruled by the court.

Upon leave granted the surety company filed an answer admitting the execution of a bond as set forth in the petition. The answer is sworn to by J. S. Mossgrove, the local agent who executed the bond.

The case stood upon this answer from November 26, 1906, to the trial in October, 1909.

In the meantime the case had been prepared for trial. Depositions had been taken and the original bond executed. The surety company had notice of the taking of the depositions and did not attend, relying upon counsel for the phosphate company who did attend.

Upon the application for leave to amend, counsel for the surety company stated that the local agent, J. S. Mossgrove, who verified the answer, would, if permitted, testify that the copy of the bond in his office contains the fourth condition and

that the original bond when executed contained the fourth condition and that the alteration in the bond was after delivery.

Now, upon the face of the bond it appears to have been executed upon the part of the surety company by W. D. Park, "resident vice-president" and J. S. Mossgrove, "resident assistant secretary."

While Mr. Mossgrove assumes to speak positively as to the alteration so far as the local office is concerned he does not do so as to general offices, nor does his proposed testimony show that the bond was in his control until final delivery. The fact remains that the fourth condition is inconsistent with the contract which the bond purports to guarantee and with the application upon which it is based. The failure to pay in full each month would be a breach of the contract; while a payment in full would be a breach of the bond if the fourth condition remains.

There is, therefore, a strong presumption of fact that the alteration was made before final delivery. *Franklin* v. *Baker*, 48 Ohio St., 296-303.

And this presumption of fact is corroborated and strengthened by the admission of the original answer and long delay and is not met and overcome by the proposed testimony of J. S. Mossgrove for the reason that he does not show opportunity to know of the condition of the bond when finally delivered or to know whether the general officers approved the alteration.

Upon this state of the evidence given and offered the trial court did not abuse its discretion in its refusal to permit the amendment at that stage of the case.

It is contended that the failure of the Jarecki company to notify the surety company of one or more defaults of the phosphate company in the full performance of the contract for preceding periods operates as a complete release of the surety company.

This question is raised by the demurrer to the petition, by demurrer to the plaintiff's evidence, upon motion for non-suit and upon the special and general charges of the court. The contention is based upon the first condition of the bond, viz.:

"That in the event of any default on the part of the principal, in the performance of any of the terms, covenants or conditions of said contract, written notice thereof with a verified statement of the particular facts showing such default and the date thereof, shall within ten days after such default be delivered to the surety company at its office in the city of Columbus, Ohio."

The view of the court of common pleas as shown by charges given and refused was, in substance, that a failure to give notice within the stipulated time of any particular default was effective as a bar to liability for that default, but in the absence of actual prejudice to the surety company did not relieve it from liability for future defaults for which notice is duly given.

This view is supported by the weight of authority and is in harmony with the scope and purpose of the bond. *Lakeside Land Co.* v. *Surety Co.*, 105 Minn., 213; *United States F. & G. Co.* v. *United States*, 191 U. S., 416; *United States* v. *Fidelity & Guaranty Co.*, 178 Fed. Rep., 721; *Lazelle* v. *Surety Co.*, 58 Wash., 589; *Van Buren Co.* v. *Surety Co.*, 137 Ia., 490; *Aetna Indemnity Co.* v. *Waters*, 110 Md., 673; *Henry* v. *Indemnity Co.*, 36 Wash., 553.

To hold as contended for here that notice is required for every trifling or inconsequential departure from the strict terms of the contract guaranteed and that a failure to give such notice is a bar to all further liability upon the bond is too narrow and would amount to a practical destruction of the objects and purposes of the bond.

Counsel for plaintiff in error cite *Home Ins. Co.* v. *Lindsey*, 26 Ohio St., 348, but a careful examination of that case discloses that the holding of the court as to want of notice applied to an existing loss—not future losses. The case might be made parallel if we assume that an insured had one or more fires in the insured building of trifling results and then a complete loss. It would be unreasonable and absurd to hold in the case assumed that a mere failure to report the small fires would be a complete bar to recovery for the complete loss upon its being properly reported.

The same conclusions must also prevail as to slight devia-

tions by request or order of the Jarecki company as to amount and time of delivery during previous months where in no wise affecting the contract for the period of alleged liability.

We find no prejudicial error in admitting evidence of market values of phosphate rock at other nearby points to be considered in the absence of a market value at the stipulated place of delivery, nor in the charge of the court in respect thereto.

We find no prejudicial error in the charges given or special charges refused in respect to a complete breach of the contract.

The failure of the phosphate company to answer the letter of February 8, or to make any effort to comply with the contract up to the bringing of the suit, and in view of the needs of the Jarecki company and of their proceedings to buy supplies is sufficient evidence of repudiation of the whole contract to uphold the verdict.

Some of the special charges requested by the plaintiff in error might be considered good as general statements of the law but were not sufficiently concrete or specific to met the present case.

The subjects of the special charges were properly covered by the general charge.

We have examined the other exceptions complained of and find no prejudicial error in the record. Affirmed.

ACTION FOR RECOVERY OF HOMESTEAD EXEMPTION.

Circuit Court of Clarke County.

SARAH M. BENTZEL v. JAMES P. GOODWIN ET AL.

Decided, December 1, 1910.

Homestead—Order to Pay Cash in Lieu of, Out of Proceeds of Sale, Not a Final Order Upon Which Suit May be Brought on the Bond of the Assignee—When an Action on the Assignee's Bond Would Lie on Order of Distribution—Procedure by Means of Exceptions to the Assignee's Account.

1. Where an assignor waives the right to select specific property in lieu of homestead under Section 11378, and asks that the sum of $500 be allowed to him out of the proceeds from the sale of the assigned property, and such sum is set off to him by the appraisers, and the action of the appraisers is approved by the court and said sum is ordered to be paid to the assignor out of the proceeds of sale—*Held:* that such order by the court is not a final order upon which, in case the assignee fails to pay, an action could be brought against the assignee on his bond.
2. If the order directing the payment be made in the court's consideration of the question of distribution of the proceeds of sale of the property out of which exemption could be paid, and all persons in interest were in court, a failure to comply with such order might sustain an action on the bond.
3. The better and safer procedure, however, in case the assignee has failed to pay the exemption claim, is for the party claiming the exemption to file exceptions to the account of the assignee and then, if an order to pay be made and the assignee fails to comply therewith, bring an action on his bond.

J. F. Locke, for plaintiff in error.

J. P. Goodwin, contra.

ROCKEL, J.; DUSTIN, J., and ALLREAD, J., concur.

Error to Common Pleas Court.

In the court below, the plaintiff brought suit against the defendants as set forth in her petition. To this petition a demurrer was filed upon the ground that the petition does not state facts sufficient to constitute a cause of action.

The defendant in error, in support of the demurrer, contends among other things that whatever rights that the plaintiff in

error may have, must be worked out through the probate court.

The plaintiff says, and for the purpose of this cause they are the admitted facts:

"That prior to and on or about July 10, 1905, she was the owner of a stock of goods and chattels in a storeroom in Springfield, Ohio, consisting of monuments, markers and other articles necessary for carrying on the business of furnishing and erecting monuments and tombstones, and some notes and book accounts, and that on said date plaintiff executed and delivered to the defendant, James P. Goodwin, her deed of assignment whereby she conveyed to him all her property in trust, for the benefit of her creditors, excepting therefrom and reserving to plaintiff her exemption in lieu of a homestead, and other rights and property to which she might be entitled, under the homestead, exemptions, or other laws of the state of Ohio.

"At the time of the making of said deed of assignment and ever since, the plaintiff has been a resident of the state of Ohio, residing therein, being a widow and not the owner of a homestead or any real estate.

"Said James P. Goodwin, on or about July 10, 1905, filed said deed of assignment in the Probate Court of Clarke County, Ohio, and was thereupon appointed and qualified as assignee of the plaintiff, and letters as such were duly issued to him by said court, and said defendant, James P. Goodwin, and the Bankers Surety Co. of Cleveland, Ohio, thereupon duly executed a joint and several assignee's bond, a copy of which is hereto attached, marked exhibit 'A,' whereby they became jointly and severally bound to the state of Ohio in the sum of $1,400, subject to the condition that if the said James P. Goodwin shou'd administer the said trust according to law, then said obligation should be void, otherwise to remain in full force.

"Thereupon, said James P. Goodwin entered upon said trust of said assignment, and as such assignee at once took possession of all of said property of plaintiff, and of the storeroom containing the same, and on or about July 14, 1905, by the oaths of Andrew Bennett, S. E. Fay and H. G. Forbes, who had been appointed appraisers by said probate court, proceeded to make an inventory and appraisement of said property and to set off and allow to plaintiff her homestead rights therein, and the said appraisers at the request of the plaintiff set off and allowed to plaintiff in lieu of her homestead in said property the sum of $500 to be paid to her out of the proceeds of the sales thereof. On or about July 20, 1905, the said inventory, appraisement and allowance of said sum of $500 to plaintiff in lieu of her homestead

therein made by said appraisers was approved and confirmed by said probate court, and said sum of $500 was ordered by said court to be paid to plaintiff by said assignee out of the proceeds of the sales of said property.

"Thereupon, under the orders of said court, the said assignee proceeded to sell the property so assigned to him by this plaintiff, and to collect the notes and book accounts so assigned to him, and on May 2, 1906, the said defendant, James P. Goodwin, as such assignee, filed his account in said probate court, reporting to said court that he had received from the sales of said property, and from collections of said notes and book accounts the sum of $1,107.75, and on June 29, 1906, said account was approved by said probate court.

"That on or about May 2, 1906, the plaintiff demanded of the said defendant the said sum of $500 and that on or about the — day of ———, 1906, said defendant paid to plaintiff the sum of $350 thereof, and has since paid her the sum of $20 thereof, but the exact dates of such payments the plaintiff is unable to state.

"The defendant, said James P. Goodwin, has neglected, failed and refused to pay to plaintiff the balance of said sum of $500 so allowed and set off to her in lieu of her homestead out of the proceeds of the sales of said property, being the sum of $130, with interest from May 2, 1906, although he has been frequently requested so to do.

"There is due the plaintiff from the defendants, by reason of the premises, the sum of $130, with interest from May 2, 1906, for which she prays judgment."

The plaintiff in error contends that when the appraisers in making the inventory allowed to her the $500 in lieu of a homestead and that such report having been approved and confirmed by the probate court and the same ordered to be paid by that court, that upon the assignee defendants' refusal to pay such amount, that a right of action accrued against the assignee and the surety on his bond; and that thereafter such right of action could be enforced by the plaintiff in a court of general jurisdiction. Section 5441, Revised Statutes (11738, General Code), provides that:

"Husband and wife living together with an unmarried daughter or minor son, every widow and every unmarried female, having in good faith the care, maintenance and custody of any minor child or children of a deceased relative, resident of Ohio,

and not the owner of a homestead, may, in lieu thereof, hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding $500 in value, in addition to the amount of chattel property otherwise by law exempted."

It will be observed that this section does not allow a gross sum of money in lieu of a homestead, but allows specific property to be held which is to be selected by the person desiring the same, not to exceed $500 in value. In the case at bar, according to the petition, the plaintiff requested that the same be not set off to her in specific property, but that money out of the proceeds to the amount of $500 be allowed her.

While the petition does not so state, it may be assumed that the assignee agreed to this request, waiving a strict compliance with the statute. It is very often found to be to the advantage of both the person claiming the exemptions as well as the creditors whom the assignee represents, that such be done; that in compliance with such request the appraisers in their return reported such fact to the probate court and this inventory was approved and confirmed and by the averments of the petition at the same time, said sum of $500 was ordered by said court to be paid to the plaintiff by said assignee out of the proceeds of the sale of such property, receiving therefor the sum of $1,100.

The question thus presented is, was such order of the probate court such a final order as would justify the plaintiff in bringing the suit in question, and when it was made, did the probate court lose jurisdiction to further consider the question whether or not the plaintiff was really entitled to the exemption set aside to her.

It is well to observe, as hereinbefore stated, that the plaintiff waived the right to have specific articles set off to her and a strict compliance with the statute in that respect, and that the order of payment by the probate court was made before the property was sold and converted into money.

It seems, therefore, to us that this order made by the probate court was not a final order, and was subject to review by that court by motion, or in some other proper manner, when the question of distribution of the funds derived from the sale of the property was before the court. That what was really intended

by that order was a reservation to the plaintiff of her rights under this statute, and that the amount should be paid to her out of the proceeds of the sale upon a final distribution of the same. To hold otherwise might be manifestly unjust to creditors and other parties in interest. No doubt at the time this order was made the matter came up to the probate court principally upon the approval of the appraisement. If on motion in the probate court the assignee had been ordered to distribute to the plaintiff the sum of $500 out of the proceeds then in his hands, derived from the sale of such property, then the plaintiff would have had a right of action in the court of common pleas against the assignee and his bond if he would have failed to comply with such order. Even upon this proposition, there might be some doubt if such order was made prior to the expiration of eight months from the time that the assignment was made.

There is an averment in the petition that the said property was sold, and from it and notes, etc., the assignee realized $1,-107.75, and that he filed his account in the probate court which was by the court approved. What expenditures were made or whether anything remains on hand does not appear or that any order was made as to plaintiff's claim.

When the account was filed, the plaintiff had full opportunity to except thereto, and in that way have had an order of the probate court as to the assignee's action on her claim. It may be that all the funds coming into the hands of the assignee were properly expended in a proper administration of the trust, and no further payment could be made on her claims. Perchance there might have been liens, prior to hers, that exhausted the entire fund.

The petition does not disclose the fact but what there may still be sufficient funds in the hands of the assignee to satisfy her claim in full. If that be true, she has yet a right to go into the probate court and have the court pass upon her right to have her claim satisfied, and if the court should find that her claim is unsatisfied, and an order would be made that the assignee pay the same and he should neglect, then an action like the present could be maintained. Perhaps then, as the probate court could not enforce the payment, by an order for the payment of money

by contempt proceedings, no other remedy would be open to the plaintiff.

As a general rule it may be stated, and the courts have so held, all matters in assignments should be worked out through the probate court, and that court has full and complete jurisdiction in all cases relating thereto, except where its powers are inadequate to grant relief.

The matter as to whether or not the plaintiff, being a widow, is entitled to this exemption, under the peculiar punctuation of the statute, as it then stood, we have not found it necessary to consider under the views we have taken. Suffice to say were the case of *Brown* v. *Parham*, 1 C.C.(N.S.), 602, not affirmed by the Supreme Court, we might find ourselves not in harmony with the conclusions of that court.

We therefore find no error in the court below and the same is affirmed.

TRESSPASSER INJURED BY OWNER AND AWARDED DAMAGES.

Circuit Court of Hamilton County.

WILLIAM CORDES, PLAINTIFF IN ERROR, v. CHARLES MASON, DEFENDANT IN ERROR.

Decided, March, 1911.

Tort—Owner of Premises Shoots Trespasser—Judgment in Favor of Trespasser for Injuries Sustained.

A mere trespass on real estate does not justify the owner in the use of fire arms in driving the trespassers from the premises, and where a jury has found from the testimony of the owner himself that he had no reason to fear the trespassers would do him great bodily harm a judgment for damages in favor of one of the tresspassers who was shot and injured will be sustained.

Burch & Johnson, for plaintiff in error.
Geo. S. Hawke, contra.

The plaintiff below was given a verdict of $900 on account of injuries sustained.

GIFFEN, P. J.; SMITH, J., and SWING, J., concur.

Charles Mason and two companions were trespassers while fishing in a pond on the premises of William Cordes. The latter being advised of their presence at about 3:30 o'clock in the morning, secured a loaded shot-gun and proceeded toward the pond. On the way he met his servant, who informed him that three colored men were fishing in the pond; that he told them to leave the premises, and that they refused. When he arrived at a point about 200 feet distant from the men on the other side of the pond without any warning he fired the gun in that direction, and within two minutes thereafter seeing the plaintiff stooping as though intending to pick up something, he fired directly at the plaintiff, one of the shots penetrating and causing the loss of one eye.

He justifies the shooting on the ground that he believed and had reasonable ground for believing that plaintiff was stooping to pick up a gun or other deadly weapon and intended to do him bodily harm. He does not claim that his servant or he himself saw them do anything that would justify the first shot, except fishing on his premises without permission.

He certainly can not excuse the unlawful use of fire arms by a mere trespass on his real estate by the plaintiff; but on the contrary the plaintiff himself, although a trespasser, would be justified in resisting the assault with force, if he believed that he could not escape from the premises without suffering great bodily harm, and had reasonable grounds for such belief.

The jury, however, must have found from the defendant's own statement of the affair that he had no reasonable ground for believing that the plaintff would do him bodily harm.

In this view of the case we deem it unnecessary to consider the objections to the general charge of the court to the jury, which as a whole fairly states the law of the case, although certain parts considered above would be misleading.

We are not unmindful of the great provocation to use force, when one's premises are invaded by three unknown men at such an unreasonable hour; but we are satisfied from the testimony of the defendant that a request or demand that they leave the premises, when made with a shotgun in reserve, was the only

necessary and reasonable course to pursue, and would no doubt have been obeyed.

Finding no prejudicial error in the record the judgment will be affirmed.

ESTOPPEL AGAINST CONTEST OF A WILL.

Circuit Court of Richland County.

FLORA LEEDY v. R. H. COCKLEY ET AL.

Decided, January 25, 1911.

Wills—Devisee in Possession Estopped from Contesting, When—Leasing and Collection of Rents from Land Devised—Contest of a Will Not a Proceeding to Quiet Title—Section 12070.

1. A daughter who went into possession of land devised to her by the will of her father, and leased the land and collected the rents under the lease from the date of the probate of the will, is estopped thereby from contesting the validity of the will; and having full knowledge of the condition of the estate and the terms of the will she can not raise the bar so erected by a surrender to the executor of the rents received, or by bringing the money into court, but the acceptance of the devise remains an absolute bar to a contest by her of the validity of the will, and where such an action has been brought by a devisee so situated its dismissal by the trial court is not error.
2. One who has no legal pecuniary interest in an estate in case of intestacy, and who under a will has only the interest of a remainderman, is a necessary party defendant in an action to contest the validity of said will, but has no such interest as will permit him as such legatee to file and maintain an answer and cross-petition to contest the validity of the will, or to join in the prayer of the petition to have an issue made up; and it is not error for a trial court to dismiss a cross-petition filed under such conditions.
3. An action to contest a will can not take the place of a proceeding to quiet title under the statutes of this state.

C. H. Workman and *W. S. Kerr*, for plaintiff.
O. M. Farber and *A. A. Douglass*, for defendant.

PER CURIAM (TAGGART, J., VOORHEES, J., and POWELL, J.)

The plaintiff in error, Flora Leedy, files an amended petition in error, making Rollin H. Cockley, executor and trustee of the

will of Eliza J. Young, deceased, F. M. Hess, administrator *de bonis non* with the will annexed of the estate of David L. Young, deceased, Harry Leedy, Clyde Leedy, Jay Leedy, Mary Alice Leedy, Mrs. Elsie True, Romilda Leedy Edwards and Levi Young, defendants in error.

By this petition in error she seeks to reverse the judgment of the court of common pleas in an action pending in that court wherein the parties herein were parties in that court. The defendants in error, Harry Leedy, Clyde Leedy, Jay Leedy, Mary Alice Leedy and Mrs. Elsie True and Romilda Leedy Edwards, file a cross-petition in error and seek the same relief. The defendants, Rollin H. Cockley, eexcutor, etc., and Frank M. Hess, administrator, etc., file motions to strike from the files the cross-petition in error of the defendants. Harry Leedy et al. The grounds of the motion are that the cross-petition in error was not filed within four months from the rendition of the judgment in the court of common pleas; second, that the said Harry Leedy et al neither jointly nor severally have such an interest in the estate and will of D. L. Young as to entitle them either to file said cross-petition or to maintain the same in this court; and third, because the said Harry Leedy et al neither jointly nor severally have such standing as entitles them in law to test the validity of the will.

The matter in controversy had its origin in the court of common pleas by Levi Young and Flora Leedy filing in that court a petition to contest the last will and testament of David L. Young. Levi Young and Flora Leedy were children of David L. Young. The widow was Eliza Jane Young. The case proceeded with varying fortune, motions, applications for leave to file amended petitions, until July 19, 1909, when the plaintiffs herein got leave to file an amended petition within thirty days, and make Levi Young a party. Just why this action was taken, when Levi Young had been a party plaintiff in the case, is only explained by the entry of the court on that day, wherein it is recited in the journal entry that Levi Young had withdrawn as a plaintiff in the case and that Flora Leedy is the only remaining plaintiff.

We call attention to this fact as the question is made as to Levi Young being a party to the suit. He was a party at the outset and remained a party by his appearance in the case. This is further shown by the action of the court on March 5, 1910, wherein Levi Young prays that he may be permitted to withdrawn his separate answer in the above entitled cause, filed in this court October 9, 1909, and refiled November 17, 1909, and the said answer of Levi Young is hereby withdrawn.

It would thus appear that, so far as Levi Young is concerned, from the filing of the petition February 1, 1908, down to March 15, 1910, Levi Young was at all times a party to this suit, first, by his own appearance as plaintiff in the case; and second, by his appearance in the action, filing answers and motions to withdraw the same.

The case finally resulted in a third amended petition being filed herein in which Flora Leedy was plaintiff and the widow, Eliza J. Young, and the children of Flora, who were given an estate in remainder in certain real estate in the state of Iowa, were also made parties defendant, and Hess and Cockley and Levi Young were defendants.

The plaintiff alleged that the paper writing which had been theretofore admitted to probate, purporting to be the last will and testament of David L. Young, deceased, was not the valid last will and testament of the said David L. Young, and prayed that the issue be made up, and that it be declared not to be the valid last will and testament of the said David L. Young, deceased.

The defendant, Cockley, who was the executor and trustee of Eliza Young, who had deceased, filed an answer admitting the probating of the will and substantially admitting the relationship of the parties, and for a second defense setting out the fact that the plaintiff, by the terms of that will, was given the use for life of a certain farm situated in Dallas county, Iowa, of the value of between $16,000 and $20,000, and that immediately on the death of the testator the plaintiff, with full knowledge of the provisions of the will, entered into possession of the Iowa land, and has since been and is now in possession of the same, that

received the rents and profits of the same, and that, in consequence of the reception and retention of said property, plaintiff can not now institute and maintain this action to question the validity of the will.

A similar answer was interposed by Hess.

Amended replies were filed to these answers, but it is only necessary to state that she claims that she did not enter into possession of the lands with full knowledge of all the facts concerning the condition of the estate, and that, in consequence of some representations, she simply accepted such issues and profits which she tenders into court "and relinquishes all her right to the future rents and issues of the farm, and each and every right and interest in said estate she had received or would in any way receive by virtue of the provisions of said pretended will."

A jury was impanneled and, at the close of the evidence, the court withdrew the same from the consideration of the jury on the facts, and held and determined that the plaintiff could not maintain this action to contest the validity of the will, and ordered plaintiff's third amended petition to be dismissed and rendered judgment against her for costs. To all of which plaintiff at the time excepted.

It then appears from the record that the plaintiff filed her motion for a new trial in this action; that the defendants, Harry Leedy and others, also filed a motion for a new trial, and that Levi Young filed a motion for a new trial. It is not necessary to consider the motion of Levi Young, for he is not a plaintiff in error in this case.

The questions that are made in this case are: Was the court in error in its judgment in not submitting this case to a jury under the facts as shown in this case?

It appears from the record in this case that Flora Leedy did, in fact, upon the death of her father, D. L. Young, enter into the possession of the real estate devised to her, and has been in possession of the same at the time and during the times she has instituted and was attempting to carry on this suit; that not until answers were filed in the case alleging these facts, did she attempt to make restitution or dispossess herself of the rights so

her possession is by virtue of the said will, and that she has conferred upon her by this will. Now, we think it was too late. Had this been a money legacy, there are authorities that indicate that she might possibly have dispossessed herself of any benefit so bestowed upon her by the will, and made restitution, but in the case at bar, it appears that she not only received the rents, issues and profits, but that she created a leasehold on the estate which was outstanding at the time she was attempting to maintain this suit.

It does not appear that she was misled as to the condition of this estate by any one authorized to represent matters concerning its status. There nowhere appears in this record that she did not have the means of knowing. True, it is said that there was no inventory filed until more than a year after the death of the testator, but nothing appears to indicate that she could not have informed herself fully as to her rights under the will, as to her rights as legatee and heir, to compel full disclosure as to the situation and condition of the estate, so that, with the means at hand of ascertaining the condition of the estate, and perhaps with full information as to the condition of the estate, she went into possession of the benefits conferred upon her by the will of her father, and we think that she can not now be heard, after having taken this decisive step, to occupy a distinct and antagonistic position to that which she has taken.

This being so, so far as she is concerned, we think the court was right in holding that, under the facts as shown in the record, she could not institute and maintain an action to contest the will of her father.

But not only did the court dismiss this action as against Flora Leedy, but it dismissed it as against the cross-petition of the defendants.

The cross-petitioners in the court below were the children of Flora Leedy, the remainder-men of the estate which was bestowed upon Flora Leedy for life, and at her death, upon Harry Leedy and the other cross-petitioners in remainder.

Now, it is contended that these defendants, who are necessary parties to the contest of the will, had a right to file an answer

and cross-petition, or a cross-petition in the case, seeking the same relief that the plaintiff, Flora Leedy, was asking for. We are cited to Section 5858, Revised Statutes (General Code, 12079):

"A person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest the validity thereof in a civil action in the court of common pleas in which such probate was had."

Section 5859, Revised Statutes (General Code, 12080):

"All the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to the action."

It is now contended that the terms of these sections are so wide as to include any person interested in a will, and then it is argued "surely devisees are interested in the will or codicil and, therefore, they could contest the same."

It was held by this court and afterward affirmed by the Supreme Court, that a creditor of an heir might contest a will, but we can not see upon what basis or foundation these devisees who have the estate in remainder, could possibly be said to be interested in the will so that they might contest the same. They could not receive any advantage were they successful in the contest. They would simply deprive themselves of all right or benefit that would accrue to them by virtue of the provisions of the will; and we do not conceive that a will contest can take the place of a proceeding to quiet title so that they could contest the will, and by a moot court proceeding secure a judgment that it was the valid last will and testament for the protection of their title. Time would ripen their title so that they could not be interfered with in their rights under the will.

We are clearly of the opinion that they are not "persons interested in the will, who would be authorized to contest the will, and that, therefore, the court was right as against these persons filing the cross-petition in the court below, holding that the contest should not proceed but be dismissed as to them.

It further appears, however, that they can not secure a reversal of the judgment of the court below because they took no

exception to the action of the court in dismissing the petition, and while they may have filed a motion for a new trial, yet exceptions must be entered at the time the action of the court was had.

So that we find no error in the action of the court in dismissing the proceedings in the court of common pleas as against the cross-petitioners or any of them.

As to the motion that was filed in this court to dismiss the cross-petition in error of these remainder-men, we do not deem it necessary to pass on the same in the view that we take of this case. We think that the affirmance of the judgment of the court below is decisive of the rights of the parties, and the judgment of the court of common pleas is affirmed with costs and the cause remanded for execution.

Exceptions may be entered on behalf of the plaintiffs in error and the cross-petitioners in error. Exceptions may be entered in behalf of the persons filing the motion to dismiss the cross-petition in error.

LIABILITY FOR DAMAGES FOR CAUSING A HORSE TO RUN AWAY.

Circuit Court of Hamilton County.

CINCINNATI TRACTION CO. v. KUNIE FRANK.

Decided, April 15, 1911.

Negligence—Horse Frightened by Snow Sweeper Operated by Traction Company—Question of Negligence of the Company Should be Determined by the Jury.

Whether a traction company is liable for damages resulting from the frightening of a horse by the unexpected starting in the street of a snow sweeper, which made a loud and unusual noise and filled the air with snow in the direction in which it was operating, is a question to be determined by the jury under all the circumstances of the case.

Kittredge, Wilby & Stimson, for plaintiff in error.
Thos. L. Michie and *C. L. Swain*, contra.

There was a recovery below by the defendant in error in this case of $2,500, which was reduced to $2,000 in the court below.

JONES, J.; SMITH, P. J., and SWING, J., concur.

The evidence in this case shows that defendant in error was, at the time of the accident, driving south on Reading road in Cincinnati in a market wagon. It was snowing and a sweeper propelled by electricity and equipped with large, cylindrical, revolving rattan brushes was being operated by defendant company in removing snow from its tracks located on said street. As plaintiff approached, the motorman, on her account, stopped the sweeper and called for her to come on. Whether she signalled for him to stop or he stopped of his own volition is immaterial. It is evident that from some act of hers or the horse which she was driving, he saw fit to stop out of consideration for her safety. The sweepers of this type are only used in time of snow, make a loud, unusual noise, scatter the snow through the air and are likely to frighten horses.

Two eye-witnesses testify that after waiting until Mrs. Frank drove 150 or 200 feet, and when her horse was just opposite the sweeper, it was started causing the horse to run away. She was thrown out of the wagon and injured.

The question of negligence was one of fact and was submitted to the jury, whose verdict was for defendant in error.

We can not say that the verdict was not sustained by the evidence.

Judgment affirmed.

LIABILITY FOR DEATH OF A BOY FROM BEING STRUCK BY A CAR.

Circuit Court of Hamilton County.

JOSEPH FRITCH v. CINCINNATI TRACTION CO.

Decided, March, 1911.

Negligence—Newly-Discovered Evidence Which is Cumulative Only—Charge of Court as to Degree of Negligence for Which a Boy May Be Held.

In an action against a traction company on account of the death of a boy eight years old from being struck by a car, it is prejudicial error to fail to so modify the usual charge to the jury with refer-

ence to negligence as to hold the decedent to only that degree of care and prudence which may be expected from a child of his age, capacity and intelligence.

Gideon C. Wilson and *Horstman & Horstman,* for plaintiff in error.

Kinkead & Rogers, contra.

SMITH, J.; GIFFEN, P. J., and SWING, J., concur.

The court is of the opinion that there was no error in overruling the motion of plaintiff in error for a new trial on the ground of newly-discovered evidence. The evidence at its best was cumulative, and under the rule laid down in *Ludlow's Heirs* v. *Park,* 4 Ohio, 44, such evidence, while it might induce a different verdict with its introduction, it would not require a different one.

There was no error in the submission of the special interrogatories, nor in the giving of the special instructions asked by defendant in error except special charge No. 2 with reference to plaintiff's own evidence raising a suspicion that the decedent was negligent himself. We think under the circumstances of this case, the decedent being a child eight years of age, that the charge as given by the court is not qualified sufficiently to place before the jury the consideration of negligence upon his part from the standpoint of a boy of his age, capacity and intelligence. A child is held to such care and prudence only as would be expected from a child of his age and capacity. *Railway Co.* v. *Mackey,* 53 O. S., 370; 5 C.C.(N.S.), 321.

We find no other errors in the record, but for the above reason the judgment of the trial court will be reversed, and a new trial granted.

LIABILITY OF MUNICIPALITIES FOR DEFECTS IN SIDEWALKS.

Circuit Court of Trumbull County.

MILDRED GIBBS v. VILLAGE OF GIRARD.

Decided, March 9, 1911.

Municipal Corporations—Degree of Care Required in Maintaining Sidewalks in Safe Condition—Slight Depressions—Reasonable Care on the Part of Pedestrians—Weight to be Given to Evidence of Prior Accidents.

Reasonable care is all a municipal corporation is charged with in the maintenance of its sidewalks, and it is not liable for slight depressions not exceeding two inches, unless there be something in the condition of the depression specially calculated to cause an injury.

Pierson & Casey, for plaintiff in error.
Theo. Gillmer and *Wade R. Deemer,* contra.

POLLOCK, J.; NORRIS, J., and METCALF, J., concur.

This case is in this court on petition in error to reverse the judgment of the court of common pleas of this county.

The plaintiff in error brought suit in the court below to recover damages for a personal injury she claims to have sustained by reason of a defective sidewalk in the streets of defendant village. She claims that after night, on August 7th, 1909, she was going north on the west side of State street in said village, at a point between Elm and Cherry streets, and in stepping over a depression of about two inches in the pavement she fell and was injured. She further says that her injury was caused by the negligence of the defendant in permitting this depression to be and remain in said sidewalk.

To this petition the defendant's answer is a denial that the street was in this condition, and a denial of any act of negligence on the part of defendant, and also alleges contributory negligence on the part of plaintiff.

To the latter defense plaintiff filed a reply denying contributory negligence.

In the trial of the case in the court below, at the close of plaintiff's testimony, on motion of defendant the court directed a verdict in favor of defendant, and the sustaining of this motion is assigned as error in this court.

The testimony in this case tends to show that at the point described in the petition, as you go north, you pass over a concrete pavement, and just north of the concrete pavement is a flagstone pavement; that at the time of the injury claimed the flagstone pavement was two inches lower than the concrete; that this depression in the pavement had existed for a long time—at least a year or more; that the plaintiff was a stranger in the village of Girard, and had no knowledge of this depression except what she had or should have had by passing south over it a short time before the accident; that plaintiff, in walking, turned her toes out more than is usually done; that on this night between nine and ten o'clock she was going north over this pavement, and in stepping from the concrete pavement on to the flagstone she fell and was injured; that at the time of the injury it was dark at this point, either because the street lights were not burning, or from some other cause. There was also testimony tending to show that at least two other persons, prior to this suit, had stumbled over this depression, and that one person had fallen.

These are substantially the facts in this case, and a motion to direct a verdict for the defendant was insisted upon in the court below, and is insisted on here, for three reasons:

First. That the plaintiff by her own testimony has raised a presumption of contributory negligence on her part.

We think, so far as the contributory negligence on plaintiff's part is concerned, there was not such a presumption as would have justified the trial court in directing a verdict.

Second. It is urged that the testimony in this case fails to show any express or implied notice to this defendant of the condition of the sidewalk.

We think the testimony shows that the depression had existed for such a length of time that it was at least a question for the jury to determine whether or not the village had constructive notice of the condition of the sidewalk.

Third. That the defect in the sidewalk, as shown by the testimony, is as a matter of law not such a defect that plaintiff can recover, and that the court was authorized as a matter of law to say that the village was not negligent in permitting such a defect in the street.

This is the real question in this case: Is a court authorized to say, as a matter of law, that a village is not negligent in permitting a depression of two inches in its sidewalk?

It is a duty imposed upon a municipality by statute to keep the sidewalks within a corporation open, in repair, and free from nuisance. Whether permitting a particular defect in a sidewalk constitutes negligence on the part of a village is a question for the jury, unless the court can say that the defect causing the injury to one using the sidewalk in an ordinary way, could not reasonably have been anticipated from its existence. The law imposes upon a municipality the duty only of using ordinary care to see that its streets and sidewalks are safe for travel, and if it uses this care it is not liable.

"A municipal corporation is charged with the duty of keeping its streets free from nuisance and in a reasonably safe condition for travel in the usual modes, but it is not an insurer of the safety of persons using them, and when they are in that condition it is not chargeable with negligence, although an accident happens in the use of the streets." *Dayton* v. *Glaser*, 76 O. S., 471.

This was an action seeking to recover damages against the city of Dayton caused to one riding in a vehicle in the driveway of the street, by the wheels of the vehicle dropping into ruts that had been worn in the pavement. The trial court, at the close of plaintiff's testimony, made the same order as was made in the case at bar, and such judgment of the trial court was affirmed by the Supreme Court.

In the opinion in that case the court cite and quote from the case of *Beltz* v. *City of Yonkers*, 148 N. Y., 67, which holds that the city was not liable for an accident which happened on a sidewalk where the depression in the sidewalk was two and one-half inches deep. They also cite the case of *Grant* v. *Town of Enfield*, 11 N. Y. App. Div., 358, where the court reversed a judgment for error in denying a non-suit where the depression was

only three or four inches deep. They further cite *Morgan* v. *City of Lewiston*, 91 Me., 566, where the court held, as a matter of law, that a sidewalk was in reasonably safe condition where at the junction of two sidewalks at the intersection of two streets there was a depression of five or six inches.

In this case counsel on both sides have been very diligent in citing authorities bearing upon this question. Authorities have been cited where municipalities have been held for defects in sidewalks of less than two inches; others have been pointed out where the defect has been much greater, and it would be impossible to reconcile all of these cases.

In the case of *Terry* v. *Village of Perry*, 99 N. Y., 79 (92 N. E., 91), they lay down a rule which in a measure tends to distinguish these cases, or at least distinguish the New York cases.

"A municipality is not as a matter of law, responsible for injuries arising from slight depressions or difference in the grade in sidewalks, except when the depression is peculiar and specially calculated to result in injury to pedestrians."

We think this is the true rule which should govern in cases of this kind. Reasonable care does not require the authorities of a municipality to anticipate that injury will occur, to persons walking on the sidewalk, from a slight depression of two inches, unless there be something in the depression peculiarly calculated to cause an injury.

The law does not require perfectly smooth sidewalks, and that the sidewalk be free from every inequality. Such a degree of care would be beyond the reasonable requirements on the part of a village, and common observation teaches us that it does not obtain on the sidewalks in any village.

In this case there was nothing peculiar or special about this depression. The only condition out of the ordinary was, the testimony showed, that it was dark on the pavement at this point.

When the question is debatable whether or not a claimed defect is negligence, evidence of prior accidents may be received for the purpose of showing that by actual experience the depression was calculated to cause the accident; but the evidence of prior accidents can not be sufficient of itself to sustain a charge of negligence, and to lay the foundation for damages, because of

the maintenance or mere peculiar construction of the pavement or sidewalk. There must be evidence of such a fundamental condition of things as will at least permit the inference that the party complained of has failed to discharge the duties reasonably and fairly imposed upon him by law. *Gastel* v. *City of New York,* 194 N. Y., 15 (86 N. E., 833); *Terry* v. *Village of Perry,* 99 N. Y., 79 (92 N. E., 91).

In this case the depression was in a public street. There was nothing peculiar or special about it. At the north edge of the concrete pavement the flag pavement had either been laid or had sunk two inches lower. It was a public street where there was much travel every day, and it had been there for some time. The mere fact that three persons, prior to this accident, had stumbled or fallen would not be sufficient to draw the inference that it was peculiarly dangerous.

The court below held as a matter of law that this sidewalk was in a reasonably safe condition, and in so holding we find no error.

FIXING VALUES IN A CONDEMNATION CASE.

Circuit Court of Hamilton County.

THE UNION GRAIN & HAY CO. v. THE CITY OF CINCINNATI.

Decided, March, 1911.

Eminent Domain—Independent Judgment of Jurors as to Value May Be Applied With the Evidence—Only Prejudicial Error Considered on Review.

In fixing the value of property in a condemnation suit, the jury in considering the evidence before them may also apply their own sound judgment as to value, and where it does not appear that the jury acted on any wrong basis or with partiality or bias their verdict will not be set aside except for prejudicial error.

Littleford, James, Frost & Foster and *C. W. Baker,* for plaintiff in error.

Albert H. Morrill, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

Notwithstanding the alleged errors claimed to have been committed at the trial of the above case we are of the opinion that the same are not prejudicial. We have carefully examined the record and believe that the finding of the jury is in conformity with the evidence in the case.

In considering the fair market value of the property sought to be condemned, the jury may not only resort to the evidence before them, but may consider also in connection therewith their own good sound judgment as to the value.

The rule seems to be that when it is not fairly evident that any substantial injustice has been done, the proceedings of a jury will be affirmed; the presumption being that the jury took into account all facts bearing on the question of damages, and that there was no bias on the part of the jury that stood in the way of a fair verdict (*Mills on Eminent Domain,* Section 259). Such findings should not be set aside except on good cause, but not because the parties are dissatisfied with the amount recovered.

In the examination of this record, we do not think the jury in determining the value acted upon a wrong basis, or from any partiality, bias or prejudice, nor are any of the errors of which complaint is made of such character as would furnish any inference of the existence of such influence.

It is not for us to say whether plaintiff in error was entitled to more compensation than that allowed by the jury. This was the sole question to be determined by it, and as we think the same is fair, the judgment of the court below will be affirmed.

ACTION FOR DAMAGES WHERE A RELEASE IS PLEADED.

Circuit Court of Franklin County.

NELSON P. ROBINSON ET AL v. CORNELIUS V. EASTON.

Decided, February 7, 1911.

Release—Pleaded in an Action for Personal Injuries—Tender Back of Amount Received Not Necessary, When—Releases which are Void and Those which are Voidable Only—Negligence—Weight of Evidence.

1. Where, in an action for damages for personal injuries a release is pleaded by the defendant and the plaintiff denies in his reply that he ever entered into such a contract of release, the plaintiff is not bound to tender back the amount paid to him by the defendant in consideration of the alleged release.
2. A claim that the injuries received were due to the breaking of a chain which contained an open link, of which the defendant is alleged to have had knowledge and the plaintiff supposed had been repaired, raises a question of negligence which is peculiarly within the province of the jury, and where the testimony tends to support the claim a determination by the jury in favor of the plaintiff will not be set aside on the weight of the evidence.

ROCKEL, J.; DUSTIN, J., and ALLREAD, J., concur.

The plaintiff below brought an action against the defendant below for damages alleged to have occurred by the falling of a derrick upon the plaintiff, whereby the plaintiff was injured, said derrick having fallen by virtue of alleged negligence of the defendant below in not repairing or having a proper guy.

To the petition the defendant filed an answer of general denial and also alleged contributory negligence, and as a third defense set up the following:

"That before this action was brought and that no alleged cause of action having accrued for plaintiff's said injuries, to-wit, on the 4th day of February, 1907, these defendants paid to the plaintiff herein in compromise and satisfaction of any and all claims or causes of action arising out of said injuries, the sum of

$29.25. That said plaintiff accepted the same in full satisfaction and discharge of any and all claims or causes of action arising out of his said injuries; that said plaintiff executed and delivered to defendants a release in writing, a true copy of which is as follows: 'Received of the Columbus Hoop Company this 4th day of February, 1907, the sum of $29.25 in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 15th day of January, 1907, while in the employment of the above.

" 'Witness: C. V. EASTON.

" 'WINIFRED ALTWATER,

" 'Address, 276 E. 11th Avenue.' "

To this answer plaintiff filed a reply admitting that on or about the 4th day of February, 1907, he signed some instrument of writing and admits that he received about $29.25 at said time. Plaintiff denies that he ever agreed to accept said money in full satisfaction and discharge of any claims or causes of action arising out of said injuries, and alleges that if the said writing which he did sign purports to be a receipt in full satisfaction and discharge of any or all claims for causes of action arising out of his said injuries, he was ignorant of that fact; that his signature thereto was obtained by false and fraudulent representations on the part of defendants in this, to-wit:

"That defendants represented to plaintiff that said writing was merely a receipt for wages due him from said defendants; that plaintiff relied upon the said representations, and, believing them to be true, signed said writing without reading the same or knowing what it contained."

The case was tried to a jury and a verdict returned for the plaintiff. A motion was made by the defendant for a new trial which was overruled, and error was prosecuted to this court.

The principal errors relied upon by the plaintiff in error for reversal of judgment are two: The first being that the issue raised by the pleadings upon the matter of the release would not warrant a judgment for plaintiff, because there was no tender pleaded of the amount received in the release, and that neither the pleadings nor the evidence showed that it was that kind of a

contract that could be set up as a defense without pleading tender of the money received or having the instrument first reformed by a court of equity.

In the case of *Perry* v. *O'Neil*, 78 O. S., 200, we have this in the syllabus:

"A release of a cause of action for damages for personal injuries that is void is not a bar to such an action, and the plaintiff may, if it is set up by answer as a bar to his right of action, by reply, aver the facts that make it void. But if it is not void but only voidable, he can not maintain his action until the release is set aside."

This decision of the Supreme Court is unfortunate in not making clearer what is intended to be included or necessary to constitute a void contract within the language of the syllabus. That it might be meant to include such a contract as the one under consideration, even though it were not what is ordinarily considered as a void contract is borne out from the opinion in the case as well as the construction that has been given thereto by other courts.

In the case of *Railway* v. *Coleman*, 12 C.C.(N.S.), on page 500, in considering a case somewhat similar to the one at bar, we have this language of the court:

"If what I have read were established, it would appear that the release was absolutely void. If it were true that Coleman at the time was unable to read by reason of these injuries to his eye and if he was deceived by Mr. Latta, his superior in the employ of the company, as to the contents of the paper, if he signed the paper under such circumstances, supposing it to be one thing whereas it was an entirely different thing, that is to say, a mere matter of form that he must sign before he can work again, whereas it was a release of all claims against the company, if his signature was obtained under such circumstances and by such method, the release would be absolutely void, and under the authorities this issue of release might be raised by reply setting forth the facts showing that the release was void."

So, we are constrained to believe that what was intended by the Supreme Court was, that if the contract were such, in this kind of cases, that a court of equity could or would set it aside, that

the defense could be made that the contract was invalid without pleading a tender of the money received. The case in the 12th Circuit was affirmed without opinion by the Supreme Court. That this was the idea that pervaded the mind of the judge rendering the opinion in 78 O. S., 209, is clear from this language:

"If a party suing to recover for personal injuries admits the execution of a release and seeks to avoid it on equitable grounds, he must obtain that relief to maintain his action, when he denies the execution of the release, or that it is his act, on the ground of want of mental capacity at the time he signed it, or that his signature to the release was procured by fraud, such as misreading, the surreptitious substitution of one paper for another or obtaining by some other trick or device an instrument which he did not intend to give, he may maintain his action without obtaining a decree. In other words, if the release is void, he may ignore it in his petition, and if it is plead as a bar in the answer, he may in his reply plead the facts that make it void; if it is not void but only voidable, he must, to maintain his action, obtain its rescission or cancellation."

And quoting further, he says (p. 210):

"At common law it has often been held incompetent to a defendant suing at law on a specialty to plead that the instrument was obtained by false representation: it is a case, it is said, for equity alone. It is clearly otherwise of the execution of the instrument, as where the bond is misread to the obligor, or where his signature is obtained to an instrument which he did not intend to sign. In such cases fraud may be alleged at law."

In this opinion a large number of cases are given and quoted from where a release has been set aside without pleading tender of money received. In the case at bar, it was shown by the testimony that during the time that the plaintiff was confined to his home by reason of the injury suffered in the accident, that the defendant gave some money to his wife and also furnished him some coal; that when the plaintiff got so he could be on his feet, although suffering considerably, he went to work again. After he had been at work a few days, the defendant called him into the office and while the plaintiff was there sitting by the fire to get his feet warm, the defendant came in and called to the

plaintiff and said to him something about the money that "we have paid you"; that defendant hesitated a few moments, and that plaintiff said that, "I can't pay you all at one time. You will have to take it out a little at a time until I get you paid as my wages is not large enough that I could pay it all at one time." "Well," he says, "As far as that is concerned the only thing we want is something to show where the money has went, and we have prepared a little receipt here that we would like for you to sign so as to make us good." Plaintiff spoke up and said, "Alright." Defendant turned to Altwater, his son-in-law, and said, "Winifred, get that paper." He got the paper, put it on the writing desk, dipped the pen in the ink, and handed it to plaintiff, who signed it.

Plaintiff says that he understood that this was for money that had been advanced in the past, and that he thought for lost time, that they would keep him on the pay-roll during the time that he had been laid off by reason of the accident. He denies absolutely that it was a receipt to relinquish all his right and claim against the defendant for the injuries resulting from the accident; that he had no intimation or knowledge whatever that the paper he signed was anything more than merely an acknowledgment of the money that had been paid to his wife, or for necessaries furnished him and his family during his illness; that he did not read it but relied entirely on the statement that was then made in reference to the character of the paper that he was signing. Whether or not he was fraudulently led to believe that the paper he signed was a different one from what it was, was a question of fact for the jury. The defendant below testified that he explained to him that it was a release in full.

There are some circumstances, however, which tend to support the plaintiff's version of the giving of this release, and that is that it was for a peculiar sum, to-wit, $29.25, and that it would hardly be likely that a sum of dollars and odd cents would be given for a release in full of injury, and that it was probably what plaintiff contended, a mere release or receipt for the money that had already been paid, and, as he claimed, was requested by the defendant below for the purpose of showing on their books or something of that character.

Both by the pleadings and the evidence in the case at bar plaintiff denied absolutely that he made or entered into a contract releasing the defendant from liability for the injuries that he had received, and that in fact no contract of that kind had ever been entered into, and as no new inducement was, even by the admitted facts, given him to sign the paper he did sign, other than the mere extinguishment of a past obligation, it might be in fact held that no consideration moved to him for the execution of the release. Other states have held that releases might be set aside or held for naught in such actions without pleading a tender. A very strong case is that of *Chicago Railway Company* v. *Lewis*, 109 Ill., 120, where it is said:

"If such a release is procured by fraud and circumvention, it will be void as to the party so induced to execute the same. Fraud vitiates everything it touches, and a party will not be allowed to avail of an undue advantage obtained over another by fraudulent purposes."

In *Cleary* v. *Municipal Electric Light Co.*, 19 N. Y. (Supplement), 951, is a case very much similar to the one at bar. Here it is said:

"A release from liability for personal injury signed by the injured employe under his statement that it was a mere receipt for wages or gratuity is no bar to a future action."

In the opinion, it is said:

"Therefore, in this case, if the plaintiff had admitted the compromise or his execution of the release, but claimed that he had been induced to make the compromise by fraud, duress or imposition, he would have been bound to return the consideration received before he could maintain the action. But that was not the issue in the case. Plaintiff did not seek to avoid the contract of compromise. He denied making any such contract."

So, in the case at bar, the plaintiff denied that he made any such contract, and we think, therefore, that the plaintiff was not bound to tender a return of the payment made.

The plaintiff in error contends this case is controlled by *Manhattan Insurance Company* v. *Burke*, 69 O. S., 294. But the de-

cision in the case is on a different state of facts, as the following from the opinion indicates, p. 307:

"There being in this case a controversy between the parties, a disputed claim which the parties, being *sui generis* at the time deliberately settled, the one executing a full and sufficient release, intending to do just what he did do, and the other paying a money consideration therefor, the release whether obtained by fraudulent representations or not is binding until set aside, either by a tender or return of the money received, or by a direct proceeding in equity for that purpose," etc.

In the case at bar there was no dispute or controversy between the parties. The plaintiff below had made no claim for injuries. There was no dispute or controversy about anything. The plaintiff did not intend to do what the release purports. Neither is the case at bar similar to *Conrad* v. *Keller,* 12 C.C.(N.S.), 126; 8 N.P.(N.S.), 535. In this latter case there was a *settlement,* although it was fraudulently entered into. In the case at bar plaintiff denies there ever was a settlement concerning his injuries, and the evidence seems to sustain his contention. The admitted settlement is upon another matter, to-wit: money paid previously on wages or furnished as a gratuity.

Upon the second question as to whether or not the verdict is against the manifest weight of the evidence, we think it is not. The evidence clearly shows that the accident was caused by the breakage of the chain which was attached to a cable or guy and extended from the cable or guy to the derrick pole, and was a means of fastening the guy to the pole. This chain was several feet in length and the cable or guy was for the purpose of giving support to the derrick. On the day of the accident the plaintiff was working at a windlass or something of that character at the derrick pole, and this was used to raise logs and place them in different positions. A few days before the time of the accident, according to the plaintiff's testimony, he had learned that there was an open link in this chain and called attention to the fact that the fastening of this guy to the derrick pole by means of this chain, etc., was dangerous and unsafe, and that the defendant promised to fix the same. Plaintiff was then laid off a day or

two and when he came back to work he assumed that as the defendant had promised to fix the same, that it had been fixed. This pole was some thirty-five or forty feet high, if we remember right, and the chain being at the top of the pole, the plaintiff could not by observation have seen whether it was fixed or not.

The defendant denies this matter as to his being informed of its defective condition and his promise to remedy it. Defendant further contends that the plaintiff was guilty of contributory negligence—that the log the men were moving at the time the cable gave way was a large one, and that he had instructed the men working at the same to saw it in two before they attempted to move it.

The plaintiff denies that he heard any such conversation, and from the work that he was doing at the time the accident occurred it is not clear that he had much to do with selecting the log or fixing the fasteners thereto.

We think the evidence clearly shows that the accident was caused by the breakage of this chain, and that the breakage did occur by reason of this open link pulling apart and breaking. Slater's testimony is clear upon this question, and there is no testimony that shows the contrary. The question of negligence is one which is peculiarly within the province of the jury to decide, and we are not able to say that the verdict of the jury is against the manifest weight of the evidence or that the judgment is contrary to law.

We, therefore, find no errors of record prejudicial to the plaintiff in error, and the judgment of the court below is affirmed.

RIGHT TO TRIAL BY JURY.

Circuit Court of Hamilton County.

SECURITY INSURANCE CO. v. MICHAEL ET AL.

Decided, March, 1911.

Constitutional Law—An Invalid Statute Relating to Jury Trials—Demand for a Trial by Jury Not Waived, When—Actions at Law and in Equity.

1. The filing in an action at law for money of an answer which is no more than a defense to the petition does not change the action to one in equity.
2. Section 11466. providing when a jury shall be deemed to have been waived, pertains to a subject of a general nature, and is rendered invalid by reason of the fact that by its terms it applies to Hamilton and Cuyahoga counties only.
3. It is error to refuse a demand for trial of an issue of fact to a jury, where there was no other reason for the refusal than that the demand was not made until the trial had begun and was apparently made for purposes of delay.

J. Louis Kohl, for plaintiff in error.
C. A. J. Walker, contra.

SWING, J.; SMITH, P. J., and JONES, J., concur.

The case went to trial in the court below on the answer and cross-petition of Michael, the insurance company having dismissed its petition. This petition was by consent of parties then filed as an answer to the answer and cross-petition of Michael, which petition was for money only. The answer of the insurance company was nothing more than a defense to Michael's petition for money and could not in any way change Michael's action, which was one in law, to an action in equity The case was therefore one to be tried by a jury unless a jury was waived. 11379, General Code.

Section 11466, General Code, by its terms applies to Hamilton and Cuyahoga counties only. Its subject is of a general nature

and it should apply to all the counties of the state and have a uniform operation. For lack of uniformity of operation we think the law is invalid.

The Security Insurance Company demanded a trial by jury, which the court refused to grant. We are unable to see how this right of trial by jury can be held to have been waived by the consent of the parties in this case. After the trial was commenced the jury trial was demanded. The real purpose of the company may have been for delay, but in demanding trial by jury the company insisted only on having the trial in accordance with the terms of the statutes, and the purpose with which it was made can not affect the right. The insurance company went further than the requirements of the statute. The language of the statute is that it shall be tried by a jury unless a jury is waived.

No doubt a waiver of trial by jury may be done without an express waiver, but here a jury trial was insisted on.

In denying to the insurance company a jury trial we think the court committed error, for which the judgment should be reversed.

LIABILITY OF RAILWAY COMPANY FOR MAINTENANCE OF DITCH.

Circuit Court of Richland County.

THE SANDUSKY, MANSFIELD & NEWARK RAILWAY COMPANY v. ANNA HENRY ET AL.

Decided, September, 1910.

Contracts—Release of Railway Company from Obligation to Maintain Ditch—Error in Taking Case from Jury.

1. In an action for damages by an abutting property owner against a railway company, based upon failure of the company to construct and maintain a ditch and dike along the right-of-way granted by the plaintiff and in accordance with a contract entered into when said right-of-way was granted, the question whether the building with the consent of the plaintiff of a county ditch over and along the ditch in controversy had not carried a large amount of water to that point which did not naturally flow there, is one which should be submitted to the jury.
2. Moreover the construction of a county ditch, over and along the ditch which the defendant company had agreed to open and maintain, released the railway company from further obligation under its contract to open and maintain the ditch alleged.

Cummings, McBride & Wolfe, for plaintiff in error.
C. H. Workman and *R. E. Hutchinson,* contra.

TAGGART, J.; DONAHUE, J., and VOORHEES, J., concur.

This is the second time this cause has been in this court upon error. The original action out of which this proceeding grows was brought by Anna Henry, widow of Benjamin Larimer, and Fayetta F. Larimer for herself and as guardian of Blanche Larimer, child of Benjamin Larimer, to recover damages from the defendant railroad company for failure to maintain a ditch and dike along its right-of-way, adjacent to the real estate owned by said plaintiffs, which it is claimed the defendant company, as a part consideration of the grant of said right-of-way, agreed and contracted to do with the then owner, Robert Larimer, said contract being a covenant to run with the lands.

The defendant for a first defense admits it is a corporation and denies the allegations in the second amended petition, and for a second defense says in effect that in 1892 the board of county commissioners, in a proceeding on the petition of J. R. Crabbs et al, established a county ditch over and along said premises and over and upon a ditch opened by it along its right-of-way, the same being the ditch referred to in the plaintiffs' second amended petition. And that by means of said ditch, so constructed by the board of county commissioners, a large territory of land was drained of waters that did not naturally flow into the ditch opened by the railroad company.

In the establishment of such ditch the predecessors in title of the lands now owned by plaintiffs were duly notified and assessed for benefits and paid the same; that this ditch has been, since that time, cleaned out by the county commissioners upon petitions filed for that purpose. That at each of said times, the parties owning plaintiffs' land were assessed and paid the same, and that by reason of the establishment of said county ditch, over and along defendant's ditch, by reason of the fact that waters from a large acreage of land is now drained thereto, but did not formerly naturally flow to that point, they are not compelled by this contract set forth in plaintiffs' petition to further maintain said ditch or dike.

They further aver that the plaintiff, Anna Henry, was in possession of this land and entered into a contract with the commissioners, and other land owners, for the purpose of having the same tiled or partly tiled and agreed with other land owners that, if the commissioners would appropriate one hundred dollars for that purpose, she and the other land owners would keep said ditch open and in repair.

When this cause was first before us it was reversed by this court for the reason that a demurrer had been sustained to the second defense. We are still of the opinion that this second defense is good and ought to have been submitted to the jury, and that the court erred in its charge in taking the same from the jury.

First, the contract relied upon by plaintiffs provides that the ditch and dike shall be maintained sufficient to drain and con-

fine the waters naturally flowing thereto. The claim of the defendant is that there is a large amount of water now carried by this artificial ditch, and other ditches, to this point that did not naturally flow there, and therefore it could not be compelled under its contract to maintain a ditch and dike that would take care of all this additional water, nor keep in repair a dike that might be washed or injured by this additional water.

This was denied; it was a question of fact for the jury, and if the jury had found upon this issue in favor of the defendant, the plaintiff could not recover for damages suffered from the overflow of these additional waters.

So, in this respect, it clearly appears that the court was in error in directing the jury to disregard the second defense, as appears on page 176 of the charge.

But this court is of the opinion that when the county commissioners established a county ditch over and upon the ditch which the owner of this land had contracted to be opened and maintained by the railroad company, that owner acquiescing therein, and paying his share of the costs, the railroad company was thereby released from further obligation under this contract.

The plaintiffs' predecessor in title must have known at the time that this county ditch was established, that the land occupied by it must be appropriated by the county for that purpose and that the county commissioners would have charge of said ditch; that it would be cleaned and kept open only in the manner provided for by law; that if additional waters were to be conducted to this ditch it would bring additional debris and deposits into the ditch and require additional labor and expense in removing the same, all of which was not contemplated in the contract of the railroad company. And by paying the assessment without protest or complaint or in any manner that appears from the record, or advising the commissioners of his contract with the railroad company to maintain such a ditch, the owner of the land must be held to have admitted that the construction of such a ditch was a benefit to his land, over and beyond the benefit secured to him by the contract of the railroad company. Otherwise, he should not have been required to have paid any part of the cost of the construction of the same.

And the same is true as to cleaning out of this ditch. The owner of this adjacent land was assessed for the payment of the same; so that it clearly appears that for years the owner of this land recognized that the obligation of the company was ended and that thereafter the county would be compelled to clean and maintain this ditch, and for that purpose had the right to assess adjoining proprietors.

In order that defendant in error may test this question in the Supreme Court of Ohio, we are disposed to hold that this judgment is contrary to law, instead of holding that it is against the manifest weight of the evidence.

Therefore this judgment is reversed for the error of the court in its charge to the jury and because the verdict and judgment of the court is contrary to law. Exceptions of defendant in error may be noted.

PROTECTION TO A STAKEHOLDER.

Circuit Court of Richland County.

MYRA W. SWETT v. THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.*

Decided, September, 1908.

Procedure Where Claimants to a Fund Are Not All Before the Court —Cause One of Equitable Cognizance, Notwithstanding the Stakeholder by Filing an Answer Has Tendered Issue—Action by Beneficiary Under an Assigned Policy of Life Insurance—Parties—Interpleader—Multiplicity of Suits—Sections 5006, 5013 and 5016, Revised Statutes.

1. Where two or more persons are severally claiming the same debt or property, and the party who is to pay the debt or deliver the property makes no claim of title or interest therein, and does not know to which of the claimants he should pay the debt or deliver the property, he is entitled to the protection of a court of equity.
2. Where a policy of life insurance was issued in Michigan, the residence at that time of both the assured and his wife who was made

* Affirming *Swett* v. *Life Insurance Co.*, 8 N.P.(N.S.), 569; affirmed by the Supreme Court without opinion, *Swett* v. *Life Insurance Co.*, 83 Ohio St., p. —.

beneficiary, and an assignment of the policy was afterward made in Michigan to a resident of Michigan, and the assured died in Michigan, and the policy is still held there, and suit has been brought upon it by the assignee in the federal court in that state, an action brought in this state by the beneficiary, who is now a resident here, will be dismissed without prejudice for failure to make a *bona fide* effort to bring in the assignee of the policy as a party to the action, and she will be remanded to the Michigan forum for a determination of her rights.

Lewis Brucker and *B. F. Long*, for plaintiff in error.
John R. Sayler and *Cummings, McBride & Wolfe*, contra.

TAGGART, J.; DONAHUE, J., concurs; CRAINE, J., dissents.

This is a proceeding in error prosecuted by the plaintiff in error to reverse the judgment of the court of common pleas.

In the court of common pleas the plaintiff in error filed her petition on a policy of insurance issued by the defendant in error on the life of her husband, Edward R. Swett. The petition alleged the issuance of the policy as of the date of September 4, 1900, while the plaintiff and her late husband were residents of the state of Michigan. She further alleged that on the 24th of October, 1906, her late husband departed this life; that due proof under said policy was given the defendant, all the requirements and conditions of said policy were performed. She averred further that the policy of insurance is not in the possession or under the control of the plaintiff, but that she is informed and believes, and, therefore, avers that the same is in the possession of the defendant, and for this reason she is unable to attach a copy of said policy as an exhibit to her petition. She prays judgment in the sum of $15,000.

This petition was filed on the 24th of April, 1907, and on July 10, 1907, the insurance company filed its answer, in which it admits the execution and delivery of the policy on the life of Edward R. Swett, payable to the plaintiff, if living, upon the death of the insured, and upon due and satisfactory proof of interest and of the death of the said insured, deducting from the policy the indebtedness to the company on said policy, together with the current year's premium. The defendant further pleads

a provision of the policy that, "no assignment of the policy shall take effect until a written notice thereof be given to the company." It then pleads and sets forth a copy of an assignment of a policy to the Hackley National Bank of Muskegon, Michigan, which assignment is signed by the plaintiff and endorsed on said policy of assignment the acceptance of the same by the company and the filing of the same provision that if canceled, the original to be returned to the company.

It farther avers the purpose of this assignment to secure certain indebtedness of $15,000 to the Hackley National Bank, and that it is informed and therefore avers that no part of the same has been paid, and that the Hackley National Bank has made proof of a valid interest in said policy, and has made proof of the death of said Edward R. Swett; that it is entitled to a credit on said policy certain amounts set out in its said answer, and then says that the policy of insurance is held in the state of Michigan under said assignment, and is the same policy and insurance set out and referred to in the petition of plaintiff.

To this answer plaintiff replied admitting that the policy sued on contained the provision alleged in the answer, and that proof of the death of Swett was made to the defendant, and denies the remaining allegations of the answer.

In her second defense by way of reply, she admits signing the purported assignment of insurance in the county of Muskegon, in the state of Michigan, but avers that the purported assignment by her, as the wife of Edward R. Swett, was invalid and ineffective to convey any of her interest in said policy, and she sets out what purports to be several sections of the laws of Michigan in support of her claim.

In her third defense by way of reply, she adopts the averments of her second defense, and alleges that the purported assignment was without any consideration.

In her fourth defense, by way of reply, she sets out the alleged indebtedness, which said assignment was made to secure, was renewed from time to time and extensions of time given without her knowledge or consent, and that in consequence thereof the purported assignment is illegal and void and of no effect.

On November 15, 1907, the defendant filed its supplemental answer, in which is averred in brief that since the filing of its answer the assignee or assignees of said policy, the Hackley National Bank, and others, brought an action in Circuit Court of the United States for the Western District of Michigan against this defendant on said policy of insurance. It then further says that it disclaims any interest in any controversy respecting the validity of said assignment of said policy of insurance except in so far as this defendant may be protected in the payment of the money on said policy, to-wit, $14,160.46, as aforesaid, to the proper person or persons. It then avers that the said assignees of said policy of insurance "are parties necessary with plaintiff in this case in order that the controversy herein may be determined, that a determination of the controversy herein can not be made without the presence of said assignees."

On March 10, 1908, the defendant by its motion moved the court for an order requiring the plaintiff to bring in the assignees of said policy as necessary and proper parties to the determination of this case according to the supplemental answer of defendant filed herein, and upon failure or refusal so to do that her action be dismissed.

On May 10, 1908, this motion was heard, and on May 13, 1908, the court made the order, "whereas, the plaintiff failed to comply with the order of the court heretofore in reference to bringing in new parties, this case is dismissed without prejudice and adjudged the costs against the plaintiff," to all of which the plaintiff at the time excepted.

Thereupon the plaintiff below, now plaintiff in error, filed her petition in error to reverse the judgment and order of the court of common pleas. And the question before this court is, was the judgment and order so made erroneous?

Section 5013 is as follows:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy can not be had without the presence of other parties, the court may order them to be brought in, or *dismiss the action without prejudice.*"

That the court may dismiss a case without prejudice for disobedience by the plaintiff of an order concerning the proceedings in an action is determined by Section 5314, paragraph 5. But we take it that the order must be one that the court is entitled by law to make. This brings us to the real question in this case, did the court of common pleas have the right under the law to require the plaintiff to bring in the assignees of said policy of insurance, and upon default of bringing them in have her case dismissed without prejudice. It is claimed by plaintiff in error as this was an action at law for money only and as the insurance company had filed its answer tendering an issue that plaintiff was entitled to a trial by a jury on those issues, and the case was not one of equitable cognizance, neither did it fall within the provisions of Section 5013 or of 5006 of the Revised Statutes.

It is further contended by plaintiff in error that the insurance company, if it desires to protect itself from a multiplicity of suits, its remedy is to be found under Section 5016 of the Revised Statutes, by way of interpleader.

That in the case at bar the action is upon contract, and that if the company is ready to dispose or pay it should come into court under this provision and there find complete protection for itself. It will be noted that when the original answer of the defendant was filed the defendant pleaded a provision of its policy and an assignment thereof to other parties. The plaintiff replied attacking the assignment as being invalid and void; subsequently by its supplemental answer it alleged a demand by the assignees of this policy upon it for payment of the amount due thereunder. It then pleads a disclaimer of any interest in the controversy as to the assignee of the policy or as to the proper payees, and avers that it is willing to pay the amount of its liability. It will be seen that the company could not avail itself of the provisions of Section 5016, because it had already filed an answer and would be prevented from availing itself of this remedy under the statute.

At the time the motion was filed there was a controversy between the parties to this case. The controversy was in respect to this assignment. The plaintiff claimed the assignment was

wholly invalid, nugatory and void. The determination of this controversy as to whether this assignment was nugatory and void or valid and in full force could not be determined, as we view it, without the presence of the assignees of this policy. While the company, in the case before the court of common pleas, might have gone on and litigated this case, yet it was a controversy purely between the plaintiff and the assignees of the policy.

By the disclaimer in the supplemental answer, the attention of the court of common pleas was called to the fact that there were matters of equitable cognizance before it.

First. By the accounting of the amount that was due on the policy.

Second. By the fact that there were other parties than the plaintiff claiming the funds or proceeds of this policy.

It did not appear that this was by collusion or through an independent or different contract or arrangement than that by which the plaintiff claimed to recover. So that several contingencies might arise: the defendant might be called upon to pay this policy twice in certain events, and in certain other events might be relieved from all responsibility.

In the first contingency it would be an inequitable and gross injustice to it. In the second contingency it would be inequitable and a gross injustice to some of the contending parties. Now the Supreme Court in the 14 O. S., 303, *Penn* v. *Hayward et al,* thus lay down the rule:

"A court invested with general chancery powers in this state, may decree specific performance of agreements to convey lands lying in another state, where all the parties, still bound by the agreement, are within the jurisdiction of the court, and have been served with its process.

"But where part only of the persons from whom such conveyance is required, are residents of the state, and the court has not acquired jurisdiction over the persons of the non-residents, so that complete relief can not be had in that suit, the cause will be dismissed; especially where no real necessity exists for trenching upon the rule discountenancing multiplicity of suits."

Sections 35 and 40 of the code (Sections 5006 and 5013, Revised Statutes), providing for the joining of all persons in inter-

est, etc., and that the court may determine any controversy when it can be done without prejudice to others, are permissive in their nature, except the last clause. They substantially adopt the rule in equity, and the discretion given must be exercised with a view to avoiding multiplicity of suits.

On page 306 the court says:

"The effect of these sections is to vest in the court a legal discretion to say, when and under what circumstances a suit may proceed without drawing into its vortex all parties interested in the questions involved in it, if it can be done without prejudice to the rights of others. But this discretion is not an arbitrary discretion. It must be exercised with due regard to established rules; and prominent among these, is the duty to avoid multiplicity of suits, and to obtain a final and complete determination of all the questions involved in it, *with the least delay and at the least possible expense.*

"There is much obscurity in the title of the code as to 'parties to civil actions,' owing to the effort to blend, in one system, the rules pertaining to suits at law and in chancery; but the rules of courts of equity will be found to predominate in its provisions. Judge Swan, in his recent and valuable treatise upon the code, at page 100 says that Section 35 is a substantial adoption of the equity rule, requiring persons whose interests are involved in the issue, and who may be affected by the judgment or decree, be made defendants; and adds as a sequence on the next page, that 'all parties entitled to litigate the same questions over again in a new proceeding, instituted by them or either of them, are, in general, necessary parties.' This is not perhaps a logical sequence of the rule as stated; but when considered in connection with the duty to avoid multiplicity of suits, it is believed to be correct."

In this case the court dismissed the proceedings because all the parties to a complete determination of the case were not before it, and the court could not grant complete relief.

We are of the opinion that on the filing of the supplemental answer the court did obtain equitable cognizance and full power to grant complete relief of the parties by making the order that the assignees be brought in to the case, or that the case be dismissed without prejudice. Section 5016 is not exclusive, but is auxiliary to the practice in chancery respecting interpleader, and

[even if the matter before the court was not a matter of interpleader, it was one of equitable cognizance. Where two or more persons severally claim the same thing, and the party who is to deliver the property not claiming any title or interest therein himself and not knowing to which of the claimants he ought to render the debt or duty or deliver the property, and may be either molested by action or actions brought against him or fears that he may suffer injury from the conflicting claims he is entitled to protection by a court of equity.]

In this case the insurance was issued in the state of Michigan, the alleged assignment was made there, the assured died there, the policy is held there, suit is brought there on this policy, and there is nothing appearing to the court why the plaintiff may not assert her rights in that forum and have them there determined. By so doing no injustice will be done to any of the parties to the controversy, and the rights of all may be protected. This is not turning a suitor out of the courts of this state and requiring her to go to a sister state. It is simply requiring her to attempt to secure the attendance of the contending party in this jurisdiction, or attempt to have her rights determined in a foreign jurisdiction, where an action is pending which would determine the entire matter, and in the event of failure after a *bona fide* effort to either secure the contending parties in this court, or effect an entrance into the case as a party in the foreign jurisdiction, this case could be commenced again and prosecuted to a finality. As the plaintiff is entirely responsible for this situation every equitable consideration requires that she should be required to conform her conduct so that no wrong or injustice will be done to either party.

And we think peculiarly in this class of cases where no final judgment is to be rendered, there is reposed in the court a discretion to require the plaintiff to make the effort to secure the presence of the contending parties or suffer a dismissal of his case without prejudice. If the plaintiff after a *bona fide* attempt to secure the presence of the contending party and obey the order of the court, had failed, or had in good faith attempted to become a party in the foreign jurisdiction and had been denied, we

do not see any reason why she might not again begin this action here alleging these facts, but until she has obeyed a proper order of the court she is not prejudiced by a dismissal of this action without prejudice.

The judgment of the court of common pleas is affirmed.

BOY STRUCK BY A TRAIN.

Circuit Court of Richland County.

JOSEPH S. CARTER, ADMINISTRATOR, v. ERIE RAILROAD COMPANY.*

Decided, January, 1911.

Negligence—Uninclosed Railway Grounds Used by Pedestrians—Boys Loitering on Such Grounds and One Darts in Front of a Train—Company Held Not Liable.

A locomotive engineer while fulfilling his duty of keeping a lookout on the track in front of his train, is not charged with the responsibility of watching the open railway grounds and right-of-way in the belief that persons on such grounds or right-of-way will attempt to cross the track in front of his train, and the company is not liable for striking a boy who did attempt to cross the track almost immediately in front of a train.

Farber & McCray, for plaintiff in error.
Cummings, McBride & Wolfe, contra.

BY THE COURT (TAGGART, J., VOORHEES, J. and POWELL, J.)

The plaintiff, as administrator of the estate of Clarence A. Carter, deceased, grounded his action in the court of common pleas upon the alleged negligence of the defendant, the Erie Railroad Company.

It was his claim that the deceased, Clarence A. Carter, came to his death in consequence of the negligence of the defendant company's servants in failing to warn the deceased when in the immediate proximity of one of the company's trains in passing over its line of road close to Springmill street crossing in the city of Mansfield.

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* Affirming *Carter, Admr.,* v. *Erie Railroad Co.,* 10 N.P.(N.S.), 292.

The deceased was a boy between eleven and twelve years old, who with a companion had gone to the Baltimore & Ohio Railroad depot about four o'clock on the afternoon of the 24th of November, 1906. While at the Baltimore & Ohio Depot these two boys were required to go from the depot and grounds and they passed across Springmill street to unenclosed lands belonging to the Erie Railroad Company and the Baltimore & Ohio Railroad Company. These unenclosed lands lie between Springmill street and North Main street, in the city of Mansfield.

It is claimed in the petition that these unenclosed lands have for many years been opened and used by the public as a way for passage between the Baltimore & Ohio depot and the said Main street, and points eastward thereof; that the defendant company had permitted the public to so use these unenclosed grounds, and that the same were highly dangerous and known to be such by the defendant company, and that while these two boys were upon these unenclosed grounds the defendant company so wrongfully and carelessly operated its train and wholly failed to ring its bell or sound its whistle on the engine of the train, or give any other adequate warning so that the deceased might have been aware of its presence and its approach and escape being run down by said train.

It is further claimed that the servants of the company failed to keep a lookout so as to watch its track in front of its trains, and in consequence of the alleged negligent, careless and wrongful acts of the defendant, the plaintiff's intestate was killed. The answer is a general denial and averment of the contributory negligence on the part of the deceased at the time of the injury.

The defendant, at the close of plaintiff's testimony, moved the court to direct a verdict for the defendant, which motion the court at the time overruled but submitted the case to the jury under his instructions. The jury returned a general verdict and returned special findings which were objected to and excepted to by the defendant. Thereupon the defendant filed its motion for a new trial, which was afterwards sustained and a new trial was granted. And the defendant further insisted upon the court passing upon the motion so made at the close of all the evidence, which the court sustained and entered a judgment against the

plaintiff for costs. Plaintiff thereupon filed a motion for a new trial which was overruled, and bill of exceptions was taken and he now seeks the reversal of the judgment of the court of common pleas.

The plaintiff in error insists that the deceased being a boy of but ten years of age, and being upon unenclosed grounds of the defendant, was entitled to more consideration than had he been an adult, and that the proof in this case indicates that the grounds of defendant company were used by the public in such a way that these two boys were not trespassers but were licensees, and that the company owed them some duty by exercising care in approaching the Springmill crossing; such care in fact, that they should run their trains and keep a lookout that children of tender age or persons upon the grounds should not be run down and injured and killed as was the deceased in this case.

The record in this case discloses that these boys did not go to the Baltimore & Ohio for any purpose connected with the business of the railroad; the only excuse they give for being in that vicinity was that they went to meet the incoming car which would cross the Baltimore & Ohio tracks at the Baltimore & Ohio depot, for the purpose of getting papers that would come from Cleveland. But, it appears from the record that this was not the usual or customary manner of securing these papers, or that this errand would necessarily lead them to pass over the unenclosed grounds of the Erie company. After failing to get their papers, the record discloses that they passed across Springmill street and entered upon the unenclosed grounds of the defendant. It does not show that they ever attempted to pass down the known track or way that it is claimed pedestrians took when passing from the Baltimore & Ohio depot eastward to Main street.

Upon the contrary the record seems to disclose that they were on the north side of the Erie tracks with no well defined purpose or object, either loitering or playing there or amusing themselves as they saw fit.

It does appear affirmatively that they knew of the approach of the defendant company's train from the east, it having passed the Erie station and was westward bound. We learn from the survivor of these boys that it was in contemplation that they

cross the track in a southwardly direction to reach the Baltimore & Ohio depot; whether this was in the mind of the deceased we can only assume from his conduct.

We have a comparatively clear description of what was done by him after the two boys started from the north side of the Erie track in a southwest direction, an eye witness saw them start, describes their course and what they did. And the survivor of them gives us some information as to what the deceased did and the direction that he took.

It appears that he started in a southwesterly direction and ran parallel with the company's track westerly to near what is known as the "gateman's tower," when he started across the Erie track almost immediately in front of the engine that caused his death.

With this state of facts and the engineer having given all the usual and required signals, it is contended that the record shows that the engineer, he being on the north side of the engine, should have kept a lookout and should have given such warnings as would have attracted the attention of the deceased.

But we do not think that this record justifies such a conclusion. As we have said, the deceased, even if he were upon these grounds as a licensee, which is as much as could be claimed for him and perhaps more than he is entitled to be considered in this case, the company would only be liable when its servants saw him on the track, or when by the use of ordinary care they should have seen him. If by the exercise of ordinary care they saw him, if he was on the track or they should have seen him, and that could have prevented his injury, then they were required to do so.

But, we can not, as we view this record, hold that he was a licensee, but, on the contrary, as we view the record, we think he was a trespasser, and if he was a trespasser on these grounds, then the company owed him no duty to sound any whistle or ring any bells except that they were not to be permitted to wantonly run him down. As to the duty of the engineer to keep a lookout, we think the case of *Railroad* v. *Kisler*, 66 O. S., 326, lays down the duty of an engineer in respect to a lookout:

"It is the duty of a locomotive engineer to keep a lookout on the track ahead of the train. If while so doing his eye takes in a person approaching the track he may assume that such person

will keep away from the track until the train passes; but when it becomes evident that such person will not keep off the track, it becomes the duty of such engineer to use ordinary care to prevent injury to such person, his first and highest duty, however, being for the safety of the passengers and property in his charge for transportation."

In this case we conceive it to be the duty of the engineer to keep a lookout for Springmill crossing rather than for trespassers upon the right-of-way who might be approaching the track or attempting to cross, and this would be the case whether the boys were upon the unenclosed ground as licensees or as trespassers.

It can not be insisted, we think, that it was the duty, through these grounds, for the engineer to be compelled or required to keep a lookout for the track ahead of the train and at the same time keep a lookout for persons on the right-of-way, all the time assuming that the same would attempt to cross the track. But, if the deceased and his companion were mere trespassers and the engineer was in the use of ordinary care in managing his train, and this record discloses that these boys traversed part of the unenclosed grounds and ran alongside of the track and gave no indication of their purpose to cross the track, until the deceased attempted to cross the track almost immediately in front of the engine, and hearing the warning cry of the witness Carr and that of his surviving companion turn and attempt to go back and was struck, we see no basis or foundation for any recovery in this case, for there can be no basis upon which any negligence can be imputed to the railroad company or to its servants in the operation of its trains.

We think the case of *Railroad Company* v. *Harvey,* 77 O. S., 235, and the cases there collated by Summers, Judge, in deciding that case, is absolutely controlling in this case, and we see no grounds upon which any recovery could be had under the averments of the petition or under the proof as made in this case.

Therefore we are clearly of the opinion that the court was right in sustaining the motion and the judgment of the court of common pleas is affirmed with costs. Exceptions may be entered.

AN INVALID ACT RELATING TO SEWAGE DISPOSAL.

Circuit Court of Darke County.

THE CITY OF GREENVILLE v. M. G. DEMOREST ET AL.

Decided, April 28, 1911.

Constitutional Law—Invalidity of the Act Requiring the Purification of Sewage and Protection of Streams from Pollution—Classification of Subjects and Uniformity of Operation—Sections 1249 et seq., General Code, and Section 26, Article II of the Constitution.

1. Section 1249, *et seq.*, General Code, authorizing the state board of health to require the purification of sewage and public water supplies and to protect streams against pollution, lacks uniformity of operation by reason of the exception which is made of Ohio river cities from the operation of the law under certain conditions; and the invalidity of the exception is of such a character as to affect the entire act and bring it within the inhibition of Section 26 of Article II of the Constitution.
2. Moreover the penalty clause, directed at members of council for failure to take the steps required to carry out the orders of the state board of health, is also open to constitutional objection for the reason that it is directed against a legislative body and is destructive of the fundamental theory of government in that it substitutes to that extent the state board of health as the governing board in the place of council.

D. W. Bowman and *J. C. Elliott*, City Solicitor, for plaintiff.

T. S. Hogan, Attorney-General, and *Chas. C. Marshall*, special counsel for defendants.

ALLREAD, J. (orally); DUSTIN, J., and FERNEDING, J., concur.

This action is brought in behalf of the city of Greenville by its city solicitor against the members of council and certain other administrative officers of the city, the state board of health, and its members, to enjoin action to establish and construct a sewer disposal plant and make the levy of taxes and issue of bonds therefor, under authority of the act of April 7th, 1908 (99 Ohio Laws, 74; General Code, 1249, *et seq.*), the act being entitled, "An act to authorize the state board of health to require the

purification of sewage and public water supplies and to protect streams against pollution."

This action originated in the court of common pleas, and upon final judgment in that court was brought here on appeal. The case stands upon demurrer to the amended petition.

The amended petition is in three causes of action and goes into detail as to proceedings and the situation of the sewage, water supply, and stream into which the sewage flows, and the effects thereof upon the health and comfort of the citizens in the vicinity of the stream.

Among the averments of the petition under consideration it appears that the city of Greenville in the years 1890 and 1891 constructed and has since maintained a system of sewers emptying into Greenville creek, and that upon petition of the township trustees of Greenville township proceedings have been had under the act of 1908 resulting in an order of the state board of health, approved by the Governor and Attorney-General, to the city of Greenville "to purify its sewage in a manner satisfactory to the state board of health." That the plans contemplated by the state board of health is a "sanitary sewage disposal plant," involving an expenditure of about $35,000 and a maintenance cost of about $3,000 annually. That this expenditure can only be met by a bond issue, and that the members of council and city officials are about to act solely in obedience to the orders of the state board of health and in fear of the penalties provided for in the act.

The main question argued and presented by counsel relates to the constitutionality of the act. The act contains in section one the following exception or proviso:

"Provided that no city or village that is now discharging sewage into any river which separates the state of Ohio from another state shall be required to install sewage purification works as long as the unpurified sewage of cities or villages in any other state is discharged into said river above said Ohio city or village."

It is contended that this exception brings the act within the inhibition of Section 26, Article II of the Constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state."

That this act in relation to the public health is one of a general nature is clear, and the question in this respect is whether the act has a uniform operation throughout the state. To have a "uniform operation throughout the state" does not prevent reasonable and just classification of subjects. To hold against reasonable and just classification would greatly restrict the efficiency of legislation.

It is also clear that in testing legislative classification doubt must be resolved in favor of the act; but where the classification is colorable, arbitrary, and not founded upon reasonable distinction, the courts are bound to enforce the constitutional provision and declare the repugnancy of the act.

The case of *City of Cincinnati* v. *Steinkamp,* reported in 54 Ohio State, on page 284, involving an act of the General Assembly in reference to fire escapes on buildings of three or more stories, was limited to cities of the first grade of the first class. It was contended in that case that the act was invalid because of the drastic terms of its provisions and also because it was in violation of the uniformity clause of the state Constitution. The court held in favor of the act upon the first contention, but held it to be unconstitutional because it was in violation of the uniformity clause, being confined to the city of Cincinnati. It was distinctly held that the law, affecting the public safety, was one clearly of a general nature and should have a uniform operation throughout the state, and that a classification of a single city would not be reasonable in view of the fact that other three story buildings in other cities throughout the state were just as much entitled to the protection of this act as the city of Cincinnati. Judge Spear in the opinion in this case cites from Boynton, Judge, in the case of *McGill* v. *State,* 34 Ohio State, in relation to the drawing of juries, as follows:

"The difficulty encountered in all cases where a legislative act is alleged to contravene the provisions requiring the uniform operation of law of a general nature, lies in determining what constitutes a law of that nature, within the meaning of the Constitution. The test is said to depend upon the character of its subject-matter; that if that is of a general, as distinguished from

a local or special nature, existing in every county throughout the state, a subject in which all the citizens have a common interest, then the law is one of a general nature, requiring a uniform operation throughout the state."

Says Judge Spear:

"'Existing in every county throughout the state' means, we suppose, only in every county where the conditions of the statute exist, for in order to be general and uniform in operation it is not necessary that the law should operate upon every person in the state, nor in every locality; it is sufficient, the authorities coincide in holding, if it operates upon every person brought within the relation and circumstances provided for, and in every locality where the conditions exist. But, upon the other hand, it seems equally well settled, a law is not of uniform operation if it exempts a portion of those coming within its terms; that is, if it confers privileges, or imposes burdens, upon some of a class answering a description which are not conferred or imposed upon all others belonging to the same category."

In the case of *Costello* v. *Wyoming,* reported in the 49th Ohio State, page 202, a case arose under an act of the General Assembly providing for a special method of constructing sidewalks and assessing the cost in villages situated within a county having a city of the first grade of the first class. In other words, the Legislature undertook to classify villages because of their location in a county in which a city of the first grade of the first class was located. The Supreme Court held that that was unreasonable classification. That there was no reason why a village should have a different system of sidewalk construction from other cities and villages simply because of the fact that it was located in the same county with a city of the first grade of the first class. In discussing this proposition Judge Dickman, on page 208 of the opinion, says:

"It has been said that, 'The mode and extent of classification is left to the conscience of the Legislature—its sense of right and public necessity.' But it is now settled beyond controversy that the constitutional provision above referred to is mandatory and that a failure on the part of the Legislature to observe it will be fatal to the validity of a statute. Whether or

not the classification is authorized by the Constitution is for the courts to determine. The people in their wisdom, by prescribing in the Constitution a fixed rule of uniformity for the operation of laws of a general nature, have thereby imposed a limitation upon special legislation, and such limitation can not be broken down or overstepped under the guise of classification. In affirming the principle that classification can not be sanctioned as a pretext for evading the limitation upon special legislation, it was said by Sterritt, J., in *Ayer's Appeal,* 122 Pa. State, 266, 284, in language pertinent of this case: 'Whether, in any given case, the Legislature has transcended its power and passed a law in conflict with that limitation is essentially a question of law and must necessarily be decided by the courts.' ''

On page 211 he says: "The requirements for village classification in view of the enactment of laws which shall have a uniform operation throughout the state, will not be satisfied by adopting any common mark or feature that will serve to classify. It was stated by Beasly, C. J., in *State* v. *Hammer,* 42 N. J. Law, 435, 440, that a law may be general in its provisions, and may apply to the whole of a group of objects having characteristics sufficiently manifest and important to make them a class by themselves, and yet, the marks of distinction on which the classification is founded may be such, that the law may be in contravention of a constitutional provision prohibiting the enactment of special laws which regulate the internal affairs of towns and cities. If all that is requisite for the purpose of legislation is to designate villages by some quality, no matter what it may be, which will so distinguish them as to mark them as a distinct class, the constitutional restriction in regard to the uniform operation of laws of a general nature, would be of no avail, as there are few objects that can not be arbitrarily associated. The objects grouped for classification should be distinguished by characteristics sufficiently marked and important to make them a class by themselves."

In the case of *Gentsch* v. *State,* 71 Ohio State, 151, Judge Davis of the Supreme Cuort discusses this same question. From the syllabus we find this rule to be laid down:

"Classification is often proper and sometimes necessary in legislation, in order to define the objects on which a general law is to take effect and in order to definitely apply and effectuate the purposes of the legislation; but when classification is unnecessary, arbitrary, fictitious or otherwise falsely made, and is

used to evade the constitutional limitations under the form of general legislation, such legislation in relation to a class may be both special and unconstitutional."

And in the opinion on page 165 he says:

"The reported decisions of this court abound with cases of false classification in acts obviously drawn with the purpose of enacting special laws under the guise of general laws."

We have taken some pains to cite from the authorities upon this proposition because it is important to know how far the courts are required to go in the consideration of special acts to enforce the uniformity clause of the state Constitution and to determine when classification is justifiable and when it is not justifiable.

It is contended on the part of the state that the exception of the Ohio river cities is legitimate classification for two reasons: (1) Because the boundary of the state being at low water mark on the northwest of the Ohio river, it has no proprietory interest in the waters of the river; and (2) because the exception is based upon the contamination of the waters of the Ohio river by flowage from the cities and villages upon the other shore. As to the first, it clearly appears from the title of the act and its context that the purpose of the act was to purify the water supply and protect the inhabitants from noxious odors and the impure water. The state of Ohio has riparian rights in the waters of the Ohio river. Many cities and villages are located upon the Ohio river and the state is bound to protect those of its citizens who live along the Ohio river as well as those living on other rivers, streams and waters throughout the state. Furthermore, the exceptions exist only so long as other "unpurified sewage of cities and villages of any other state is discharged" in the river. It is therefore apparent that the manifest purpose of this act was not to exclude Ohio river cities upon the ground that it had no jurisdiction over the waters of the Ohio, but because of the facts stated in the second ground. It follows therefore that the classification can not be sustained upon the first ground, but must be upheld, if at all, upon the second ground

stated, namely, the fact that the waters are contaminated by the sewage from other cities and villages over which the state of Ohio has no jurisdiction.

It must be conceded that the contamination of a water supply from the other shore over which the state has no jurisdiction, and so that the purification of sewage on this side would be of little or no avail, would justify an exception. A good ground for the classification and exception would be found in the futility of the proceeding.

But an analysis of the excepting clause carries the exception far beyond any reasonable necessity.

The Ohio, which is the only boundary river, extends for three hundred or more miles along the eastern and southern boundary of the state and along thirteen counties, and upon its banks are many large and populous cities of this state. The exception exempts all these cities from the act so long as the "unpurified sewage of cities or villages in any other state is discharged into said river above said Ohio city or village."

Now, we may take judicial notice that three states lie along the Ohio river whose cities may and do discharge sewage into the Ohio river above Ohio cities. Under this exception if the cities or villages of any other state flow sewage into the river the cities below, regardless of distance or possibilities of contamination, are included in the exemption. Take for instance the city of Cincinnati. If all the Kentucky cities and villages are prevented from flowing sewage into the Ohio, yet the fact of flowage from West Virginia or even Pennsylvania exempts Cincinnati. Besides, the act exempts those Ohio cities "now flowing sewage," etc. A city hereafter constructing a sewer system draining into the Ohio river comes within the provisions of the act and is bound to purify its sewage, notwithstanding contamination from the other states, and although another city of the same character is exempt.

This classification can not, in our opinion, be sustained.

It is urged that the exception and not the act should be stricken down as unconstitutional. Some difficulty always arises in deciding when an exception or limitation should be held void and when the main act is to fall.

In the case of *State, ex rel Wilmot,* v. *Buckley et al,* 60 Ohio State, 296, there is a discussion of this question. The question there was as to the validity of the registration law, which was confined to all of the cities of the state except Mansfield and the cities of the fourth grade of the first class, and the court held that the act was not of uniform operation throughout the state. In the opinion it is said:

"It is urged, however, that if this exception makes the act unconstitutional, the exception should be disregarded, and the act held valid as operating uniformly throughout the state. The answer to this is that the court has no law making power, and can not extend a statute over territory from which it is excluded by the General Assembly. A court can hold a whole act unconstitutional because it is not broad enough, that is, because it is not of uniform operation throughout the state; but it can not extend an act which is too narrow, so as to take in territory which was left out by the General Assembly. In the case of an exception, the General Assembly never enacted the statute in the excepted territory, and the court has no power to enact it therein."

The same proposition was up in the case of *State* v. *Lewis,* reported in Vol. 74 Ohio State, page 403, involving the validity of the tax inquisitor law. Under an act of 1885 the county commissioners were authorized in certain counties of the state to employ a tax inquisitor on certain terms. The act of 1888 created a general authority for the commissioners in any county of the state to appoint a tax inquisitor at a certain compensation, but in Section 4 of the act there was a provision that this act of 1888 should not affect the provisions of the act of 1885. Now, it was contended that inasmuch as this was a separate section which provided that it should not affect the provisions of the act of 1885, the separate section should be declared invalid, and the main act extended to cover the entire state, just as it was argued in this case that we should hold this provision excepting the Ohio river cities unconstitutional and eliminate it from the act and leave the act one in general operation throughout the state. The court held in that case that Section 4 was manifestly an exception and qualified Section 1. In this case the exception is in Section 1 and manifestly an exception. The reason for this is given in the case of *Friend* v. *Levy,* 76 Ohio State, page 50.

That was a repeal of the direct inheritance law. In the repeal it was provided that estates in which the inventory had been filed were excepted from the repeal. The Supreme Court held that that exception was invalid, and this observation is made:

"The exception being void, the question arises whether the whole act must be declared unconstitutional. The rule of construction is that, where the void parts of a statute were evidently designed as a compensation for, or inducement to, the valid portions thereof, so that the whole taken together warrants the belief that the Legislature would not have passed the valid portions alone, the whole statute should be held inoperative."

So in this case we are not able to say that the Legislature would have passed this bill if the Ohio river cities had not been exempted from its burdens.

We are therefore of the opinion that the last clause of Section 1 is an exception and not a limitation. That there is a clear intention in the act not to extend its provisions to the Ohio river cities, and that to do so by interpretation would be judicial legislation.

The duty of the court is to construe the act as clearly intended, and so construed it is not of uniform operation throughout the state and is therefore unconstitutional.

There is still another constitutional objection. The penalty clause (Section 6) prescribes a penalty of $500 against individual members of council for failure to take the steps required or to carry out any order of the state board of health. This in effect stifles the judgment of the local governing board and taxing authority. Such a penalty might legally be charged against an administrative officer, having only administrative duties, but to do so against members of a legislative body is destructive of the fundamental theory of our government and substitutes the state board as the real governing board. (*Sanning* v. *City*, 81 Ohio State, 142.)

It is true that the penalty clause is not directly in issue in this case, but it is properly before the court by the averment that the state board is threatening to resort to the penalty clause and that members of the council are about to act solely under force of such threats.

We do not express an opinion as to whether or not the unconstitutionality of Section 6 destroys the whole act, yet conceding that it only applies to the penalty clause we feel justified in expressing our opinion as to this section, in view of the allegations of the amended petition above referred to.

It is not necessary to express an opinion as to the other points made in argument further than to say that the court is inclined to uphold drastic measures provided by the General Assembly for the public health and public safety where the enactment is made in pursuance of the general grant of legislative authority. but such enactment must not be repugnant to any specific provision of the Constitution designed for protection of the people at large.

It follows that in our opinion the act under consideration is unconstitutional and void.

The demurrer to amended petition is therefore overruled.

ALLEGED UNFAIR IMITATION OF A BRAND OF SOAP.

Circuit Court of Hamilton County.

THE M. WERK COMPANY v. THE RYAN SOAP COMPANY.

Decided, May 13, 1911.

Unfair Competition—Brand of Soap Identified by a Tag—Imitation of the Tag and Markings Charged—Failure of Evidence that the Public Were Deceived by the Alleged Imitation.

Unfair competition is not established by proof of similarity in form, dimensions or general appearance, or where the features imitated were those shared with the trade generally, and there is a failure to show that the public was deceived by the said imitation.

Hosea & Knight, for plaintiff in error.
Cogan & Williams, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

Upon a careful consideration of the evidence together with the pleadings and the numerous authorities cited by counsel for plaintiff and defendant in error, the court is of the opinion that the judgment of the trial court is correct and that the same should be affirmed.

The claim of the plaintiff in error is, that for a long period of time prior to the filing of its petition herein for injunction it manufactured soap of a yellowish brown color with its name stamped thereon, and as its business increased it adopted and applied to the face of the soap of its manufacture a tag of harder material and differing in color from the soap, impressed in the face of the bar, and caused it to be identified by this tag; and that the public generally have come to know and call for plaintiff's goods as "Tag Soap," and to further protect tself and the public, it devised a method of redeeming the said tags in the hands of the purchasers of its product. That by this means this tag soap has become familiar throughout the country for the good quality of the article manufactured by it and that the means of thus identifying its goods is the exclusive property of plaintiff.

That the defendants in error are the manufacturers of a soap called "White Home," and for the purpose of obtaining an unfair advantage over plaintiff, placed upon the market and are still maintaining a soap closely resembling plaintiff's products in color, form and size of cake, and containing on one side or face thereof a tag of hard material impressed in the bar in connection with letters sunken into the face in such a way as is calculated to deceive an intending purchaser desiring to purchase tag soap, and that the defendant has adopted the method of redemption of its tags in the same manner as done by plaintiff, all of which acts, on the part of defendant, cause the public to regard defendant's soap as tag soap, tending to the confusion of the trade and deception of the public, and that these acts on the part of the defendant constitute unfair competition in trade.

The answer of the defendant and the evidence discloses that the bars of soap of the plaintiff bear the words sunken in the face thereof "Werk Co. Soap, Cincinnati, Ohio," and also a round metal tag which is sunken into the face of said bars near the lower right hand corner, and that the metal tag bears the words "Werk Soap"; that upon the face of the defendant's soap there is sunken into the face of each, the words "Ryan's White Home, Device Pat. App'd For," together with a paper tag square in shape sunken into the face of the bar near its center, in such a position as to give the appearance of a diamond shape, blue in

color, and with the words printed upon it together with a picture of a house "Save the Home," "For Presents," "Ryan Soap Co."; that its bars are standard size and that the color of its soap is lighter than that of plaintiff's.

Unfair competition is not established by proof of similarity in form, dimensions or general appearance alone. Where such similarity consists in construction, common to or characteristic of the article in question, and especially when it appears to result from an effort to comply with the physical requirements essential to commercial success and not to be designed to misrepresent the origin of such articles, the doctrine of unfair competition can not be successfully invoked to abridge the freedom of trade competition. *Nims on Unfair Business Competition,* Section 130, and cases cited.

It is not contended that the color of the soap, its shape, size, etc., can be exclusively appropriated, but that the unfair competition is in the use of the tag adopted by the defendant.

The evidence does not bear out the contention of plaintiff in error that the public were deceived by the use of this tag upon defendant's soap, and indeed, we can not see from the appearance of the bars of soap themselves with the sunken words and tags, that anybody should be deceived thereby; that a seller might deceive, or that an occasional purchaser might be misled, is not sufficient. The evidence nowhere shows that the defendant company passed off or attempted to pass off upon the public the soap it manufactured as being the soap of plaintiff in error, and this is what constitutes unfair competition. *28th Am. & Eng. Ency.,* 2d Ed., 410.

And again to constitute unfair competition features imitated must be such as distinguish plaintiff's goods from others; not such as he shares with the trade generally. *Nims on Unfair Competition,* Section 157.

We feel that under the evidence the markings upon the soap are not at all similar or would tend to deceive any one seeking to purchase either one of the soaps in question; that the defendant company has not conducted its business or attempted to so conduct it as to pass off its goods for those of plaintiff, and that upon the entire case the equities are with the defendant in error and judgment will be affirmed.

LIMITATION OF CARRIER'S LIABILITY TO SIX MONTHS.

Circuit Court of Richland County.

PAT GATTON v. THE UNITED STATES EXPRESS CO.

Decided, January 25, 1911.

Carriers—Stipulation Limiting Liability to Six Months—Bar to an Action for Damages Suffered Through Fault of the Carrier, When—Contracts Will be Held to Have Been Executed With Full Knowledge, When—Release Must be Set Aside Before Action Can be Maintained.

A shipper by express, who signs a contract which limits the liability of the company to six months in so far as the commencement of an action for damages is concerned, is barred from maintaining such an action begun more than six months after the shipment was made, notwithstanding his allegation that he signed the contract hurriedly, and without examining it, and supposing it was the bill of lading.

Farber & Voegele, for plaintiff in error.
Cummings, McBride & Wolfe, contra.

TAGGART, J.; VOORHEES, J., and POWELL, J., concur.

This case had its origin in the court of common pleas. Plaintiff in error was plaintiff therein and defendant in error was defendant therein. By his amended petition the plaintiff sought to recover, as he alleged, for a breach of a verbal agreement entered into between himself on the one part and the agent of the defendant company on the other part, for the transportation of thirty-eight horses and mules, in first class condition, from Bellville, Ohio, to Pittsburg, Pa., upon an agreed price. He avers that the defendant company violated its agreement to his injury in the sum of $630 which he sought to recover in his first cause of action. He avers substantially the same facts in respect to his second cause of action, and seeks to recover back the money that he was compelled to pay in his compliance with said contract, and which he was not entitled to pay in consequence of the failure of the company to perform its part of the agreement.

To the causes of action thus grounded in the petition, the defendant filed an answer admitting that it was an association or-

ganized under the laws of New York, admitting that it received certain horses and mules to be transported from Bellville, in the state of Ohio, to Pittsburg, in the state of Pennsylvania, and denying the remaining allegations in the amended petition. For its further defense to the claim of the plaintiff, it avers that the horses and mules were delivered to it under and by virtue of the terms of a written contract that was signed by the plaintiff and defendant, which contract contains certain provisions and stipulations set out in the answer, which purport to limit the liability of the defendant company, and limit the plaintiff in the commencement and prosecution of the suit after the expiration of six months. It is then averred in the answer that six months had elapsed before the filing of the suit by the plaintiff herein, and specifies the date of the contract and the date of the filing of the suit.

It is necessary to look somewhat closely to the reply and to the amendment to the reply that was filed by the plaintiff to this answer. In the reply that was filed on the 10th day of February, 1909, the plaintiff, in the early part of his reply, denies that the horses and mules were delivered to the defendant under and by virtue of a written contract, denies that there was any contract, written or otherwise, entered into by plaintiff and defendant containing the provisions set forth in defendant's answer, and plaintiff then sets out that the stock was shipped on the 24th of February, 1906, and admits that suit was not entered until the 15th day of December, 1906, and then seeks to excuse the delay in bringing the suit in consequence of defendant's representations that his (the plaintiff's) claim would be paid without suit, and such representations were continued up until near the expiration of said time, and these representations led to the delay in bringing the suit.

On motion filed by the defendant all the portion of the reply except such as constitutes the denial was stricken out by the court. Thereupon plaintiff filed an amendment to the reply, which was the issue tendered in the case. In the amendment to the reply, he admitted that after said horses and mules had been delivered by plaintiff to the defendant and the same had been loaded on board of the express car of the defendant and

accepted for shipment, the defendant by its duly authorized agent at Bellville presented to plaintiff a certain paper writing and requested the plaintiff to sign the same, representing that said paper writing was a bill of lading or receipt for his said horses and mules, which representations were false and known to be false, and no opportunity was given plaintiff to read the same or familiarize himself with the same; that the paper writing was not in fact what it was represented to be, and was in truth and in fact a contract with exemptions from liability and limitations in bringing the suit; that the plaintiff relied on the false representations and was thereby induced to sign the paper writing.

On the issues thus made up, the case proceeded to trial and, at the close of plaintiff's testimony, the court was asked by the defendant to direct a verdict for the defendant, which was overruled by the court; and at the close of all the evidence, the defendant renewed the motion to take the case from the jury and direct a verdict for the defendant. Thereupon the court instructed the jury to return a verdict for the defendant, which was accordingly done. A motion for new trial was filed and overruled and judgment rendered on the verdict.

It is contended by plaintiff in error that there were issues in this case that should have been submitted to the jury, and that the court was in error in directing a verdict for the defendant.

In the case of *Perry* v. *O'Neill Co.*, 78th O. S., page 200, the court use the following language in the syllabus of the case:

"A release of a cause of action for damages for personal injuries, that is void, is not a bar to such an action, and the plaintiff may, if it is set up by answer as a bar to his right of action, by reply aver the facts that make it void; but if it is not void but only voidable, he can not maintain his action until the release is set aside."

And the court in reviewing the authorities in this class of cases, quotes from the case of *Cassily* v. *Cassily*, 57th O. S., 528, where the court construes a written instrument signed by a mother and delivered to the son. The second syllabus is as follows:

"Where a mother and son enter into a written contract which is correctly read to her before execution and she then voluntarily executes it, she is bound by its terms until it is set aside by

a proceeding brought for that purpose. The facts, if satisfactorily established, that she could not read and write and, on account of the confidence reposed by her in her son, did not carefully weigh, so as to comprehend the terms of the instrument, when it was read to her, afford no ground to treat it as a nullity, or to permit her to contradict its terms by parol evidenec, when interposed by the son as a defense to an action at law brought by her against him."

Here the court lays down the rule, as we have indicated, that where the contract is not void but merely voidable, it must be set aside before the party can maintain an action in contradiction of its terms, and the court in the case of *Perry* v. *O'Neil & Co.* above, at the close of the opinion on page 226, quotes with approval the following:

"A person who without reading it, signs a written contract releasing his right to maintain an action for damages resulting from injury caused by the negligence of his former employer, would be held to have executed the instrument with full knowledge of its contents, when his only excuse for not reading it was that he was 'somewhat hurried.' Such a contract can not be voided by the party signing it because he relies upon 'allusions to future employment' made by the agent of his former employer in the negotiations consummated by a written release, which employment was not furnished to him."

So that the record in this case, while it indicates that there was some haste, we think it comes far short of showing that there was any active fraud, or any fraud, whereby the plaintiff was induced to enter into this contract. The contract therefore, being in full force and effect, was a complete bar, the stipulation of which was that unless suit was brought within six months, he would not be permitted to maintain his action. Contracts of this kind have received approval in the courts of this state and other states and are not contrary to public policy.

So that upon the undisputed facts in this case, as shown by the admissions in the pleadings and the testimony in the case, we think the court was right in directing a verdict in this case, and the judgment of the court of common pleas is affirmed with costs and remanded for execution. Exceptions may be noted.

TITLE TO THE BANK OF A CANAL RESERVOIR.

Circuit Court of Licking County.

THE COLUMBUS, NEWARK & ZANESVILLE ELECTRIC RAILWAY COMPANY ET AL v. JOHN NELSON ET AL.*

Decided, March, 1910.

Canals—Nature of the Title Acquired by the State to Lands Occupied by Canals, Feeders, Reservoirs, Dikes, Locks and Dams—Title After Abandonment for Canal Purposes—Extent of the Land Comprised in the Banks of a Reservoir—Conversion of the Licking Reservoir Into a Park.

1. A reservoir used as a feeder for an Ohio canal became a part of the canal system of the state, and the occupation of the land by the state for such a purpose amounted to an appropriation of the land, the fee simple title passing to the state regardless of failure on the part of the owner to make application for compensation therefor.
2. The abandonment of a canal does not cause the title to the land belonging thereto to revert to the original owners, their heirs or devisees, but the title remains in the state until granted out by proper conveyance.
3. The banks of a canal, and of its feeders and reservoirs, constituted a necessary part of the canal, and in the absence of an agreement to the contrary formed a part of the original appropriation by the state; and the continued use of this land to the water's edge by the abutting owners was not a matter of right, but of sufferance on the part of the state.
4. The appropriation of land for the banks of a canal reservoir included a space of a sufficient width to hold the waters up to the storage level and protect surrounding property and afford the agents of the state a right-of-way over and around the property for purposes of maintenance.
5. The General Assembly having set apart the Licking reservoir as a public park and pleasure resort for the people of the state generally, the state board of public works is without authority to grant a lease of its banks for building purposes that will interfere with the free and uninterrupted use thereof by the people and the agents of the state.

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* Affirming *C., N. & Z. Electric Ry.* v. *Nelson*, 9 N.P.(N.S.), 56; affirmed by the Supreme Court, *Railway* v. *Nelson*, 83 Ohio State, —.

Fitzgibbon & Montgomery, W. R. Pomerene and *Durban & King,* for plaintiffs in error.

Flory & Flory, contra.

BY THE COURT (TAGGART, J., DONAHUE, J., and VOORHEES, J.).

The Columbus, Newark & Zanesville Electric Railway Company and the Ohio Electric Railway Company filed their joint petition in the common pleas court of this county against John Nelson and Lena Nelson and asked that said defendants be enjoined from bringing building material upon certain real estate described in the petition and from digging up, cutting or destroying the ground or soil thereof, and from erecting thereon buildings, constructions or frame works of any kind, and averring that the plaintiffs are the owners of said ground upon which the defendants purpose to erect such buildings and structures, said land having been conveyed to said plaintiffs by Lindsay Bounds and others, and that it constitutes a part of what is now commonly known as Buckeye Lake Park.

To this petition Lena Nelson filed an answer and cross-petition admitting that the plaintiff, the Columbus, Newark & Zanesville Electric Railway Co., is a corporation and owns certain real estate known as Buckeye Lake Park, located in Buckeye Lake, admitting that the Ohio Electric Railway Company is a corporation, and denying all the other averments of the petition, and particularly that the plaintiffs or either of them have any interest in or to the land described in the petition upon which she was conducting building operations, and averring the deed from Lindsay Bounds and others did not convey said lands to said plaintiff, but on the contrary expressly and definitely excepted the same therefrom in the following language, to-wit, "Excepting from the above real estate any right, title or interest that the said state of Ohio may have acquired in or to the second parcel herein by reason of the location of the Licking Reservoir thereon; excepting also from said covenants whatever right or title the state of Ohio has in the first parcel above said water line herein mentioned for retaining banks of the waters of said reservoir"; and further averring that she is the owner by lease from the state of Ohio of the premises in dispute so excepted from the opera-

tions of said deed. And for cross-petition the said defendant avers that Buckeye lake, formerly known as the Licking reservoir, constitutes a part of the canal system of the state and that said body of water and lands covered by said waters and the lands adjacent thereto, are all owned by the state of Ohio and under the management of the state board of public works. That by recent legislation said Buckeye lake and lands adjacent thereto have been dedicated to the public as public parks for pleasure resort, fishing, boating and other recreations, and that the said board of public works has executed a lease to this defendant for the property so owned by it, and that it is upon this land and not other land that she had started the construction of the same and had largely accomplished said construction when the plaintiffs with a large force of workmen by force and violence entered upon these premises, tore up the platform of the pier, pulling up the tiling and stakes which constitutes the lower part and support of the pier, destroying the lumber out of which it was constructed and carried the same away and converted it to their own use, and tore the cottage and boat house from their foundations and moved the same from the land of this defendant to lands owned by the plaintiffs. And that the plaintiffs threaten and will unless restrained by the court again enter upon the lands of this defendant and destroy any buildings or piers she may erect thereon, and thereby deprive her of the use and profits of the same to her irreparable injury, for which she has no adequate remedy at law, and prays for a perpetual injunction and for a decree quieting her title in said premises.

To this cross-petition the plaintiff filed an answer averring the ownership of these premises in plaintiffs and denying that defendants have any right, title or interest thereto. The cause was heard upon evidence in the court of common pleas and now comes to this court upon appeal, and has been submitted upon the transcript of the evidence taken in the common pleas court with all the exhibits and such additional evidence as parties desired to offer.

It appears from the evidence that the state of Ohio commenced about the year 1828 and completed about 1832 the Licking reservoir as a feeder to the canal system under the authority

of an act of the General Assembly of Ohio, passed April 4, 1825. By the provisions of Section 8 of that act, it appears that the state might lawfully enter upon and take possession of and use all and singular any lands or water, streams or materials necessary for its canal system, for the purpose of making any and all such canals, feeders, locks, dams, etc., and that where such property taken should not be given or granted to the state that it should be the duty of the canal commissioners on application by the owners of said lands, waters, streams and materials to appoint a board of appraisers to make a just and equitable appraisal of the loss and damages to such private owners, and it was made the duty of said appraisers to enter an apt and sufficient description of the premises appropriated for the purposes aforesaid in a book to be provided for that purpose. It further provided that the fee simple of said premises should pass to and be vested in the state.

In the case of *Ohio, ex rel,* v. *Railway Company,* 53 Ohio State. page 189, it is held that by force and provisions of Section 8. above referred to, that wherever the state actually occupied a parcel of land for canal purposes, a fee simple title thereto at once and by virtue alone of such occupancy, vested in the state. It is said however by counsel for the plaintiff that this reservoir is not a canal, and therefore it is not within the provision of this legislation, but Section 8 not only provides for canals, but for feeders, dikes, locks, dams and such other works and devices as the canal commissioners may think proper. So that this reservoir being used as a feeder of the canal becomes a part of the canal system of Ohio, and the occupation of said land by the state of Ohio for such purposes is an appropriation of the land, and the fee simple passed to the state with the right only in the original owner to make application for damages and compensation therefor, and his failure to make such application for damages and compensation would in no wise affect the title of the state thereto. It is suggested, however, that before such title could pass to the state that there must be an apt and sufficient description of the premises, but the statute does not so provide. The statute provides that the canal commissioners and each of them or any superintendent, agent or engineer employed

by them might enter upon and take possession of lands, waters, streams and materials necessary for canal purposes and does not seem to provide that a description thereof shall be given, and nothing further is required beyond the actual occupation of the same, but where damages and compensation have been demanded and the board of appraisers have considered such claims then it becomes the duty of such board of appraisers to make an apt and sufficient description of the premises in a book to be provided for that purpose.

So that unless the owners of this property actually apply to the state for compensation and damages there would not be any description of the land as a matter of necessity, but only such description as the canal commission might have for its own use and convenience. The appropriation consists in the taking possession of the land and the mere fact of taking possesion for the purpose mentioned in the statutes passed the fee simple title to the state, and a later abandonment of the canals would not revest the title in the original owner or divest the state of its title thereto. The fee simple having once lodged in the state remains there until it be granted out of the state by proper conveyance.

Another contention is that actual occupancy and actual taking is required in order to vest the title in the state, and therefore the adjacent banks which confine the waters in the canal were not actually or physically in possession of the state, and the title did not pass to the state and it can claim no more than the lands actually covered by the waters.

In the case of *Hatch* v. *Railway Company,* 18 Ohio State, page 92, the Supreme Court of Ohio held in the case of a private canal company that an appropriation of land by a canal company for the purpose of a canal in the absence of any contract or statute to the contrary will be presumed to have included land for a berme bank as well as a tow path and the exclusive power of the company over the land necessary for such bank is the same whether it consists of a natural or artificial deposit of earth. It would seem to us that the power to appropriate land upon which to store water without carrying with it the right to the retaining banks would be a useless grant of power. In the case of *Hatch* v. *Railroad Company,* the Supreme Court, page 125, says:

"A berme bank is necessary for the use of the canal, and whether it consists of the natural or artificial deposit of earth can make no difference; it must have formed a part of the original appropriation for the canal unless there was a special agreement to the contrary. The plaintiff had full opportunity to show a special agreement to the contrary, if such existed, and if during the existence of the canal the adjoining proprietor use the land up to the water's edge it was a matter of sufferance and not a right."

In the case of *Carpenter et al* v. *State*, 12 Ohio State, page 457, it is held that no record or writing is necessary to show the appropriation of such berme bank by the state; on the contrary it is presumed in the appropriation of land for canal purpose. It is claimed that this is not a canal proper, but only a reservoir, and was not intended at the time of the appropriation to be used for navigation but for supply water only. The statute however included feeders as well as the canal proper; and feeders or reservoirs equally require retaining banks—otherwise the appropriation is useless.

We are therefore of the opinion that the state acquired not only the land actually covered by these waters but also a berme bank of sufficient width not only for the purpose of retaining the waters but for such other legitimate purposes for which it may be used, including not only the duty to protect adjacent land owners, but also to protect the reservoir from invasion from adjoining proprietors from any natural cause that might affect the same, and also for the purpose of affording a right-of-way to the agent of the state over and around this property for the purpose of proper maintenance thereof.

We are of the opinion that this appropriation by the state of lands for reservoirs or feeders for the canals included berme banks, and that they would necessarily be included in ascertaining the compensation and damages that might be allowed therefor.

It is hard for this court to determine from the evidence before it what the actual width of this berme bank is. The survey the state made under the provisions of Section 218-223, Revised Statutes, is of no value whatever. The state at this time can not arbitrarily determine how much land was originally appropriated.

If the surveys had been made at the time of the appropriation, then the land owners could have obtained compensation and damages therefor and such surveys might control, but at this time the court must determine as best it can from the evidence, considering the nature and extent of the improvement and requirements of the state, the minimum amount of land that would necessarily be included in the appropriation for berme bank purposes. It does appear from the evidence that the original provision for berme bank for canal purposes was never less than 12.12 feet, and it would seem reasonable to conclude that this minimum must have been recognized then as the amount necessarily included for this purpose, and in view of the purpose to be served that amount is not excessive. This reservoir was built for the storing of large quantities of water, and wherever it was necessary to construct an artificial berme bank the state did construct such a bank of this or greater width, and this alone ought to have been sufficient notice to the land owners that the state was claiming that a bank of this width was necessary for its purpose. Undoubtedly the owner could have recovered compensation and damage for that extent of bank in addition to the land actually covered by the water, if such application had been made to the board of appraisers.

It is further insisted that this appropriation was made by the state at the time the United States owned the land and therefore could not be operative as against sovereignity, but when the United States conveyed by patent deed to the original predecessor in title to the plaintiff such predecessor in title then had the right to make his application for compensation and damages, for at least the right of the state to appropriate would then obtain, and the state at that time was in possession of this property and has ever since remained in possession; the fact that he may have used or pastured this land to the water's edge is not important; as said in the case of *Hatch* v. *Railroad Company*, if he did so do it was by mere sufferance and not of right.

Another question of considerable importance is the question as to the extent or line of appropriation. It is insisted on the one hand that, if there was an appropriation at all, that appropriation can not extend beyond the low water line and that if any

berme bank is to be added to that, the measurement therefor must be from that line. It is contended on the other hand that the measurement of this bank should commence at the flood water line. We can not agree with either of these contentions. This reservoir was built for a feeder to the canals, a place in which to store water in wet seasons to maintain the level of the canals in dry seasons. That being true the reservoir would be useless if it could only be maintained to a low water line. Undoubtedly in season of continued drought, water would be drawn from this reservoir to the level of the water in the canal and if that were all the land that the state acquired, then it would be useless as a storage reservoir. On the other hand when by heavy floods it is filled beyond the capacity of the reservoir and above the level of the waste weir so that these flood waters would waste until the level of its storage capacity is reached, the state could have no need or interest in such flood water only to the extent which the state had prepared to hold and retain the same for the use of the canals. Therefore it is the storage level that must obtain.

We have reached the conclusion first, that the state has the title in fee simple to not only the land covered by these waters but also to a berme bank around the same to the width of 12.12 feet; that this measurement of this berme bank commences at the water line at a stage of water to the limit of the storage capacity of the reservoir. The exact location of this level is one of the most difficult questions presented in this case. There seems to be no record of that level, and it may be said here that it is not important as to the level that is maintained at this time; it is the level which was originally established that marks and defines the appropriation by the state by which title in fee passed to the state, for the title being once vested it becomes absolute, and even the abandonment of the canal system or of this reservoir would not affect it.

The data however from which the engineer of the board of public works has attempted to establish this level is fairly satisfactory. It seems to us that in the absence of evidence to the contrary, that must be accepted as the best evidence of which the case is now susceptible. This evidence was given in the common

pleas court many months ago, affording the plaintiff sufficient opportunity to further investigate and determine its reliability and if possible furnish better data to establish the storage level.

It is insisted that the evidence is too uncertain and unreliable to be adopted by the court in determining this controversy, but in view of the purpose for which this reservoir was built and the needs it was designed to serve, it seems to us that the result reached by the engineer is at least reasonable, and for lack of testimony in conflict therewith we were compelled to accept the same for the purpose of this case. It would further appear that the purpose for which the berme bank was acquired by the state originally as well as its present needs not only for the board of public works, their agents and employes, and in view of the rights of the public therein under the act of Legislature establishing this as a public park and pleasure resort for all the people of the state, that the board of public works has no authority whatever to grant a lease of this berme bank for building purposes or for the purpose of placing any obstruction thereon that would interfere with the free and uninterrupted use thereof either by the people or by the state and its agents.

Having reached the foregoing conclusion it follows that the petition of the plaintiff must be dismissed with costs of this suit, that the prayer of the defendant's cross-petition must be granted as to all that portion of the property leased by her from the state not included in the limits of the berme bank, but as to that portion she is enjoined from constructing any building or other structures thereon that would in any wise interfere with the free and uninterrupted use of the same.

PROOF AS TO INTENTION IN HAVING BURGLARS' TOOLS IN POSSESSION.

Circuit Court of Lucas County.

RALPH MARTIN, ALIAS HOWARD COX, v. THE STATE OF OHIO.

Decided, April, 1911.

Criminal Law—Prosecution for Having Burglars' Tools in Possession with Burglarious Intent—Weight of Evidence as to Intention—Time and Place when it was Intended to Use the Tools Need Not be Shown.

In the trial of one charged with having burglars' tools in his possession with intent to use them burglariously, it is not necessary that the state prove the exact time and place at which the defendant purposed to use the tools, or that he purposed to use them within the jurisdiction in which the arrest was made and the trial is held; but it is sufficient if the evidence convinces the jury beyond a reasonable doubt that it was his intention to use the tools found in his possession burglariously.

Thos. H. Murphy, for plaintiff in error.

A. F. Connolly and *Roy R. Stuart*, Assistant Prosecuting Attorneys, contra.

KINKADE, J.; WILDMAN, J., and RICHARDS, J., concur.

Indictment for carrying burglar tools with the intent to use them burglariously.

The plaintiff in error here was indicted by the grand jury of this county for having burglar tools in his possession with intent to use them burglariously. He was tried and the jury found him guilty as charged. The case is here on error to reverse the judgment entered upon this verdict of the jury.

It was said in opening the case for the plaintiff in error here that another error was sought to be presented by the bill of exceptions, misconduct of counsel in argument, but the trial judge erased the statement placed in the bill by counsel, so that is not a matter for consideration here. The two grounds of error relied upon here are:

First. The charge of the court.

Second. Insufficiency of the evidence to sustain the verdict returned by the jury.

It is said that there is no evidence in this record from which the jury could have found properly, that the defendant had these tools in his possession with intent to use them burglariously, and therefore that the verdict can not be sustained. And we were earnestly asked by counsel to read this record with care to discover, as counsel stated he had discovered, that it was devoid of evidence justifying the finding of the jury. A serious thing if true. We have read the record as urged by counsel and have read it with care. The members of this court, while at the bar, have tried many criminal cases. All of us have been upon the common pleas bench and have heard scores of criminal cases, so we feel qualified to judge of the character of the evidence presented here, as to whether it shows any intent or not in a case of this character.

This man was found upon the grounds of the Lake Shore railroad at Air Line Junction, and he says at six o'clock in the evening. The state says something like seven o'clock in the evening. We think it is not material who is correct in this regard; he was there, and in company with four other men. He was there admittedly, by his own testimony, for the purpose of stealing a ride to Chicago. The other four men he said were there for a similar purpose; they had all discussed the going out of the trains, what they would do, and how they would do it, and where they would locate themselves in order to be at the best advantage in carrying out their purposes; and while there the officers of the railroad company came to them and ordered them off of the grounds; some dispute arose and they were all arrested, I believe—at least this man was—and on his person was found a bunch of keys, curiously constructed keys, quite a number of them. There was also found on his person a revolver and a chisel, described in the indictment and described in the record as a "jimmy"—a chisel so shaped that it might be used as a "jimmy"—a search light, and some cartridges were in the revolver.

We think it clearly appears from the record that the articles found on this man were articles of a kind commonly used by burglars in carrying on their trade. In fact, it is not seriously contended they were not.

When he was arrested with these things on him he was inquired of where he got them and what he had them for, and he declined to make any statement at all. When he gets into the trial of his case he offers this as an explanation, that when the officers came to him they searched him, at least to some extent; as he says they "frisked" him. This is described to mean that the officers came near him and slapped him where he would have pockets to see if they could discover anything, but did not make a careful search. He says they "frisked" him and he says they discovered nothing for the very good reason he had nothing. He started away pursuant to the order of the officers, and was going to take a street car and come back to the city; he says that after he had gone a distance he met a boy who said the street car was the other way and not that way, so he went back to the neighborhood of his companions, intending to go the other way to look for a street car, but the dispute between the officers and the other men had progressed to such a point that the officers had evidently determined to take them all in, or take some of them in I should say. It is said sometime during that movement one of the other men came to him and said to him, "Now you have been searched and they have not discovered anything on you, and they will not search you again. Now here are these things that I have; if they find any of these things on me it will be a serious thing; therefore you take these things now and you keep them and they will not be discovered on us to our detriment." He says this is the way he came to get these things, and when afterward they inquired of him where he got them he said he did not answer them for the reason that the other men were not then out of reach of the officers and that to have told them he got them from the other men would have been the same as to have permitted the other men to be found with them in their possession; therefore, to shield the other men (he did not say that, but that is the inference), to shield the other men he declined to tell where he

got them; and when he was found and they were found on him, at no time did he offer any explanation where he got them until he comes into his trial, and then he tells this story as to where he got them and how. He seems to have had more concern about the welfare of the other men, who were practically strangers to him, than he had about himself. He now tells this story, that the reason he did not explain to the officers was that it would have been detrimental to his associates who were then trying to get away, but were not far enough away to make their escape.

He tells how he came to go to Air Line Junction; says he went up Broadway to the crossing of Broadway and the Wabash tracks prepared to take train No. 32 for Chicago; that he stepped into a saloon near there and found No. 32 had gone, and he then met these three or four men and expressed his disappointment to them that he should have thus missed his connection, and they said to him to come with them as they were going to Air Line Junction and they would all find a train out there. He then gives a curious account of how he got to Air Line Junction—curious to anybody who understands the geography of the situation, but at any rate he finally got to Air Line Junction, and then all of these things took place that he says took place.

It is argued here, that this story disposes of the question of intent. Well, if it were believed by the jury, perhaps it might, but it evidently was disregarded entirely by the jury, and after reading his story and considering its inconsistencies and improbabilities, we are unanimous in the opinion that the jury were quite justified in diregarding his story entirely, and, taking the case as it is with the goods found on him without any explanation, with himself in a railroad yard where many burglaries are committed on the railroad cars, in company with associates of doubtful character, we think the jury were justified in reaching the conclusion that they did, that this man had tools or implements upon his person for the purpose of using them burglariously.

It was said he might have had an intention to commit a burglary in Chicago or some place else, and that it was incumbent upon the state to show he had an intention to use them burglariously and presently within Lucas county. We think the statute is not limited. The statute says, whoever has in his possession

such tools, etc., with the intention of using them burglariously; this is what makes the offense complete; there may be no occasion to use them at that precise time and place; in fact it may be impossible to use them at the time and in the immediate locality where the party having them in his possession is arrested, and yet he may be guilty of the offense defined in the statute. The important inquiry is what is his intention with respect to the use of the tools found in his possession. If his intention is to use them burglariously, the exact time and place where he expects to go into business is not very material. Both the possession and the intent must be found by the jury to have been shown by the evidence beyond a reasonable doubt to warrant a finding of guilty.

We find in the record, unobjected to, an inquiry of this man whether he had ever afterwards seen any of these associates after he was found with them in the railroad yard, and whom he described as "hoboes" (he said the act of the whole of them, stealing rides on trains, is what is known as "hoboing"). He said yes, he had seen them, and when asked where he had seen them he said he saw them in the county jail here when he was in the county jail.

Now we think the jury were entitled to take into account that fact and all the circumstances and surroundings of this case. This man testified he had worked for sometime at a restaurant here. He testified as to the length of time he had been in Toledo. He was a witness in his own behalf but he called no one to testify as to his good character. His defense rested entirely upon his own statements, and when they are rejected we think there is very little, if anything, left of his defense, and it impresses the members of this court that he might have been in better standing with the jury had he omitted entirely his story or testimony and left the case as the state rested it.

We think, taking the case as a whole, that there is abundant proof here to justify the jury in finding that he had these implements upon his person with the intent prohibited by the statute.

We have read the charge of the court and find no prejudicial error in the charge. At one place the court does say that a rea-

sonable doubt is a doubt that a man can give a reason for; but in the very next sentence the court explains correctly and in detail what is meant by that expression. It has been held by the Supreme Court that that expression standing alone and unexplained does not state the rule correctly, but it has not been held that the form of statement found in this charge presents prejudicial error. We have read the charge with care and we find no prejudicial error in it. The judgment of the court of common pleas will have to be affirmed.

COMPETENCY OF EVIDENCE.

Circuit Court of Hamilton County.

WALTER CANFIELD v. SOUTHERN FILM EXCHANGE.

Decided, January, 1911.

Negligent Destruction of Property—Error in the Admission of Evidence —Remittitur.

It was prejudicial error to overrule objections to questions and answers in this case which involved the very issue to be determined by the jury as to whether the destruction of the property in suit was due to the negligence of the defendant, and constituted the only evidence upon which a verdict for the plaintiff could be based.

Plaintiff sued below on two causes of action, one for $47.59 on an account and the other for $93.90 for picture films which were destroyed by fire. The verdict below was for the full amount claimed with interest.

Snyder & Dickerson, for plaintiff in error.
Wm. J. Rielly, contra.

GIFFEN, P. J.; SMITH, J., and SWING, J., concur.

There was no error in overruling the motion of the defendant, the Auditorium Theater Company, to instruct the jury to return a verdict in its favor, as liability upon the first cause of action is now admitted, whereas the motion was addressed to both causes

of action. The following question and answer appear at page 26 of the bill of exceptions:

"Q. Now you have examined that magazine. Will you please state to the jury as an expert in your experience in operating machines how that fire occurred?

"(Objected to by counsel for defendant. Objection overruled and counsel for defendant excepted.)

"A. There is only one thing that can cause a fire, and that is by allowing the light from his lamp house to rest upon the film. If he allows the light to rest on the film eight or ten seconds it will burn."

And again at page 47:

"Q. From your experience as an operator and your examination of the condition of that box, what in your opinion was the origin of the fire?

"(Objected to by counsel for defendant. Objection overruled and counsel for defendant excepted.)

"A. The cause of the fire would be in not sliding his lamp house over in front of the machine. That would be the cause of the fire, and the cause of the real burning up would be from leaving this door open."

These questions and answers involved the very issue to be determined by the jury, whether the destruction of the film was the result of defendant's negligence, and were prejudicial because they constituted the only evidence upon which the jury could base a verdict for plaintiff under the second cause of action. The objection to the questions should have been sustained. *Runyan* v. *Price et al*, 15 O. S., 1.

The testimony offered by the defendant, especially that of the operator in charge of the machine, tends strongly to prove that the machine hired was itself defective, and that such defect was the direct cause of the fire.

Unless the defendant in error will consent to a remittitur of all the amount recovered except the account stated in the first cause of action with interest, the judgment will be reversed because not sustained by sufficient evidence, also for error in admitting above testimony, and the cause remanded for a new trial.

PARTICIPATION IN A LYNCHING.

Circuit Court of Licking County.

MONTELLA WATHA v. THE STATE OF OHIO.*

Decided, April, 1911.

Criminal Law—Prosecution of Members of a Mob for Homicide—Aiding and Procuring the Commission of Crime—Legality of Jury Array—Prosecution Indirectly Involving the Liquor Interests—Competence of Jurors Who Participated Actively in a Recent Local Option Election—Weight of Evidence—Charge of Court—Riot Not Embraced in Section 13692.

1. An accused person, who has been jointly indicted with others for murder in the first degree, can not complain of the overruling by the court of his challenge to the jury array, where this particular defendant has been brought to trial upon election of the prosecuting attorney, and a copy of the venire, summoned in the case as against all the defendants, was served upon him three days before the day set for his trial.
2. Error will not lie to the overruling of a challenge to the jury array, on the ground that names had been placed in the jury wheel of persons who were known to have actively favored the "drys" in a recent local option election and the crime of which the defendant was accused grew out of a contest over the illegal sale of liquor, if it appear that there was an entire absence of evidence of any kind tending to show that the jury commission placed in the jury wheel names of persons who did not fulfill the qualification of being judicious and discreet.
3. The instruction given in this case relative to the reputation of the defendant for peace and quietness and its bearing on the question of his guilt or innocence, was not prejudicial to his interests.
4. In a prosecution of one alleged to have participated in a lynching, it is not error to charge the jury that "any words, acts, signs or motions, done or made for the purpose of encouraging the commission of the crime" may be considered by the jury in connection with the criminal character of the alleged acts of the defendant, and a verdict of guilty may be based on evidence, which the jury

* Motion for leave to file petition in error in the Supreme Court denied June 27, 1911.

believed was entitled to credit, that the defendant mingled with the crowd some hours before the lynching occurred, and engaged in conversation regarding the events which led up to the lynching, and was heard to urge the crowd to avenge the blood which had been shed and soon afterward the doors of the jail were battered open, and the cell in which the decedent was confined was forced, and the deceased taken out and hanged to a telephone pole until he was dead.

Chas. L. Flory and *Thomas L. King,* for plaintiff in error.

Phil. B. Smythe, Prosecuting Attorney, *Wm. H. Miller,* Assistant Attorney-General, and *Seth McMillen,* contra.

SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.

At the April term 1910, of the Court of Common Pleas of Licking County, Ohio, the grand jury of said county returned an indictment against the defendant, Montelle Watha, charging him, jointly, with some fourteen others, with the crime of murder in the first degree. To this indictment the defendant entered a plea of not guilty. A motion was made challenging the array of the jury, which motion was overruled. Thereupon the defendant was put upon trial to a jury, which returned a verdict of guilty against the defendant of manslaughter. A motion was filed by the defendant for a new trial, alleging various reasons why the verdict of the jury should be set aside and a new trial granted him, which motion was overruled; to which action of the court the defendant excepted. A motion in arrest of judgment was also filed by the defendant, which motion was overruled; to which action of the court the defendant excepted. Thereupon the court sentenced the defendant to the term of twenty years imprisonment in the Ohio Penitentiary.

A bill of exceptions was tendered and allowed, and a petition in error is filed in this court to reverse the judgment of said court of common pleas, which said petition in error recites the following grounds of error:

"1. That said court erred in ruling out relevant and proper evidence offered in behalf of plaintiff in error on the challenge to the jury array. 2. Said court erred in overruling the challenge

to the jury array. 3. Said court erred in admitting improper and illegal evidence offered on behalf of the defendant in error. 4. Said court erred in excluding proper and illegal evidence offered on behalf of the plaintiff in error. 5. Said court erred in overruling the motion of plaintiff in error at the conclusion of the testimony of the defendant in error, to take the case from the jury and direct a verdict for the plaintiff in error. 6. Said court erred in refusing to give to the jury, before argument, certain requests to charge offered by the plaintiff in error. 7. Said court erred in giving to the jury certain requests to charge offered by the defendant in error. 8. Said court erred in its charge to the jury to the prejudice of the plaintiff in error. 9. Said court erred in refusing to give to the jury, after argument, certain requests to charge offered by the plaintiff in error. 10. Said judgment is against the weight of the evidence. 11. Said judgment is contrary to law. 12. Said court erred in rendering judgment for the defendant in error when it should have been given for the plaintiff in error. 13. Said court erred in overruling the motion for a new trial made by plaintiff in error. 14. The sentence and judgment of the court is excessive and unwarranted by the evidence. 15. Other errors apparent upon an inspection of the record."

While the foregoing contain the assignments of error in the record on which the plaintiff in error asks for a reversal of the judgment and sentence, counsel for plaintiff in error, in their argument to the court, rely chiefly on the following assignments of error:

1st. That the jury was illegally selected, drawn and summoned.

2d. That the number of names put in the jury box exceeded the number provided by statute.

3d. That only such names of persons who signed "dry" petitions were put in the jury box.

4th. That the court erred in overruling the challenge to the array by the plaintiff in error, for the foregoing reasons.

5th. That the court erred in its charge to the jury on the subject of the evidence introduced by the plaintiff in error, touching his reputation for peace and quietness.

6th. That the court erred in its charge concerning an accessory after the fact.

7th. That the court erred in its charge to the jury upon the subject of words spoken, or acts done, or signs or motions made by the plaintiff in error, for the purpose of encouraging the commission of the crime.

8th. That the court erred in refusing certain requests to the jury, requested by the plaintiff in error.

The preliminary steps necessary to be taken in the selection, drawing and summoning of a jury in a capital case are regulated wholly by statutory provisions. The accused is entitled to have these provisions observed before he is placed upon trial.

Section 7267, R. S. (13642, General Code), provides for the issuing of a venire by the clerk.

Section 7270, R. S. (13645, General Code), provides for the service and return of such venire.

Section 7271, R. S. (13646, General Code), provides that where two or more persons are jointly indicted for a capital offense, each person indicted shall be separately tried, and the clerk shall make out a venire, as provided in said Section 7267, R. S., for the trial of each person indicted.

Section 7273, R. S. (13648, General Code), provides that a copy of the panel of the jury returned by the sheriff shall be delivered to every person so indicted at least three days before the day of trial.

Section 7268, R. S. (13643, General Code), provides that if it appear to the clerk, by the return of the sheriff, that any person named in the venire is dead, insane, absent, removed from the county, or not an elector of the county, or has been convicted of a felony, and not pardoned, the clerk shall draw from the box the number of ballots equal to double the number of such persons, etc. But the return of the venire in this case by the sheriff does not show the necessity for any such action by the clerk.

It is contended by the plaintiff in error that the court erred in overruling the challenge to the array of the jury made on behalf of the plaintiff in error before trial, because the venire was not issued, or the selection, drawing and summoning of the jury made, for the trial of the case as contemplated by the statute.

It is contended that inasmuch as Section 7271, R. S., provides that the clerk shall make out a venire, as provided in Section 7267, for the trial of each person indicted, that therefore the accused was entitled to have a venire drawn and served upon him in his individual case before trial. The record shows that the accused was jointly indicted for said crime with some fourteen others, under docket No. 2866; that a venire was issued by the clerk and served by the sheriff upon a precipe filed by the prosecuting attorney of said county in said case, as directed by Sections 7267 and 7271; and, upon the election of the prosecuting attorney to try the case, a copy of the panel of the jury, returned by the sheriff, was delivered to and served upon the accused at least three days before the day of his trial. The prosecuting attorney had the right to make the selection, and, having exercised it, and the jury having been drawn and summoned in the case named, we think that the objection urged in this respect affords no ground of error.

It is further contended that the court erred in overruling the challenge to the array of the jury, made on behalf of the plaintiff in error before trial, because of the action of the court in excluding evidence upon the objection of the state, offered by the plaintiff in error, by which it was sought to show by one of the jury commissioners for said county that said jury commission placed in the jury box the names, in part, of persons of known and pronounced opinions upon temperance, as evidenced by their signatures to certain "dry" petitions.

Section 5164, R. S. (11421 *et seq.*, General Code), provides that the jury commission shall, before entering upon their duties, take an oath that they "will consent to the selection of no person as a juror whom they believe to be unfit for that position, or likely to render a partial verdict in any cause in which he may be called as a juror," etc. Said statute further provides that said commissioners shall, at a stated time, "select such number of judicious and discreet persons having the qualifications of electors."

It thus appears that this commission is clothed with sole authority to select the names of persons for the performance of jury

duty. They are to select the names of "judicious and discreet persons"; that is, persons who have, or as they have reason to believe have, the qualifications of sound judgment and discernment. The statute is silent as to the qualifications of jurors in other respects. It does not provide that they shall be of one sect or another; of one belief or another; of one party or another; but simply provides that they shall be "judicious and discreet persons." In the absence of a showing to the contrary, it is presumed that the jury commission performed its duty in this respect, as required by law.

An examination of the record shows that, in the impanneling of the jury, the plaintiff in error publicly announced, through his counsel, that he was satisfied with the jury, and that no question was raised by him of the want of the requisite qualifications possessed by each and every juror in the panel. We are, therefore, of the opinion that there was no error upon the part of the court in this respect, in overruling the challenge to the array by the plaintiff in error.

It is further contended by the plaintiff in error that the court erred in its charge to the jury upon the subject of the reputation of the plaintiff in error for peace and quietness. The testimony shows that testimony of this character was submitted to the jury. On page 1104 of the record, the court, in instructing the jury on this subject, said:

"The defendant introduced evidence tending to show his good character for peace and quietness. If, in the present case, the good character of the defendant for peace and quietness is proven to your satisfaction, then such fact should be kept in view by you in all your deliberations, and it is to be considered by you in connection with all the other facts in the case; and if, after the consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, it is your duty to acquit him. But if the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character."

Evidence of reputation and character is always admissible in a case wherein a party is charged with a crime, and such evi-

dence is proper to be considered by the jury in connection with all the proven facts and circumstances in such case, as bearing upon the guilt or innocence of the accused; but such evidence raises no issue, the burden of which is assumed or imposed upon the defendant. It is, in no sense, an affirmative defense. And while we think that this instruction to the jury, if standing alone and not qualified by any other instruction given to the jury upon this subject, either before or after it was so given, would perhaps be erroneous, an examination of the record shows that the following special charge was given by the court to the jury at the request of the plaintiff in error, before argument:

Request No. 20. "If the evidence of good reputation, taken in connection with the other evidence, raises in your minds a reasonable doubt of Watha's guilt of the murder charge made in the indictment, you can not find him guilty of such murder charge."

Comparing this special charge with the court's general charge upon the subject of reputation for peace and quietness, can it be said that the jury was thereby probably misled, or that the general charge was erroneous? 5 C. C. Rep., 375; 20 O. S., 508-514.

The charge of the court is to be construed as a whole. 33 O. S., 444; 61 O. S., 608.

Considering that part of the charge of the court referred to, in respect to the defendant's reputation for peace and quietness, we think it excludes the possibility of prejudicial error, arising from the objection made to the charge of the court in this respect by the plaintiff in error.

Exceptions were also taken by the plaintiff in error to the court's charge in respect to an accessory after the fact. An examination of the record shows that the court made mere mention of this, and nothing more; and we do not think that the jury could have been misled by the court's reference thereto. We, therefore, think that there was no error committed by the court in its charge in this respect.

Exceptions were also taken to the action of the court in admitting certain evidence offered by the state, against the objection

of the plaintiff in error on the trial, in respect to certain disturbances occurring and assaults made during the day preceding the evening of the alleged lynching of Carl Etherington, when and where it is claimed that the evidence shows that the plaintiff in error was not present.

The plaintiff in error claimed upon the trial that he was not away from his home and about the square in the city of Newark during the day, at any time when any riotous disturbances were going on, except that he went up street on an errand in connection with his work at home. But the evidence for the state tends to show that he was up street, and in that part of the city where the riotous disorder was prevailing as the result of the arrival in said city of some twenty detectives, armed with warrants to search certain places in said city where it was alleged that liquor was being illegally sold, contrary to the provisions of the Rose local option law.

Referring to the record on page 699, Kenneth Black, a witness for the state, testified, among other things, as follows:

"Q. Were you in the city of Newark on July 8th, the day of this riot and lynching? A. Yes, sir.

"Q. Did you on that day see this defendant, Watha? A. I saw him in the afternoon, I believe between 1 and 2 o'clock.

"Q. Where were you when you saw him? A. We were standing over here by the National Bank on the west side of the square.

"Q. State where you were. A. Not the First National Bank, but by the Franklin National Bank.

"Q. Were you standing on Third street? A. Yes, sir; on Third street.

"Q. Who was with you, if any one, and this man Watha? A. There were several of us in the crowd; Lansing Sutton, Sanford Henry and Uly Craig, and a fellow named Johnson, from Granville. There were five or six of us.

"Q. State to the jury whether or not William Howard, at that time, had been shot at the park. A. Yes, sir; I think he had.

"Q. What, if anything, were you talking about? A. We were talking about the excitement.

"Q. About what excitement? A. The rioting.

"Q. What do you mean by 'the rioting'? A. The shooting of Howard, and one thing or another."

Further referring to the record, on page 702, Lansing Sutton, a witness for the state, testified as follows:

"Q. Were you in the city of Newark on the 8th day of last July? A. Yes, sir.

"Q. State whether you saw this man, Montelle Watha, upon that day. A. Yes, sir; I did.

"Q. Where did you see him? A. Well, I met him over there by the express office; right across the street over here.

"Q. On what street? A. On Third street.

"Q. Who, if any one else, was with you? A. There was Sanford Henry, Uly Craig and Kenneth Black, and a man named Walter Johnson, as far as I can remember. I know there were a good many in the crowd.

"Q. Tell the jury about what time of day that was? A. Well, it was about half-past one or two o'clock.

"Q. State to the jury whether or not you had any conversation with Montelle Watha, or the other man that you have mentioned. A. Not personally with him, but I had a conversation with all of them.

"Q. What was that conversation? What were you talking about? A. Well, we were talking about dry detectives being in town, and generally talking about the whole thing. About them doing the searching.

"Q. State to the jury whether or not, at that time, you knew that William Howard had been shot. A. Yes, sir; he had.

"Q. State to the jury whether or not there was anything said in that conversation—well, I will ask you this: state to the jury whether or not there was any conversation in that crowd about the death of William Howard at that time. A. Well, I don't remember whether there was or not."

Further referring to the record, on page 711, Sanford Henry, a witness for the state, testified as follows:

"Q. About how long have you known him?" (referring to Montelle Watha.) "A. I think between nine and ten years; possibly longer than that.

"Q. Were you in the city of Newark on July 8th, last? A. Yes, sir.

"Q. That was the day of the lynching and riot? A. Yes, sir.

"Q. Did you, upon that day, see this defendant, Montelle Watha? A. Yes, sir.

"Q. Where did you see him? A. I believe I saw him once on Third street.

"Q. Where upon Third street? A. About the corner of the Franklin National Bank.

"Q. Who, if any one, other than yourself, was present? A. Well, there was U. G. Craig, Kenneth Black and Lansing Sutton, and a couple of young men from Granville.

"Q. Did you, at that time, have any conversation with Montelle Watha and the other men that you mentioned? A. Yes, sir; we were talking together.

"Q. Tell the jury what you were talking about. A. Well, we were talking in regard to the events of the day.

"Q. Tell the jury what it was. A. In regard to the rioting.

"Q. What else? A. And the shooting of Howard.

"Q. State whether or not this defendant, Montelle Watha, was engaged in that conversation, and what he said, if you know. A. Well, he was with the crowd talking; but, in regard to what he said, I can not just remember. I can not just remember at that time what he said while we were talking there.

"Q. How long did you stay together there? A. I suppose we were together there possibly twenty minutes.

"Q. Were you waiting there for anything? If so, what was it? A. We just simply met there and talked.

"Q. What, if anything, did you hear this Montelle Watha say? If he did say anything to anybody, during that conversation. A. I believe I heard him speak to Craig—to U. G. Craig.

"Q. What, if anything, did he say to Craig? Tell the jury what it was. A. I think he asked Craig how many revolvers he had; and Craig answered: I haven't got any."

In the light of the foregoing evidence, we find no error in the action of the court in the admission of this evidence.

Error is also assigned because the court instructed the jury that "any words, acts, signs or motions, done or made for the purpose of encouraging the commission of the crime, are sufficient" as bearing upon the criminal character of the alleged acts of the defendant.

Persons participating in the commission of a crime do so either as principals or as those who aid, abet, or procure the commission of a crime.

Section 6804, R. S. (12380, General Code), provides that whoever aids, abets, or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender.

After testimony was given to the jury tending to show the state of mind of the plaintiff in error in the afternoon of the day in question, as hereinbefore stated, the record shows that in the evening of that day, the plaintiff in error met with a large number of persons—perhaps thousands—who had assembled in and about the county jail where Etherington was confined, and, in the language of Joshua Hull, a witness for the state, at page 595 of the record, states that the plaintiff in error said, in addressing said assemblage:

"I heard him say that he abhorred lynch law, but, in this case, he wanted the blood of Howard—Howard's blood avenged; and he said: Come on, boys; come on.

"Q. What else did you hear? A. I walked away.

"Q. What was the last thing you heard him say? A. 'I want the blood of Howard avenged.'

"Q. What else? A. 'In this case.' And he says: 'Come on, boys; come on.'"

Soon afterwards, it appears that an assault was made on the county jail; that its doors were forced open; that Etherington's cell was broken into; that he was removed therefrom, and was led to the corner of the public square of said city, where he was hanged to a telephone pole until he was dead.

If the jury believed the testimony of this witness and other testimony introduced in support of this issue of fact, surely here was an active participation in a felonious plan, under concerted action, rendering the accused liable as an aider and abettor and procurer in the commission of a crime. 12 O. S., 214; 37 O. S., 179-184.

Exceptions were also taken to the action of the court in refusing to give to the jury the following requests submitted by counsel for plaintiff in error. The first request to charge, and refused, was request No. 22, on page 1062 of the record. An examination of the court's charge shows that the substance of this request was repeatedly and variously given by the court to the jury, and

other requests submitted by counsel for the plaintiff in error; we, therefore, find no error on the part of the court in refusing to give such request.

Request No. 3, on page 1060 of the record: The record shows that the court charged the jury on page 1082 on the proposition embraced in said request.

Request No. 1, on page 1058 of the record: Section 7316, R. S. (13692, General Code), provides that when the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any inferior degree. The crime of "riot" not being embraced in the crime charged in the indictment, we think the request made was properly refused.

Requests Nos. 17 and 18, on page 1063, and request No. 4, on page 1064 of the record, we think were properly refused.

Several other assignments of error are made upon the record, but we do not deem it necessary to notice them further than to say that, in our judgment, they are not maintainable; and, upon the whole record, we are of the opinion that there is no error in the record, prejudicial to the legal rights of this defendant.

The judgment is, therefore, affirmed, with costs. Exceptions noted, and said cause is remanded to the Court of Common Pleas of Licking County for execution.

ESTATES IN CURTESY.

Circuit Court of Wood County.

PETER LANDIS v. JAMES H. MARSH ET AL.

Decided, May 6, 1911.

Curtesy in Lands—There Can be No Tenancy by Curtesy in a Remainder where there is an Outstanding Freehold Estate in Another —Right of Present Possession Necessary—Actions to Quiet Title.

1. Where an estate for life is not terminated prior to the death of a wife who owns the remainder in fee no estate in curtesy rests in her husband, but such estate is extinguished by her death.
2. An action to quiet title does not lie where brought by a husband not in possession and having no interest in remainder in the lands involved in the action.

Benj. F. James, for plaintiff.
E. M. Fries, contra.

KINKADE, J. (orally); WILDMAN, J., and RICHARDS, J., concur.

This is an action said to have been brought for the purpose of having assigned an estate by curtesy belonging to Peter Landis. The plaintiff alleges that in 1886 one David Adams died intestate, the owner of the property mentioned in the petition; that at the time he had nine children, one of them being the wife of the plaintiff, to whom plaintiff was married some four months after the death of Mr. Adams.

The plaintiff claims that the wife of David Adams, Lucinda Adams, held for life the property described in the petition, and that she died in 1895. The plaintiff's wife died in 1877, and the plaintiff now says that his wife having died and the holder of the life estate having died, he is entitled to an estate for life in the one-ninth interest of the property described in the petition.

The defendant answers, admitting some of the things alleged and denying others, and then sets up the fact that when David Adams died he was the owner of a large amount of land includ-

ing therein the 144-acre tract described in the petition, and that shortly after the marriage of his daughter, Sara L. Adams, to the plaintiff here, that the heirs all joined in a conveyance of the property mentioned in the petition, to the wife of David Adams as and for her dower, she releasing dower in all the balance of the property, and it is said further in the answer that from the time of the execution of that conveyance in the year 1886 down to 1895 the wife of David Adams remained in possession of all the property described in the petition.

It is stated as a third defense that if the plaintiff had any right by way of an estate by curtesy in this property that it arose in the year 1877, at the time of the death of his wife; that he had known all of the facts incident to the situation from that time to this; that the other defendants named in the action have been in open, notorious and adverse possession of the property since 1877 and that consequently the rights of this plaintiff in this action are barred by the statute of limitations.

There was a reply filed to the answer. A demurrer was first filed to this petition on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and then upon the final hearing of the case rendered judgment in behalf of the defendants. Notice of appeal was given by the plaintiff, but the case is here on error to reverse the judgment of the court of common pleas.

We think there is but one question to decide in this case, and that is whether Sarah Landis at the time of her death had such an estate in this property as that her husband succeeded to an estate by curtesy upon her death. It is contended on behalf of the plaintiff that she had, and on behalf of the defendants in error that she had not.

It is said in behalf of the defendants in error that she must either have had possession at the time of her death, or the right of possession. It is conceded that if she did have either, the plaintiff would be entitled to recover in this action, barring one or two other matters I will mention later; but on that particular question the plaintiff would be entitled to recover if she

had either an estate in possession, or right to possession at the time of her death.

We are fully in accord with all that was said by Judge Thurman in the case of *Lessee of Charles Borland et al* v. *Ann Marshall,* found in 2 O. S., page 308, where he says that every reason obtains for holding that an estate by curtesy is entitled to as much consideration and protection at the hands of courts as any other interest or estate in lands.

This matter is very fully discussed by Judge Thurman in the opinion. It is of no moment what our opinion might be if this were a new question presented to the court. We think it has been settled by the decisions in Ohio what the law is on this subject, and it is our duty to decide this case according to the law as we find it settled, no matter how many reasons any one may be able to assign why it might be better if it were other than as it is.

We call attention to the case of *Moore* v. *Iles,* found in the 16 C. C. R. at page 591, and also the case in the 11 O. S., page 367, to which our attention has been called, the case of *Watkins* v. *Thornton.* The syllabus in *Watkins* v. *Thornton* is short and I will read it:

"In order to give a right by the curtesy in the wife's lands, it is not sufficient that the wife was seized of an estate of inheritance therein during the coverture. She must also have had a right to the present possession of the freehold. Hence, it is the settled rule of law that a husband can not be tenant by the curtsey of a remainder, exceptant upon an estate for life, unless the latter be determined during the coverture."

The estate for life in the case at bar was not determined during coverture. The wife died in 1877. The life tenant died in 1895; that being true it is our opinion that the estate of curtesy in the husband was thereby extinguished; that on the termination of the life estate there was no existing estate of curtesy resting in the husband. We think that the case in the 11 O. S. determines the issue here.

It was stated in argument here that the court of common pleas, while agreeing with the proposition of counsel for defendants

in error that there was no such proceeding known to the law as an assignment of an estate in curtesy, still held that it was proper to overrule this demurrer to the petition, for the reason that it might be treated as an action to quiet title. He is not a remainderman; he does not come in under that clause of the statute. He is not in possession and therefore had no right to bring an action to quiet title. Nobody out of possession can bring an action to quiet title under the statute, except those who hold an interest in the remainder. The life estate had passed away; the wife had died, and what ever interest the husband had was a present interest and he was not in possession. Section 11901, General Code, is the section that provides who may bring the action to quiet title. It says:

"An action may be brought by a person in possession of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having or claiming to have an estate or interest in remainder, or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

I call attention to another feature of this case, and that is, that it is very doubtful whether this petition presents the question of the other defendants holding this title adverse to the plaintiff. We think the petition is insufficient in that regard, and on that account the demurrer filed might have been properly sustained.

The court overruled the demurrer however, and resting our decision upon the case cited in the 11 O. S., 367, and the case of *Hershizer* v. *Florence,* in 39 O. S., page 516, we hold that the judgment of the court of common pleas was correct and must be affirmed.

AS TO THE ACQUISITION OF TITLE THROUGH THE ADVERSE POSSESSION OF A PREDECESSOR.

Circuit Court of Licking County.

AMY LOUGHRIDGE v. M. D. HARTSHORN.

Decided, March Term, 1911.

Title—Prescriptive Rights in Land do not Pass to a Grantee, When—Adverse Possession—Injunction Against Occupancy.

The purchaser of a specified amount of land, cut off by accurate survey from one side of a larger tract belonging to the grantor, does not acquire title to an additional strip lying outside of his surveyed line, to which he contends his predecessor acquired title by adverse possession through a mistake as to the location of the true boundary line; and in the absence of the predecessor in title as a party to the case, the owner of the adjoining lands will be granted an injunction against occupancy of said strip by the grantee of said predecessor in title.

Smythe & Smythe and *J. M. Swartz*, for plaintiff.
Flory & Flory, contra.

BY THE COURT (VOORHEES, J., SHIELDS, J., and POWELL, J.)

The petition in this case was filed by the plaintiff, Amy Loughridge, alleging that she is the owner in fee simple of certain described real estate and in possession of the same, giving a pertinent description of the lands owned by her, and alleging also that the defendant is in possession of and claims to be the owner of a tract of land immediately west of her lands described in said petition, and that the two parcels of land are divided by a straight line running north and south, a distance of about 113 rods. She further alleges that, by an agreement heretofore made by the owners of said respective tracts of land, the fences erected and to be erected and maintained along said line were erected and maintained as follows:

The owners of said east tract, being the land now owned by plaintiff, were to erect and maintain a fence along said line, commencing at the north end thereof, and running south about 40 rods; the owners of the west tract, being the land now owned by the defendant, were to erect and maintain a fence along said line,

commencing at the point where her fence terminated and to connect with the same, and running thence south along said straight line about 49 rods; and that the owners of said east tract were to erect and maintain a fence along said line, from the point last mentioned to the south end thereof, *i. e.*, along said line dividing the said two parcels of land.

She alleges that the defendant threatens to and has commenced to erect a fence on the said line of plaintiff, at a point about 40 rods south from the north end of said line, at least 2 feet at said point, from the true line, by planting posts there and running in a southeasterly direction, and in a straight line, to a point about 12 feet east of said true line, and alleges that his intention and purpose in so doing is to enclose within his own land so much of plaintiff's land as lies east of said true line and west of the fence so to be erected by him; and she asks that he be enjoined from erecting said fence on the line on which he is attempting to construct the same.

To this petition the defendant filed an answer and cross-petition, in which he claimed that the line on which he is intending to construct his fence was the true line between his land and the lands of plaintiff, and that he and those under whom he claims had, for more than twenty-one years last past, constructed and maintained a fence upon the line between the lands of plaintiff and defendant, commencing at the end of plaintiff's part of said partition fence and extending south, and that plaintiff and those under whom she claims had, for more than twenty-one years, constructed and maintained a fence upon said line between the lands of plaintiff and defendant commencing at the south end of that part of the partition fence constructed and maintained by defendant and those under whom he claims and running south to the end of the line between the lands of plaintiff and defendant; and he makes the claim that he and those under whom he claims have, for more than twenty-one years, been the owners in fee simple of the land located on the west side of the land owned by plaintiff, and that he is now the owner of said land, and that said fence has been a partition fence.

A supplemental answer and cross-petition was filed, alleging that the plaintiff was about to construct her fence at the south

end thereof, not on the line where it had formerly stood, but upon the lands of this defendant. To this answer a reply was filed, denying each and every allegation therein contained.

On this issue trial was had, in which the petition was dismissed in the court of common pleas, and an appeal taken by the plaintiff to this court, where the same was tried upon the evidence.

It appears from the evidence adduced that the defendant, Hartshorn, purchased the real estate owned by him, adjoining the lands of plaintiff, about the year 1905, from one Margaret Bean; that the same consisted of 30 acres off of the east end of what was known as the Bean farm; that at that time the county surveyor, John J. Gilpatrick, was called upon to survey said tract of 30 acres and to furnish a description of the same, for the purpose of making a deed by the then owner to the defendant; that a survey was made some time during the months of June and July, 1905, by said surveyor, and the deed for the lands so conveyed, being 30 acres, was executed by the owner of said Bean farm to the defendant, Hartshorn.

It appears from the evidence of Mr. Gilpatrick that his survey was to measure off the exact amount of 30 acres, and that the east and west lines of such survey were parallel lines and included within the boundaries measured by him the exact amount of 30 acres out of the Bean tract.

It further appears from the evidence that the west line of plaintiff's land is a straight line; that a stone was planted at the northwest corner of plaintiff's land, in the center of the fence running south, being the west line of plaintiff's land, and the southeast corner of plaintiff's land and the southwest corner of defendant's land was ascertained and marked in said survey.

The defendant can claim only such lands as were conveyed to him by the deed of Margaret Bean, and these lands are accurately marked and defined by the survey then made by Mr. Gilpatrick and described in the deed.

It further appears from the evidence that at the south end of the partition fence that belonged to plaintiff there had formerly stood a worm rail fence, which was not upon the true line, but which diverged east of the true line or the line located and established by the Gilpatrick survey; and defendant claims that be-

cause said fence, as located, had stood on said line for more than twenty-one years, it had, by prescription, become the true line between his lands and the lands of plaintiff, and that he owned the land to said line without regard to the line marked and established by said county surveyor; but it is not claimed or contended by the said defendant that he himself had been in possession of said land for the twenty-one years, but he claims to own to said line because his predecessors in title had so occupied said land for more than twenty-one years.

We find that the defendant is the owner of the land surveyed and designated by the county surveyor and incorporated in his deed, and of nothing more; that if there is a strip of land lying east of the surveyed line, and west of the line where said fence stood. it does not become his land by prescription, and that if any right by prescription has accrued to his predecessors in title, the same was not conveyed to him by his deed.

For this reason, we think we are not called on to ascertain whether any such prescriptive right exists or not, because if it does exist, it exists in favor of Margaret Bean and not of the defendant, and he should build his part of the partition fence upon the actual line surveyed by Gilpatrick, the county suryeyor, and not upon the line where such worm fence formerly stood.

It appears from the evidence that plaintiff has the title to the lands east of and adjoining the land so conveyed to the defendant, subject to any prescriptive right that any other person not a party to this suit may have to the strip west of said worm fence, and as no such party is here making claim under such prescriptive right, except the defendant, she has the right to have her title quieted to said line.

The holding of this court is supported by the authority in the case of *George Earl* v. *Rosetta Williams Hall et al,* 14 O. N. P., 234, wherein it is held:

"Where land owned by two tenants in common is partitioned with reference to a fence upon the premises, which, under a mutual mistake, is believed to be the true boundary, and both parcels are occupied and farmed by their respective proprietors up to and with reference to such line, in an open, continuous, notorious and exclusive manner, for a period of twenty-one years, a title by prescription is thereby acquired.

"Where an occupant claims title under a deed which does not in fact include the land in dispute, his possession thereunder can not be tacked on to the adverse possession of his grantor, in order to make out a title by prescription."

We think the second proposition of the syllabus controls this case and does not conflict with the holding of the Supreme Court in the case of *McNealy et al* v. *Langan*, 22 O. S., 32, but is in harmony with the principles recognized by the Supreme Court in the case of *Smith* v. *McKay*, 30 O. S., 409, and the case of *Humphreys et al* v. *Huffman et al*, 33 O. S., 395.

For the reasons above stated, a decree may be entered in favor of the plaintiff, quieting her title as against the defendant for the premises in dispute, and restraining the defendant from interfering with her in the possession and enjoyment of the same, and from constructing his fence as he threatens to do, all as prayed for in the petition.

PERSONS SELLING THEIR OWN PRODUCTS NOT PEDDLERS.

Circuit Court of Lucas County.

CITY OF TOLEDO v. ANDREW BROWN.*

Decided, March 24, 1910.

Municipal Corporations—Licensing Powers of Council—Discriminations Between Sellers of Their Own Products and Sellers of Purchased Products are Reasonable—Justification for Licenses Found in the Police Rather than the Taxing Power—License Issued by Auditor Upon Application to Mayor Not Invalid—Sections 3634 and 3672.

1. Persons selling the products of their own raising and manufacture designated in the proviso of Section 1536-327, Revised Statutes (Section 3672, General Code), are not peddlers or hawkers against whom fees for licenses may be imposed.
2. Discriminations in license laws between persons selling products of their own raising and those selling purchased products, are not unreasonable. In the former case the selling is but an incident of the seller's business; in the latter it constitutes the seller's business.
3. Exactions of license fees in municipalities in Ohio are justified in the exercise of police power rather than upon the right to tax for revenue purposes.

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* Affirmed by the Supreme Court without opinion, *Brown* v. *Toledo*, 84 Ohio St., —.

4. A license issued by the auditor upon application made to the mayor therefor is in effect issued by the mayor, and an ordinance so providing is not thereby rendered invalid.

Cornell Schreiber, City Solicitor, and *Alonzo G. Duer,* for plaintiff in error cited:

That the evidence failed to disclose the year in which the offense was committed—Foster vs State, 19 Ohio St., 415; Corry vs Gaynor, 21 Ohio St., 277, 280.

That the affidavit upon which the warrant was issued was defective, mainly for the reason that it is not specially alleged "that the articles sold were not products of defendant's own raising or manufacture"—St. Louis vs Meyer, 185 Mo., 583; Toledo vs Hutchinson, 55 Ohio St., 573.

As to constitutionality of the statute and the validity of the ordinance—People vs Sawyer, 106 Mich., 428; Rosenbloom vs State, 64 Neb., 342; State vs Stevenson, 109 N. C., 730; Marmet vs State, 45 Ohio St., 63; Kansas City vs Overton, 68 Kan., 560; State vs Montgomery 92 Me., 433; Sterling vs Bowling Green, 4 C.C.(N.S.), 217.; Commonwealth vs Ober, 12 Cush. (Mass.), 493; Fisher vs Patterson, 13 Pa. St., 336; Raquet vs Wade, 4 Ohio, 109.

Charles K. Friedman, for defendant in error.

WILDMAN, J.; PARKER, J., concurs; KINKEAD, J., dissents.

Error to common pleas court.

This case, in its inception, was a prosecution of the present defendant in error upon a charge of going about from place to place, hawking and peddling and selling some articles of value without a license, in violation of an ordinance of the city of Toledo. He was convicted in the police court, fined five dollars and costs, and upon a proceeding in error instituted by him in the court of common pleas, this judgment of conviction was reversed, upon the sole ground, as stated by the judge of the court of common pleas, that the ordinance upon which the prosecution was based is invalid, and that the statute by virtue of which the ordinance was passed is unconstitutional. While the amount of the penalty imposed is very small, the questions involved are of such importance and wide interest as to demand from this court very careful consideration.

The proceeding here is in error to reverse the judgment of the court of common pleas. The evidence in the trial court was very brief, consisting of the testimony of one witness and some agreements or concessions, and they develop the fact that Andrew Brown at the time stated in the complaint against him was engaged in selling fish upon and across the streets of the city of Toledo, and that the case was covered by the ordinance found in the revised ordinances of the city, Section No. 580.

I will briefly dispose of all the incidental questions substantially as in the court below. We agree with that court that the contentions of the defendant in error are not tenable unless he can sustain the one upon which the court of common pleas based its conclusion, to-wit, that the ordinance and the statute are invalid. In saying this, as in all that I may say with regard to this case, counsel may understand that I am voicing the judgment of a majority of the court only. I understand that Judge Kinkade is not quite prepared to give his concurrence to the views entertained by Judge Parker and myself.

The statute under which this ordinance was passed, Revised Statutes, 2669 (General Code, 3672), is under the caption "General licensing powers of council." There is another section of the statute in another chapter, Revised Statutes, 1536-100 (General Code, 3634) under the heading "General powers of municipalities," which gives to the council power to regulate the use of vehicles upon streets by means of license; but the section to which I first referred is the one under which this ordinance requiring a license from hawkers and peddlers and certain other persons selling commodities or articles of value was drawn and passed.

Reading only such portions of Revised Statutes, 2669 (General Code, 3672) as apply to the case at bar we find this language:

"The council of any city or village may provide by ordinance for licensing * * * hawkers, peddlers, * * * and hucksters in the public streets or markets, and, in granting such license, may exact and receive such sum of money as it may think reasonable; but nothing in this section shall be construed to authorize any municipal corporation to require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, license to vend or sell in any way, by himself or agent, any such article or product."

It is earnestly urged, and with a great deal of plausibility, that this language of the statute as to its own construction makes an unjust discrimination between two classes of vendors of things of value, and that it thereby violates certain sections of the Constitution of Ohio. It is possibly claimed to be affected by the Fourteenth Amendment of the Federal Constitution also, although I do not know that this was specifically referred to in the argument. The ordinance in attempted compliance with this section of the statute is in some respects very crudely drawn, and we are not prepared to say that it may not be in some of them invalid as in violation of the Constitution, as vague and uncertain in its terms, and also as not authorized by the section of the statute to which I have referred. I may say briefly, however, as to this matter, that in most of the respects pointed out to us by counsel for defendant in error to sustain the holding of the court below, these matters have no special pertinency to the state of facts embodied in the complaint against the defendant in error. Brown, or in the evidence adduced upon the trial. As to the matter of the broad powers of revocation of a license given to the mayor, the uncertainty in the grading of the license as to the amount, and perhaps some other matters evidencing the carelessness with which the ordinance was drawn, they may be eliminated from it and still leave those particular parts of it affecting the rights of the defendant in error intact and unaffected. It is a principle so familiar as to require no citation of authorities that an entire act or an entire ordinance will not be invalidated by the unconstitutionality of some of its parts, provided that it may fairly be inferred that the Legislature or the legislative body of the municipality would still have made the enactment as to the other parts without respect to those which are invalid.

The kind of traffic or business in which the defendant was engaged is one very fully treated in the various text-books. There is an extensive chapter in 21 Cyc., 364, entitled "Hawkers and Peddlers," in which we find definitions and numerous rules and principles applicable to hawking and peddling. On page 365 we have the general statement:

"The licensing of hawkers and peddlers is within the power of the Legislature, provided that the statutes do not discriminate between the citizens or the products of the several states or for-

eign countries, and that the purpose is not merely to benefit the resident merchants of a city. Furthermore, the Legislature has no power to discriminate in favor of citizens of one county as against citizens of other counties in the same state, or to require a license for the peddling of goods only where manufactured in the state. So it can not exempt sales to all manufacturers and dealers residing or doing business in a certain territory. But it is generally held to be allowable to exempt from the operation of the statute certain persons who peddle their own products or manufactures, such as farmers, butchers and manufacturers."

Certain other classes are mentioned which it may be allowable to exempt from the ordinances. It will be noted that in the section of our statute to which I have referred, there is no provision that certain classes shall be excepted from the operation of the act, but it is said that nothing in this section shall be construed to authorize any municipal corporation to require of the owner of any product of his own raising, etc., such license tax or fee. The courts have often construed this phrase, "hawking and peddling," holding that a farmer who is marketing his own meat, or a manufacturer who is marketing his own work, is not a peddler or a hawker within the meaning of the terms used almost from time immemorial in the various enactments, not only in the states of this Union but also in Great Britain. On page 372 we have this statement:

"Irrespective of statute, persons who raise or produce what they sell, such as farmers and butchers, have been held not to be peddlers, although there is authority to the contrary. In many of the states the statute exempts from its operation any manufacturer, mechanic, nurseryman, farmer, butcher, or fish or milk dealer, who sells, either by himself or an employe, manufactured articles, wares or products."

It should not be overlooked, however, that the ordinance of the city of Toledo before me imposes in terms a fee for license, not only from peddlers and hawkers, but also upon persons generally who sell under certain circumstances articles of value. It covers not only peddlers and hawkers, but hucksters and it may possibly be construed as larger in its scope even than the embracing of these three classes. The language is:

"No person shall go from place to place in the city of Toledo upon or across the streets or other public places peddling, hawk-

ing, selling or offering for sale or exchange any goods, merchandise, products, fruits, vegetables, meat or other articles or things of value of any kind or character."

Going back to the definition of a hawker and peddler, I find in 15 Am. & Eng. Enc. of Law (2d Ed.), p. 293, this statement in the text:

"A manufacturer, real worker, or manufacturing mechanic selling his own products is not considered a hawker and peddler unless declared so by statute. In Great Britain this exemption extends to the children, apprentices and servants of any real worker or maker of goods, usually residing in the same house with him, selling or seeking orders for wares made by him. In Canada this same exemption seems to exist except where changed by provincial legislation or local laws."

It may be inferred from what I have already read and said that legislation of the kind which we have under consideration is not a novelty in this country or in England. It is a subject which has been recognized and treated by legislative bodies and by courts for several centuries, and it has seemed to the majority of this court that to attempt to establish distinctions not recognized by the current of authority in this country and in Great Britain would be to legislate rather than to adjudicate; it would practically be attempting to establish a new rule of law in innovation of that which has been recognized by the current of the decisions and by the bodies authorized to legislate in the various states and in the mother country. As stated in 21 Cyc, the rule has not been universally adopted that a discrimination may be made between the selling of purchased products and the selling of products of one's own making or raising, but not only from the statement in the text, but from numerous authorities which we have found time to examine, we are satisfied that the drift of authority is in favor of the recognition of such a discrimination as a just one. It is not, however, for the court to determine whether a legislative enactment is wise or unwise; whether an attempted classification is one which ought to have been made or not in the exercise of the discretionary powers of the legislative body, whether it be the Legislature of a state or the council of a city. It is enough, as repeatedly held by the courts, to justify the upholding of an enactment, as a valid one, if the classification ap-

pears not to be capricious and arbitrary. Its expediency is for the enacting body, not the courts. We are concerned with the powers, not the wisdow, of the Legislature and council.

In *Marmet* v. *State,* 45 Ohio St., 63, 69, our Supreme Court has touched upon the question in considering an ordinance of Cincinnati, passed under a power to regulate the use of streets, the charge being that the plaintiff in error had used vehicles thereon without first obtaining a license. The ordinance was attacked, on the ground, as in the case at bar, that it made an unjust discrimination in favor of farmers marketing the product of their own farms. Judge Spear, in his opinion, says:

"It is urged, too, that the last clause of Section 29 makes discriminations in favor of farmers marketing the products of their own farms, which are unjust, and that this invalidates the law. Such products ordinarily embrace the necessaries of life, without which the people, and, to some extent, domestic animals could not subsist, and it is not unfair to assume that this consideration had weight with the Legislature in making the discriminations referred to. Other reasons may have been within the knowledge of that body which are not here disclosed, and do not occur to us. However, it is enough to say, that it is not shown that such discriminations are not within the legislative discretion. It may be added that absolute equality as to burdens, whether applied to taxes or other subjects of legislation, is not to be expected in our laws. The wisdom of man has not yet devised a system of equalizing burdens so perfect in its application and so thorough in its enforcement as to leave no room for adverse comment or criticism."

Although this specific feature of the Cincinnati ordinance is not referred to in the syllabus of the case, the question was one of the contentions and it was essential that it be considered and disposed of to arrive at the court's conclusion. It is said by counsel for defendant in error in the case at bar that *Marmet* v. *State, supra,* has been practically repudiated by the Supreme Court in later adjudications. We do not, however, think that it has been disturbed in this regard, if in any other, and we think that it may be taken still as the law of Ohio. We have found in other adjudications various statements of reasons for the making of such discriminations between on the one hand peddlers, hawkers and sellers of goods purchased by them or obtained in

other ways, and on the other hand, the marketing of farm products or manufactured goods by the producer or maker.

In *Rosenbloom* v. *State*, 64 Neb., 342, the syllabus contains. among others, this paragraph:

"There is such a real distinction between persons who go from house to house, and place to place, vending their own products, and those who sell in the same way the productions of others, that the Legislature, acting on considerations of general policy, may make it the basis of classification for the purpose of taxation."

It was held in that case that the license fee was in the nature of a tax which was authorized under the Constitution of the state of Nebraska. Whether it would be so authorized under the Constitution of Ohio is a question which we do not consider, because it is probable, as it appears to the majority of the court, and perhaps to all, that licensing ordinances in this state are ordinarily based upon the general police power rather than upon a right to tax for the purpose of raising revenue. But it has seemed to me that the right to discriminate or classify in the manner in which a classification or discrimination was attempted by the Legislature of Ohio and the council of the city of Toledo, may even better be justified in the exercise of police power than in that of the taxing power. On page 925 the judge, speaking for the Nebraska court, says:

"A further contention of counsel for defendant is that, by reason of the exceptions contained in Section 152, the law lacks the essential requirement of uniformity." "The real test," he adds, "of the validity of defendant's objection to this statute, is not whether the classification is wise and just, but whether the Legislature acted arbitrarily, whether, without an adequate determining principle, it made a division of peddlers into two classes, and then sought to deprive one class of their constitutional right to the equal protection of the laws. If there is a genuine and substantial distinction between persons who go from house to house, and place to place, vending their own products, and those who sell in the same manner the productions of others, the classification is founded in the nature of things, and is therefore upon a basis everywhere recognized as lawful. Now there is, in our opinion, such a marked and material difference between the two classes of peddlers as to make it entirely proper for the Legislature, acting on considerations of general policy, to tax one class, and to permit the other to go free. The man

who goes about the country selling what he has himself produced may be presumed to confer a benefit upon the general public, by eliminating the profits of the retail merchant, and perhaps even those of the wholesaler and jobber. He has a fixed abode where he produces the things which he sells, and where he may be reached and required to make good his warranties. He is generally the owner of immovable property, which is subject to state and local taxation. It may be that he is required by the municipality in which he lives to pay a poll tax and a tax upon his business; to build and repair sidewalks, and keep the same free from snow, ice, and other obstructions. He contributes to the social, educational, and financial property of the community in which he resides. He bears a just share there of the burdens of government. And, in addition to all this, it must be remembered that the selling of his products is only incidental to the business of producing them."

This last matter is one referred to in a number of cases we have found, that is, that the selling is but an incident to the production where the selling is conducted by the one who produces.

"These characteristics," the judge continues, "speaking generally, distinguished the untaxed peddler from the peddler who is taxed; and they are, it seems to us, quite sufficient to justify the classification which the Legislature has made."

There is a great deal more in the discussion of this question in the opinion which I should be glad to read if I had time. One judge dissents from the views of the majority of the court on certain points, but, if I understand his reasoning, he concurs as to the particular point which we have under consideration, the right to discriminate between mere peddlers or hawkers and farmers or others marketing their own productions.

The Supreme Court of Michigan, in *People* v. *Sawyer*, 106 Mich., 428, holds:

"Under a charter giving the city power to license and regulate hawkers and peddlers, an ordinance requiring peddlers to take out licenses may exempt from its operation mechanics of the state selling their own manufactured articles, and farmers selling the products of their own farms."

And in the opinion I find this language:

"The exemption of mechanics, in selling their own manufactured articles, and farmers, in selling products of their own

farms, from the operation of the ordinance, is but following the state statute on the subject of the license to hawkers and peddlers. The power given by the charter is to regulate hawkers, peddlers, etc. Under this power the common council had authority to impose such reasonable conditions and limitations as it saw fit (1 Dillon, Munic. Corp., Sec. 359). The discrimination in favor of mechanics and farmers in the sale of their products is within the power conferred by the charter on the common council. These immunities have been recognized for many years. By the statute of 50 George III, Chap. 41, Sec. 23, real workers and makers of goods within Great Britain were exempt from the payment of the license which was imposed upon hawkers and peddlers."

He then cites some English authority in connection with this statement and adds:

"In many if not in most of the American states, these immunities are granted to mechanics and farmers selling their own products, and the power is not questioned."

In the state of Kansas also the question has been passed upon by its court of last resort. In *Kansas City* v. *Overton*, 68 Kan., 560, the syllabus states:

"A city ordinance imposing a license tax on hucksters and hawkers is not invalid because it exempts from its operation those who are personally selling the products of their own or leased lands."

In *State* v. *Montgomery*, 42 Me., 433, decided by the Supreme Court of Maine, in which the legislative enactment of that state involving this principle is decided and the act is held constitutional, and in the opinion we have something added to the suggestions of reasons for the discrimination made in some of the other adjudications which I have cited. On page 15, Judge Savage, who announces the opinion, says:

"As expressive of the reason why it has been deemed advisable in time past to regulate the exercise of the business of hawkers, we quote from Jacob's Law Dictionary, title 'Hawkers':

" 'Those deceitful fellows, who went from place to place, buying and selling brass, pewter and other goods and merchandise, which ought to be uttered in open market; and the appellation seems to grow from their uncertain wanderings, like persons that with hawks seek their game where they can find it.'

"The object of such legislation has also been well stated by Baron Graham to be to protect, on the one hand, fair traders, particularly established shopkeepers resident permanently in towns and other places, and paying rent and taxes there for local privileges, from the mischief of being undersold by itinerant persons, to their injury; and, on the other hand, to guard the public from the impositions practiced by such persons in the course of their dealings. *Attorney-General* v. *Tongue,* 12 Price, 51. So by Judge Cooley:

" 'That the regulation of hawkers and peddlers is important, if not essential may be taken as established by the current practice of civilized states. They are a class of persons who travel from place to place, among strangers, and the business may be easily made a pretense of a convenience to those whose real practice is theft and fraud. The requirement of a license gives opportunity for inquiry into incident and character, and the payment of a fee affords some evidence that the business is not a mere pretense.' "

Several other authorities are cited in support of the conclusion at which *State* v. *Montgomery, supra,* arrives that the enactment in that state is constitutional although it makes such discrimination.

It has seemed to me that this suggestion made by Judge Cooley as quoted in *State* v. *Montgomery, supra,* is entitled to weight. Of course it can not be said that all persons who travel from place to place are dishonest and that they are going about using the form of traffic as a cloak to disguise some fraudulent or corrupt purpose; but the Legislature in its enactments, or the council in its ordinances, makes general rules because of general evils or dangers, precisely upon the principle that a license is required as to certain occupations, in order that people may not be deluded by persons not skilled in their trade or profession, although there may be many unlicensed persons having abundant skill.

I have discussed this question at length because counsel on both sides have sought a consideration of the case upon its merits as to the validity of the ordinance and the constitutionality of the law, and because it involves a question which may affect many municipalities in the state. Our view is that the court below was wrong in its conclusion that the statute of the state is unconstitutional and that the ordinance enacted under it is in-

valid, and we think for this reason that the judgment should be reversed.

Mr. Friedman: This question is of considerable importance. It is not the mere matter of these five dollars, but I have some forty-five clients I think altogether in relation to that matter. and it is a matter of considerable importance, not only to us but to the city itself. I can say frankly that I deem it of even more importance than in this particular case the question of whether or not the mayor should issue the license, because the statute provides that the mayor should have a right to issue the license, and not only that ordinance provides that the auditor should issue the license, but also that we are charged in the affidavit with not having obtained a license from the auditor. It is of such interest to me that I trust the court will pardon me.

Judge Wildman: I will say, if counsel desires, although I intended to cover the matter by the general statement made preliminary to consideration of the constitutionality of the statute and ordinance, that the statute does require that the license shall be obtained from the mayor. The ordinance provides that the application shall be made to the mayor, and after certain examination the license shall be issued by the auditor, but we think that while the auditor is the clerical person who issues the license, he is but doing it as a ministerial act, and under the authority and by the direction really of the mayor. While the ordinance is somewhat irregular in this respect, it is not invalidated by this fact. We think that the mayor does, in effect, under the ordinance as well as under the statute, issue the license, and when it is stated in the complaint that the defendant below was doing these acts without having obtained a license from the auditor, it means only that he has not obtained the license from the auditor as a last step in a series of acts which would entitle him to the license. We deem it equivalent to an expression on the part of the affiant that he had no license. However, if the affidavit was defective in this regard, it was shown upon the trial without contradiction that defendant stated that he had no license.

PROSECUTIONS FOR VIOLATING THE ROSE COUNTY LOCAL OPTION LAW.

Circuit Court of Wood County.

GEORGE ROGERS ET AL v. STATE OF OHIO.

Decided, May 11, 1911.

Illegal Sales of Intoxicating Liquor—Trial of Several Cases Together—Stipulation as to Evidence—Defendants Not Entitled to a Jury—Plea in Abatement—Finding of Error Not a Disproval of Charge—Evidence as to Reputation of Physician Issuing Prescriptions for Intoxicating Liquor—Proof as to Number of Sales—Failure to Require the State to Elect Upon which Sale it Would Rely.

1. It is within the power of counsel, where a number of cases are pending which are of the same character, to stipulate that they shall be tried together, but only such evidence as relates to a particular defendant shall be applicable to his case; and a reviewing court will presume that the trial judge in determining the case of each defendant considered only such evidence as was competent and pertinent to that case.
2. A finding that error has intervened in a trial on the charge of making sales of intoxicating liquor in "dry" territory, does not amount to a finding that no sales were made, or render it impossible that the defendant be found guilty of keeping a place where such sales are made.
3. Where the defense is proffered in such a case that the sales were made on the prescription of a physician, it is not error to hear testimony as to the reputation of the physician as bearing on the question of good faith in the issuing of such prescriptions.

Benj. F. James, for plaintiff in error.

Chas. S. Hatfield, Prosecuting Attorney, and *N. R. Harrington*, contra.

KINKADE, J. (orally); WILDMAN, J., and RICHARDS, J., concur.

In the case of George Rogers et al, plaintiffs in error, against the State of Ohio, ten separate cases are considered.

These prosecutions were all instituted in the Probate Court of Wood County and a conviction resulted at the trial in each case, and a penalty was imposed.

The cases were carried on error to the court of common pleas, and the court of common pleas reversed five cases on which the

prosecution had been sustained for "keeping a place." The defendants below are here in the five cases that were affirmed below to reverse the action of the court of common pleas, and the state of Ohio is here upon a petition in error in the other five cases to reverse the court of common pleas.

It is stated by counsel for Rogers, first, that they were entitled to a jury, but under the statute we think this claim can not be sustained.

Second, it is said that the motion to quash was incorrectly overruled. We think that the action of the court was correct in this regard, and in it we see no error.

Third, it is said that the court was in error in overruling the demurrer. This action of the court we regard as correct.

Fourth, it is said that the court was wrong in overruling the plea in abatement. We have examined the plea in abatement with care, and in our judgment it is not a plea in abatement, but it is a matter which might be given in a plea of not guilty, and furthermore the matter set up in the plea in abatement we think does not constitute a defense to the prosecution, and therefore we find no error in the action of the court in overruling the plea in abatement.

Fifth, it is stated there was error in the court admitting evidence over the objection of the defendants, and that this was found to be true by the judge of the common pleas court in the five cases that he reversed.

Sixth, it is stated that if the court of common pleas was correct in finding there were no sales, it must naturally follow he was wrong in the other cases, because if there were no sales defendants could not be found guilty of keeping a place. We think this does not result at all. We do not see that the common pleas court found there were no sales. The court found there was error in a case in which the state sought a conviction for making sales, and that was all; and we think this point is not well taken in the case.

Attention is called to the stipulation found on page 25 of the record, and it is said that even if the scope contended for by this stipulation by counsel for state be admitted, still it could not avail here, for although made by counsel it was a stipulation

which counsel could not make in a case of this character. We dispose of that by saying that in this character of case we see no objection at all to counsel making a stipulation of this kind. Furthermore, we think the stipulation was entirely proper. Ten cases were to be heard. It could avail the defendants nothing to insist on puttting in the same evidence in ten different cases. It would have multiplied the cost of taking the evidence by ten, and it was in the interest of the defendants that the stipulation should be made by their counsel that was made—an entirely proper thing to do, and we think it clearly within the power of counsel to make that sort of a stipulation.

It is said there was error in receiving testimony as to the reputation of a certain physician. Passing the question now as to the character of some of the evidence received, it may be said there was no error in receiving competent evidence as to the reputation of a physician, because the statute provides there shall be no liability for sales in good faith upon the prescription of a *reputable* physician.

The state claims that inasmuch as they were obliged to prove that the sales were in fact made upon prescription, that they were entitled to prove also, and it was the state's duty to prove that the prescriptions were not from a reputable source; that they were neither given nor acted upon in good faith, because if the state should not offer this evidence, the presumption would at once arise that the sales had been made in good faith, and as a consequence the state would prove itself out of court. We think the position of the state was entirely correct, and it was competent that the state prove the reputation of the physician issuing this prescription, and also as to whether the prescriptions were accepted and filled in good faith, and whether they were secured in good faith by the purchaser. We find no prejudicial error in the evidence admitted in this regard.

It is said that the fines imposed are excessive. The fines were within the terms of the statute, and we see nothing to indicate why this court should disturb them.

This reviews the principal questions which were considered by the court of common pleas in reversing the five cases that it did reverse. As has been stated, there were ten cases on trial,

some relating to one defendant, some to two, and some to three, and after the case had progressed to a given point, a stipulation was entered into. It is stated here by counsel for defendants that this stipulation was limited in character, and he seeks to have assigned to him only the portion of the stipulation which appears in the main sheet of the bill of exceptions, and to repudiate that which appears on the slip attached.

It is impossible for us to tell just what and all that was said at the time this stipulation was made, and we think it is not material. The probate court has found that the stipulation was entered into, and that the cases proceeded under that stipulation. Now of necessity when that stipulation was entered into and the cases proceeded, there being three different defendants and the defendants being liable for different sales at different times and under different circumstances, there would be evidence in the cases thus offered that would apply to one of the defendants and not to the others, or to two of the defendants and not to the other. It is improbable that you could have ten cases presented under this form of stipulation and not have that condition arise, and it is apparent to us that this stipulation was intended by the parties to provide just as it states, viz.: "that the object of this is to avoid the taking of testimony in all the cases and only such testimony as may be pertinent against the defendant shall be considered in each case, and the evidence revelant to the other defendants will not be regarded"; and we must assume that the court in passing upon all the evidence offered in one batch like this, excluded the evidence that was not competent and pertinent to any one defendant whose case he was at the time considering, and that he considered only the evidence that related to that defendant's case at that time.

The common pleas court in its opinion pointed out many embarrassments that would necessarily come to the trial court in carrying out this plan of trial, and we think all that he has enumerated would come to him and we might name others; but the difficulty with it all is that the parties placed themselves before the court in this manner, and they thereby imposed upon the trial court the duty and authority to thus discriminate, sift,

consider and apply this evidence, and the trial court did so consider it and reached the conclusion he did.

The court of common pleas seems to think that the difficulty would be that it would be almost impossible for the trial judge to separate this evidence so as not to do injustice to some of the parties, but it does not impress us that his difficulty would go that far. It seems to us that the record might be read, and the parts that relate to the other defendants excluded, and as I said, it must be presumed that the trial judge did that. We think if it had been submitted to this court, we could have done that.

It has been said that there have been a number of sales proven here. Counsel are familiar with the law of Ohio in that regard. The charge in the information is not a specific sale upon a specific day; it is a specific sale on or about a given date, and under that form of charge in the cases cited by counsel for the defendants in the 27 O. S. and 32 O. S., it is clear that the state had a right to prove other sales; had a motion been made at the close of the evidence as stated by Judge Baldwin in his opinion, the state would have been obliged to elect upon which specific sale they would have relied for conviction, but it seems no such motion was made, and for that reason the cases were disposed of without any election.

There is another matter that we think may not have received perhaps as full consideration as it should have received at the hands of the common pleas court in reaching the conclusion he did reach and that is this: There is no statement in any of these bills of exceptions that they contain all the evidence. Counsel don't contend that there is any such statement. (In this connection I call attention to the fact that while these bills of exceptions are intended evidently to be duplicates and in general are duplicates all the way through, some slight variation exists notwithstanding, as we find page 31 of the bill of exceptions is missing from cases Nos. 910, 911, 917 and 918.)

The certificates being omitted that the bills contain all the evidence, it may be said that much of the evidence in the case that is said by the court of common pleas to have been incompetent, might have been competent for aught we know, not having all the evidence before us. Near the close of the bill it is stated

"that thereupon the plaintiff rested," but it is not stated that the evidence produced is all the evidence that was put in. It is stated that the defendants rested, but it is not stated that the defendants put in no further evidence. It is stated that the defendants made offer to put in further and other evidence which was denied them, and to which denial, exception was taken.

Counsel are entirely familiar with the rule that every presumption obtains in favor of the correctness of the judgment that has been entered by the probate court, and as I say, there may have been other evidence in one case that made much of this evidence entirely competent. For instance, suppose the defendants in one case had testified, and suppose they had admitted the different sales. Suppose that Carmack had testified and had not only admitted the selling, but had admitted other sales, while he was a clerk of the Rogers Brothers—we are not saying that there was any presumption that he did so testify, but we say that every presumption obtains in favor of the regularity of the judgment, and it may be that much of the evidence that was held by the court of common pleas to be incompetent was made competent by something else that was said.

Suppose a bill of exceptions contained evidence of several witnesses testifying for the purpose of impeaching the reputation for truth and veracity of a defendant in a case, and the bill did not show whether it contained all the evidence, the court would be bound to presume that the evidence was competent. It would be wholly incompetent if the defendant had not testified, or if any witness whose reputation for truth and veracity was thus attacked had not testified. The reviewing court would not be justified in saying that this evidence was not competent because the party attacked had not testified where the bill of exceptions is silent as to whether he did or did not testify.

We mention this as an additional reason why we are not able to reach the conclusion which the court of common pleas did in saying that some the evidence that was offered in the five cases for selling was incompetent.

We think that the stipulation should have been given a wider scope than was given by the court of common pleas. The stipulation taken in connection with the absence of the certificate that

the bill contained all the evidence, leaves the case in such a form that we can not concur in the conclusions reached by the court of common pleas, and for that reason we are obliged to reverse the court of common pleas as to the five cases for selling, and affirm the judgment as to the others.

PRESCRIPTIVE RIGHT IN A ROADWAY WHICH HAS SHIFTED.

Circuit Court of Richland County.

C. C. STAMAN v. LEWIS BALLIETT.

Decided, January 25, 1911.

Adverse Possession—Prescriptive Right-of-way Along the Banks of a Stream Passes by Devise or by Conveyance—Shift of Roadway in Conformity to the Shift of the Adjacent Stream Does Not Defeat the Prescriptive Right—Ingress and Egress—Water and Water-Courses.

1. A party who uses a road or way as a means of ingress or egress to his own land, without let or hindrance over the lands of another and without obstruction for a period of twenty-one years, acquires a right by prescription to its use as an incident to his land, and the right will pass by conveyance or by devise of the land.
2. A prescriptive right to the use of a road or way over the lands of another along the banks of a stream as a means of ingress and egress, is not lost, modified, or affected by reason of a shift in the traveled road or way within a period of less than twenty-one years, where such shift in the traveled road or way was due to a like shift in the bed or bank of said stream, and no more land was used after said shift than was necessary if the use of said way was to be continued as a means of ingress and egress; but in such a case the traveled road or way lawfully shifts with the bed and bank of the stream.

C. H. Workman, for plaintiff.

C. H. Huston, for defendant.

PER CURIAM (TAGGART, DONAHUE AND VOORHEES, JJ.).

Appeal from common pleas court.

This cause is in this court by appeal from the court of common pleas. The controversy between the parties arises from an alleged right of way leading from a public road in this county, known as the Wooster road, and leading from the village of

Mifflin, Ashland county, Ohio, westward across the Blackford or the Richland county line.

The alleged way is about thirty rods long and is claimed to be about ten to fifteen feet in width, and is claimed as a means of ingress and egress from this highway to a portion of the plaintiff's premises. The plaintiff complains of the defendant that he wrongfully barred this way by a fence and posts preventing him from at all times passing and repassing over the alleged way, and he prays for an injunction requiring the removal of said fence and from interfering with the plaintiff in the use of the way. It is the claim of the plaintiff that he has been in peaceable occupation of this way for a period of time that would give him a prescriptive right thereto.

The answer of the defendant in respect to the material allegations of the plaintiff's cause of action are a denial, and he further avers that, in consequence of plaintiff's straightening the stream to the north of the alleged right-of-way, the channel of the stream was changed and that a portion of the claimed driveway was washed away, and that there is not sufficient room to drive between the fence, which he avers was to the west of the bank of said creek, and the bank of the creek; he further avers that the plaintiff has other means of ingress and egress to his said premises which, through his own fault, was interfered with, and that he has no prescriptive right to said alleged way. This was denied and on these issues the case was presented to the court on the pleadings and evidence.

On behalf of the plaintiff there were certain witnesses introduced who testified directly to the fact of the way leading from the Wooster road to the eighty-nine acre tract of land to which it is claimed this way is a means of ingress and egress. These witnesses testified that for a great many years the way was used and they testified that they used it, so that considerable credence must be given to the witness who testified distinctly and affirmatively to facts which they themselves were cognizant of.

Much of the testimony introduced on behalf of the defendant is that there was no such way, and that they had the means of knowing, but we think the clear weight of the testimony in this case is to the fact that there was a traveled way substantially upon the line claimed by the plaintiff in his petition, and that it

was used and intended as a means of ingress and egress to this eighty-nine acres of land.

In addition to the affirmative testimony on behalf of the plaintiff, a number of witnesses on behalf of the defendant testified that the plaintiff did use the disputed way in the summer of 1884 and each and every year since that date, up to the time that he was interfered with by the defendant. This would be a sufficient mite to give the plaintiff a right to use this way under the doctrine of prescription, unless the same was by permission. The defendant undertakes to say that the use of this was merely permissible and that before and while attempting to use it, he had sought the defendant out and secured his permission so to do. But this is denied by the plaintiff, and if in view of the testimony that is introduced in this case that prior to this alleged permissive use it was a matter of right, we think that the weight of the testimony is with the plaintiff in this case.

We perhaps would not need to introduce any authority supporting this proposition of the right of relief to the plaintiff further than the case of *Pavey* v. *Vance*, 56 Ohio St., 162, but it is insisted that the proof in this case shows from the fences and the remains of fences that have been dug up since, that the present traveled way has been changed, and that in consequence of the straightening of the stream to the north of the property in dispute, the traveled way has been so far interfered with that the plaintiff can not now claim the use of the same, and that, in the event that he attempted to pass and repass there, he could not pass within the boundaries of the former right-of-way, in consequence of a portion of the same being washed away by the stream.

But we think that *Pomeroy* v. *Salt Co.*, 37 Ohio St., 520, 523, and the case of *Holtsberry* v. *Bounds*, 9 C.C.(N.S.), 510, answers this question. This latter case was affirmed by the Supreme Court without opinion, *Bounds* v. *Holtzberry*, 75 Ohio St., 636.

In the latter case, the right-of-way was shifted in many places, but a decree was entered confining the party to the width of the road or way as it formerly existed.

A decree may be entered herein for the plaintiff, enjoining the defendant from interfering with him in the use of this way,

and a judgment may be entered for costs. Motion for a new trial will be overruled with exceptions, and twenty days allowed for separate findings of fact and conclusions of law.

A BUSINESS ENTERPRISE WHICH WAS NOT A PARTNERSHIP.

Circuit Court of Cuyahoga County.

FRANK E. TAPLIN v. CHRISTOPHER F. EMERY.

Decided, June 14, 1909.

Partnership—Determination as to Whether One Contributing to the Enterprise Became a Partner—Mutual Agency the Final Test.

The fact that E entered into an agreement with two others to carry on a certain line of business and that he advanced a substantial amount for that purpose and the three chose to denominate themselves as partners, does not create a partnership, where the usual incidents and criteria of a partnership are expressly excluded by the terms of the agreement and with them the element of mutual agency.

C. F. Taplin, for plaintiff in error.

Cook, McGowan & Foote, contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Error to the court of common pleas.

The sole question in this proceeding in error is as to the construction of a partnership agreement attached to and made a part of the amended petition below, by which it is claimed that the defendant in error became and was a partner in the partnership firm of Denison, Prior & Company, and is liable, as such, for said partnership's debts. Said agreement is as follows:

"Made at Cleveland this first day of May, 1899, by and between Charles E. Denison, party of the first part; Leland W. Prior, party of the second part, and C. F. Emery, party of the third part;

"WITNESSETH, WHEREAS, the above named parties desire to engage as partners in the business of buying and selling bonds, stocks and investment securities, also to do a brokerage business in stocks, under the firm name of Denison, Prior & Co.

"Said parties are to respectively contribute in cash for the capital of said partnership the following sums, to-wit: Party

of the first part, $50,000; party of the second part, $50,000; party of the third part, $25,000.

"Said parties of the first and second parts hereby bind themselves each to give their entire time, skill and ability to the promotion of said business, and are to have full and entire charge of the business of said firm.

"It is mutually agreed that the parties of the first and second parts shall be credited monthly from said business, as salary, the sum of three hundred ($300) dollars, during the life of this partnership, also interest at the rate of 6 per cent. per annum on the amount of their capital; said interest to be credited semi-annually.

"It is also mutually agreed that the party of the third part shall be paid by the firm as full compensation for the use of his capital interest on same at the rate of 8 per cent. per annum, payable semi-annually, without regard to the firm's profits or losses, and the parties of the first and second parts firmly agree to protect the party of the third part to the full extent of their power and resources, against any loss of his capital.

"Any profits earned over and above the salaries and interest charges mentioned above, shall be divided equally between the party of the first part and the party of the second part, and each shall be entitled to withdraw his share at the end of each year, or to leave same to his credit, on which 6 per cent. interest shall be paid by the firm.

"It is also agreed that any losses by the firm shall be shared equally by the party of the first part and the party of the second part.

"The obligations of this agreement shall be binding upon the parties hereto for a period of three years from May 1st, 1899, and as much longer as mutually agreeable to the parties hereto, it being understood that the partnership shall terminate any time after three years, upon the giving of three months' notice in writing of such desire by any one of the three parties interested.

"If for any reason this partnership should be terminated, it is mutually agreed that after paying each party the amount of his capital, and interest due thereon, the remainder of the property and assets shall be divided equally between the party of the first part and the party of the second part.

"It is hereby further agreed that the party of the first part and the party of the second part shall not, during the term of this agreement, endorse any paper except for the purpose of the partnership nor become surety in any manner or in any sum whatsoever.

"It shall be the policy not to enter into any large or important contracts without the consent of both parties of the first and second parts, and it is also mutually agreed that the firm will not

speculate in stocks or buy or sell listed stocks for its own account.

"In WITNESS WHEREOF, we have hereunto set our hands and seals the day aforesaid.

"CHARLES E. DENISON,
"L. W. PRIOR,
"C. F. EMERY."

Plaintiff in error calls especial attention to the following features of this agreement:

First. That Emery by his own agreement is called a partner in this firm.

Second. That the words "and company" in the firm name imply that Denison and Prior were not the sole partners in the firm.

Third. That the sum advanced or contributed by Emery is denominated and treated as "capital."

Fourth. That Emery is accorded by the agreement the power of dissolution of the partnership.

Fifth. That although, as among the partners, Emery is given priority over the other two in the liquidation of the firm assets, yet a proper interpretation of their agreement gives him no such priority as against the firm's creditors, so that he has in fact risked his money as capital in the firm business in a sense different from any one merely lending money to the firm.

Sixth. The agreement by its own terms gives him a certain control over the business by reason of its limitation of salaries to be paid to Denison and Prior, a covenant inconsistent with the exclusive and sole control of the partnership business by Denison and Prior alone.

Seventh. By the agreement Emery is given some share in the profits, in the sense at least that he was interested in there being profits, so that he might not have to resort to the guaranty by the other two parties to the agreement.

On the other hand, it is evident that nearly all the incidents and criteria of a partnership are expressly excluded by the terms of the agreement itself. The mere fact that Emery himself as well as the other parties to this agreement have seen fit to denominate themselves partners does not make them such, either as to one another or as to the world. *Oliver* v. *Gray*, 4 Ark., 425; *Saylers* v. *Nixon-Jones Iron Co.*, 20 Ill. App., 509.

Indeed, it is substantially conceded that such is the law, and if it were not, authorities to that effect might be multiplied.

What, then, in the last analysis is the crucial test of the fact of partnership, where the question is, as in this case, uncomplicated by any holding out as such?

The first paragraph of the syllabus of *Harvey* v. *Childs et al,* 28 Ohio State, 318, is as follows:

"The liability of one partner for the contracts of another, when not estopped from denying the liability, is founded on the relation they sustain of being each principal and agent in the joint business. That relation is, therefore, the true test of a partnership, and the liability rests on the ground that it was incurred on the express or implied authority of the party sought to be charged."

In the opinion by Day, J., at page 321, the court says:

"Although a partnership may be said to rest upon the idea of a communion of profits, nevertheless the foundation of the liability of one partner for the acts of another, is the relation they sustain to each other, as being each principal and agent. That relation, it would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation that the joint liability was incurred on the express or implied authority of the party sought to be charged.

"But if the relation of principal and agent be regarded as the test of a partnership and consequent joint liability, the question still remains, what shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question?

"To this end numerous tests have been supposed to exist; but the best considered and least objectionable is that of a community of interest in the profits of a business or transaction as a principal or proprietor. Parsons, Partnership, 71 and note; Collyer, Partnership, Secs. 25, 44. See also Story, Partnership, Sec. 36, 38, 60; *Berthold* v. *Goldman,* 65 U. S., 124; How., 536.

"But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, can not be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who can not be said to be acting, in the particular transaction, as the agent or on behalf of the

party sought to be changed. Therefore, on principle, the true test of a partnership, at least, is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence; for when they sustained that relation, a joint liability may be said to have been incurred by the authority, or on behalf of each of the parties so related. The tendency of the more modern authorities, both English and American, is to this conclusion."

So far at least as this state is concerned, this analysis of the subject would seem to be conclusive; and the element of mutual agency seems to be expressly excluded, so far as Emery is concerned, by the terms of this agreement.

Cases may be, of course, and they are cited in abundance, in support of the proposition that a partnership may exist with any of the usual elements wanting. There are also cases where nearly all the usual elements of a partnership are wanting, and yet a partnership has been held to exist, but we find no case where all the important elements, including that of mutual agency and mutual sharing in the profits and losses are wanting, and yet the existence of a partnership is affirmed. By assuming in this case that the agreement in question *prima facie* constitutes the partnership which it purports in name to create, it is easy to show *seriatim* that the absence of the ordinary *indicia* of partnership need not be fatal to its existence as such, but if we start with the contrary assumption, it is impossible to construct a partnership out of the meager elements in this agreement on which the plaintiff relies. And the same is true if we start without any presumption whatever and merely balance the arguments pro and con.

Reliance is put upon *Hunter* v. *Newman*, 1st Nisi Prius, 307, which is affirmed in 52 Ohio State, 659, 660, and an examination of that case discloses that although the facts are not unlike those in the case before us, there is this essential difference, namely: that the contract is in terms an agreement for "a limited partnership," under Revised Statutes 3141, *et seq.*, and it is not controlling in respect of the question now under consideration.

It would unduly prolong this opinion to undertake an analysis of the great multitude of cases which bear in one way or another

upon the construction of this agreement. Suffice it to say, that we do not find in its provisions any sufficient evidence that it constituted Emery a partner in the firm of Denison, Prior & Company.

But it is urged further that though it may not be sufficient to that end, it may nevertheless suffice as a basis for the introduction in evidence of the partnership books, showing that Emery's contribution to the assets of the firm was charged to capital account, and that Emery was otherwise treated in the bookkeeping as a partner, consistently with the terms of the agreement; also that the agreement affords sufficient basis for the introduction of the published notice of dissolution, which though never brought to the plaintiff's attention, might be deemed to afford some evidence of Emery's status as a partner. We fail to find any merit in this contention. None of these items of evidence proposed to be introduced would operate with the agreement to enlarge its terms and limitations.

We hold that there is no error in the record before us, and the judgment is affirmed.

LIABILITY OF MUNICIPALITY FOR UNNECESSARY DESTRUCTION OF SHADE TREES.

Circuit Court of Tuscarawas County.

VILLAGE OF NEWCOMERSTOWN v. SHELDON DICKENSON. *

Decided, December Term, 1905.

Shade Trees—Unnecessary Destruction of, in Improving Street—Municipality Liable Therefor.

The officers of a municipality have no right to destroy shade trees growing in the street in front of the property of an abutting owner, unless their removal becomes necessary in order that the space may be used for street purposes; and an abutting owner who has been injured by the unnecessary destruction of his trees may recover damages from the municipality therefor.

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* Affirmed by the Supreme Court without opinion, *Newcomerstown* v. *Dickenson*, 77 Ohio St., 597.

McCARTY, J. (orally); DONAHUE, J., and TAGGART, J., concur.

Error to common pleas court.

This case presents simply the question as to whether the town council of the village of Newcomerstown had the right to pass a resolution and ordinance which authorized the cutting down and removal of some shade trees. Mr. Dickenson had some valuable maple shade trees in front of his lot. They were pretty near at the street, but were inside the curbing. Council caused at one time an ordinance to be passed for the removal of all trees, and without any notice to him until about the time they were commencing to cut them down, that they were to remove his trees. Well, he had three large maple trees in his lot which the street pavement went around and left inside, and the village authorties proceeded to cut them down, and the action was brought for damages for so doing. And they set up several defenses, and three or four of those defenses were demurred to, and overruled, and exceptions taken, and so the whole matter is before us on error—whether the court below did right, first, in holding that demurrer to those grounds of defense ought not to have been sustained, and second, as to whether the verdict is sustained by proper and sufficient evidence so as to entitle the plaintiff to recover.

We have carefully gone over the case, and have reached the conclusion that the town council did not have any right to cut down those shade trees, unless it was necessary to take them out for the purpose of using the ground for street purposes. Some people place more stress on shade trees than they do upon anything else. Some people nourish them and cherish them and live under them and prefer to have them allowed to remain, and they object when anybody interferes, and whenever it is unnecessary to take them away for any other purpose than for the purpose of streets, the authorities violate a property right in removing or interfering with them.

A motion was made for a new trial in this case, and also for a judgment for the two or three hundred dollars awarded as damages, but the motion for a new trial was overruled and exception taken, and the case came here on a petition in error. We find no error in this proceeding and therefore hold that the judgment should be affirmed with costs.

DESTRUCTION OF SHADE TREES IN BUILDING SIDEWALKS.

Circuit Court of Stark County.

CITY OF MASSILLON ET AL v. BENJAMIN F. HUFF.

Decided, February 19, 1910.

Shade Trees—Liability for Destruction of, in Building Sidewalk—Municipal Corporations—Damages—Streets.

A municipality and its contractors are jointly liable for damages to shade trees by contractors for a street or sidewalk improvement, where the work is done under the direction of the city engineer, and the removal or injury to the trees was unnecessary in order to make the work conform to the established grade.

George W. Kratsch and *Thomas C. Davis,* for plaintiff in error.
McCaughey & Eggert, contra.

PER CURIAM (TAGGART, DONAHUE AND VOORHEES, JJ.).

Error to common pleas court.

The action out of which this proceeding in error arises was brought in the common pleas court of this county by Benjamin F. Huff to recover from the city of Massillon and Weible & Schott, contractors, for the destruction of shade trees planted by the plaintiff in front of his premises and upon the street on which his lot abuts, between the sidewalk and the curbing; and the plaintiff avers that said shade trees so planted by him in nowise interfered with or obstructed the grading of said street in accordance with the established and reasonable grade, nor with the proper and reasonable grading of the sidewalk; but that the defendant contractors under the direction and control of the city through its engineer, wholly disregarded the plaintiff's rights, and cut and excavated the ground under the sidewalk in front of plaintiff's said lot to a great and unnecessary depth, and in so doing unnecessarily, purposely, willfully and unlawfully cut out, carried away and wholly destroyed three of plaintiff's shade trees so planted by him as aforesaid.

It was agreed in the trial of this cause that if the plaintiff was entitled to recover at all, that the value of the trees so removed was $125; so that the only question in this case is the right of the plaintiff to recover for trees upon the streets and alleys of the city in front of his property.

It is conceded by the defendant in error that if in the grading of the streets to the depth necessary to construct the curbing and sidewalk on the established grade, the trees are in the way, the city or its employes, the contractors, would have a right to remove them, and plaintiff would be without remedy.

It is contended on the other hand that the city council had absolute control of the streets, and is the only forum in which the necessity for removing the trees is to be determined.

In this case the city council by proper ordinance established a grade on the street, and under the supervision and control of its officers, the contractors, proceeded to make it conform to said grade; so that the city by its council did not determine whether there was necessity for removing these trees or not. The question for the jury was whether in the work of making the streets and sidewalks conform to said grade so established, it became necessary to destroy the trees; but whether the grade was a proper one was not a question for the jury. That is conceded.

The only question for the jury was whether the contractors and city engineer in performing the labor required by the ordinance must of necessity destroy the trees, or whether the doing of the same was an unnecessary and wanton violation of plaintiff's rights, for which he might recover.

We have no doubt but that the plaintiff has such a property interest in those shade trees planted and maintained by him on the street with the knowledge and consent of the city council that he may recover for any unnecessary injury thereto.

This court in the case of *Newcomerstown* v. *Dickenson, ante* (affirmed, without opinion, *Newcomerstown* v. *Dickerson*, 77 Ohio St., 597), so held; and the opinion of Judge McCarty in that case shows the view of the court in reference to the rights of the owner of abutting property in shade trees on the street adjacent to his premises. That case was taken to the Supreme Court of

Ohio, and affirmed; so that we think the law in this behalf is fully settled in this state.

There is also a claim made that the city is not liable for this damage, because it was accomplished by independent contractors; but the charge is made, and the proof seems to us to sustain it, that these contractors were performing the work under the direction of the city engineer, and therefore, if there was a wrong at all, it seems to us that the evidence establishes that it was the joint wrong of the city and contractors combined.

The judgment of the common pleas court is affirmed with costs, without penalty.

OCCUPATION OF STREET WITH RAILWAY TRACKS.

Circuit Court of Hamilton County.

CINCINNATI GAS COKE, COAL & MINING CO. v. BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY.

Decided, July, 1911.

Streets—Two Railway Tracks in a Street Not an Exclusive Occupation Thereof—Removal of Track from Center Toward Curb of Street.

1. The placing of two railway tracks on a street from thirty-six to forty feet in width between the curbs does not amount to a destruction of or an exclusive occupancy of the street, and injunction against such use of the street will not lie upon the petition of abutting property owners, where an action by the railway company to condemn their rights in the street is pending.
2. In the case at bar the trustees of the Cincinnati Southern Railway have ample power to move the B. & O. S. W. Railway track from the center to one side of the street in order that its own track may be laid on the other side.

The Trustees of the Cincinnati Southern Railway acting under Section 3 of the supplemental Southern Railway Act of May 4, 1869 (70 Ohio Laws, 139), resolved, in 1903, to lay a track on Front street in this city for the purpose of connecting its line

with its freight depot at Vine street, and received the assent of the board of public service, successor of the board of public works of said city, thereto. In 1910 it passed a resolution condemning the rights of the abutting property owners on said street, for the purpose of laying said track, and to that end to move a track of the Baltimore & Ohio Southwestern Railroad, which was already in the street, six feet to the southward, so that when the construction should be finished there would be two tracks in the street. The street is sixty feet wide in some places and sixty-six feet wide in others, and the roadway, from curb to curb, is thirty-six feet wide in places and forty feet wide in other places. The Baltimore & Ohio Southwestern Railroad entered into an agreement with the Trustees of the Southern Railway, consenting to the making of this alteration in the location of its track. The trustees then began a suit in the court of insolvency to condemn the rights of the abutting property owners along the street for the purposes aforesaid. The design of the trustees to change the location of the Baltimore & Ohio track appeared upon the face of the application to assess compensation. The abutting property owners then began this suit in the court of common pleas to enjoin the trustees from laying the track in Front street and from removing or altering the location of the Baltimore & Ohio Southwestern Railroad track.

It was claimed by the abutters that the placing of two tracks in the street would amount to a destruction of the street and that this was beyond the power of the trustees, and that it was also beyond the power of the trustees to change the location of the Baltimore & Ohio Southwestern track, whatever might be the rights of the trustees with regard to the Southern Railway track. The court of common pleas found that although the trustees, under the act in question, would have a right to take the whole street, its proposed use did not constitute such a taking, but that the trustees did not have a right to alter the location of the existing Baltimore & Ohio Southwestern Railroad track in the street, and granted an injunction against doing so, from which the trustees of the Cincinnati Southern Railway took an appeal to the circuit court.

Pogue & Pogue, Stricker & Johnson, Albert Bettinger, Kramer & Bettman, Healy, Ferris & McAvoy, Wm. C. McLean and *Miller Outcalt,* for plaintiff.

Edward Colston, for the Baltimore & Ohio Southwestern Railroad Company.

John W. Peck, for the Trustees of the Cincinnati Southern Railway.

SMITH, P. J.; SWING, J., AND JONES, J., concur.

The court feels that there is no need of further consideration of this cause. We are unanimous that no injunction should be granted and that the petition should be dismissed. We are of the opinion, in the first place, that the question presented here could and should be presented in the insolvency court. If that is not so, we think there is no exclusive occupancy of Front street proposed, and that the trustees have full power to proceed as they are proceeding. As to carrying out the contract between the trustees and the Baltimore & Ohio Southwestern Railroad Company, we believe that the power of the trustees is ample; that in occupying Front street by the track of the Southern Railway, the trustees have ample power to move the Baltimore & Ohio track, and further, upon the evidence, the usage proposed is not an interference with the public use of the street as would destroy such use.

RAISING A PUBLIC ROAD SUBJECT TO OVERFLOW.

Circuit Court of Fairfield County.

JOHN C. HOSHOR v. THE COUNTY COMMISSIONERS OF FAIRFIELD COUNTY, OHIO.*

Decided, January Term, 1911.

Levees—Authority of County Commissioners to Construct—Raising of the Grade of a Public Road to Prevent Overflow—Resulting Injury to Adjacent Property—Injunction Against Does Not Lie, When—Measure of Damages—Sections 6778 and 7483.

1. The raising of the grade of a public highway which is subject to overflow in times of flood, can not be enjoined by an adjacent property owner on the ground that the road was long ago improved to a definite and fixed grade and no steps have been taken by the county commissioners to appropriate the land which will be damaged thereby or to make compensation to the owner.
2. In such a case the owner of the lands damaged by the improvement has an adequate remedy at law, the damage being complete at the time the improvement is complete and measured by the difference in the value of the lands before the improvement was made and afterward.

M. A. Daugherty, for plaintiff.

VOORHEES, J.; TAGGART, J., and POWELL, J., concur.

Appeal from Common Pleas Court of Fairfield County, Ohio.

This action is brought by the plaintiff against the county commissioners of Fairfield county, Ohio, to enjoin them from making certain improvements upon a public roadway. The object of the suit is to enjoin the county commissioners from making the improvements mentioned and described in his amended petition.

To the amended petition a general demurrer was filed. The demurrer was sustained and the plaintiff not desiring to further

*Affirmed by the Supreme Court on the reasoning of the opinion of the Circuit Court, 84 Ohio St., p. —.

plead, the petition was dismissed at the cost of plaintiff; an appeal was taken and the cause comes into this court on appeal, and is heard on the demurrer to the amended petition.

It is contended by the plaintiff in support of his amended petition that the improvement contemplated by the commissioners, and which the plaintiff seeks to enjoin, is authorized by the Statute in Volume 101 of Ohio Laws, p. 139, Section 6778, which reads as follows:

"When found to be conducive to the public health, convenience or welfare, the county commisioners may cause to be located, established and constructed as hereinafter provided, a levee within the county, along or near a stream, water-course, lake or body of water, for the protection of land from overflow."

Section 7483 of the General Code provides when county commissioners shall build embankments, etc.:

"When a principal public road in a county, except a turnpike road over which tolls are collected, is subject to overflow or inundation, so as to render it at any time, unfit for public travel, or hinder free and necessary transportation, the commissioners of such county may repair or reconstruct such road by changing the beds of small streams to avoid crossing, changing roads to avoid bridges, when the public travel would be better accommodated, or build an embankment or levee sufficiently elevated above all such overflows or inundations. The expenses of such embankment, changes or levee shall be paid out of the money in the county treasury raised by taxation for road or bridge purposes."

It is under favor of this section of the General Code, Section 7483, that the proposed improvement by the county commissioners of Fairfield county was being made which plaintiff seeks to enjoin in this action. The improvement is upon a public roadway which has been in existence many years; and the improvement proposed was to elevate the roadbed above the high water mark. That is the object and purpose of the proceeding the commissioners had in contemplation in making the improvement mentioned and referred to in the plaintiff's amended petition.

On the other hand it is contended by the plaintiff that the improvement was such a one as is contemplated by Section 6778, 101 Ohio Laws, page 139.

The contention of the plaintiiff is that by making this change or embankment described in the amended petition, it will and does interfere with the flow of the waters of certain natural watercourses described in the petition and by interfering with the natural flow of said waters the lands of the plaintiff are and will be damaged, and to avoid such damage this action was brought to restrain and enjoin the commissioners from further proceeding to carry out their plans and purposes in making the improvement contemplated.

There is no question about the road referred to being a public highway. There is no question from the allegations of the petition that the road is subject to overflow at times of high waters in the streams described in the amended petition.

The contention of the plaintiff is that this public highway for sixty years at least has been improved on a level with the surface of the ground, that it was so laid out and improved; a grade was established and when so laid out and graded, and ever since, it has been subject to overflow, the overflow perhaps ranging from five feet or more in times of freshet.

The claim of the plaintiff is that the road having been thus improved with a definite and fixed grade, the county commissioners, under neither of the sections of the statute of the General Code referred to, would have the right to make this improvement, if by so doing it would do substantial damage to the plaintiff, the owner of the land, without first taking steps to appropriate the land or make provision for due compensation to the owner; and until this is done the plaintiff would have the right to proceed in a court of equity to enjoin the action of the county commissioners.

That seems to be the real controversy in this case, viz., whether this action can be maintained in a court of equity for the purpose of getting relief by injunction, the plaintiff having an adequate remedy at law.

If the action is one for injunction or equitable relief, then this demurrer should be overruled; but if the action is an action at law or one in which damages would afford the plaintiff a complete and adequate remedy then this action could not be maintained as an equitable action for injunction.

Taking the view of the case that the court does—and I wish that the court may be clearly understood in the holding that it makes under the facts alleged in the amended petition, if true—we think the plaintiff would have a right of action for damages, and there is nothing appearing in the petition indicating that such an action would not be an adequate remedy and afford the plaintiff complete relief.

This improvement is in the nature of a permanent improvement, just as much so as the building of an embankment for a railroad. The damage to the plaintiff's lands is complete when the improvement is completed. It is not a case or such an action that the injury could be abated unless the road itself could be vacated and removed.

We recognize the rule that in certain actions where the damage is not complete when the improvement is made and finished, or where the injury can be abated by removing the cause, in such case the rule of damages is different from what it would be in this case; while we do not desire to lay down an inflexible rule now as to the damages, we think it is proper for us to say, that in our judgment the rule of damages in a case like this would be the difference between the value of these lands before the improvement is made and their value afterwards; therefore, we think the rule of damages is certain and easily ascertained.

Then, the question is presented, is it such an action that the plaintiff would have an adequate remedy at law? If the flood waters of these natural water-courses are interfered with by making this improvement upon the road, thereby changing the grade—counsel for the defendants criticises the claim of plaintiff that there was or could be an established grade in this or any public highway. Perhaps it is not an established grade in the sense that an established grade is made in an incorporated vil-

lage or city; but, when a public road is laid out, established, opened and used, we think that is an establishment of a grade of said road, and if it is afterwards changed, or it becomes necessary to change it by raising its bed or lowering it, or making substantial changes in the road, and by reason thereof damage results to an adjacent land owner, he would have a right of action against the commissioners of the county. We do not agree with the contention of counsel that the damages allowed in the establishment of the road originally by the viewers in laying it out contemplates or covers all changes that may be made afterwards in that highway.

In this case when this road was laid out and established, it was on a level with the surface of the land and did not interfere with the flow of the waters of these streams in ordinary flood. There was nothing to interfere with the flow of the waters by reason of the road as established. Therefore, there was no damage resulting from that cause; but in the judgment of the commissioners they had decided that under Section 7483 of the General Code there should be a change made by filling and raising the road bed, or, in other words, a change of the grade of the road. It is a substantial change that has been made or is about to be made, raising of the roadbed from four to five feet so as to put it beyond the flood waters of these streams in ordinary flood.

Now, the claim of the plaintiff is that when this is done substantially a material injury will result to his land. First, it will destroy about three acres of land, and about one hundred acres of land will be affected seriously and materially by reason of this improvement the commissioners are contemplating. If that be true there would certainly be a right of action in the plaintiff for damages against the county if such change were made.

We think the commissioners have the right to make the improvement contemplated, and they can not be enjoined from making it; but if substantial damage result to the plaintiff and his lands by reason of that change, the county must answer to the plaintiff in damages therefor; and the fact that there were or may have been damages allowed in the original appropriation

does not interfere with the plaintiff's right to maintain this action for damages occasioned by this contemplated improvement.

The general principle, we think, is very well settled in actions of this kind—in 33 Ohio State, p. 271, where the court lays down the rule and remedy to be followed. There is nothing appearing in this case showing that the remedy at law would be a complete and adequate one. There is no allegation here that the damages would be irreparable or an action at law inadequate.

We think this question is really settled in Ohio by the 50 Ohio State, p. 628; the allegations in the amended petition bring the case within the principle there recognized.

If it were necessary for the benefit of the public to have this embankment made, when by so doing the right of the plaintiff to have the water of these streams flow in their natural course will be interfered with to his damage, the county will be liable and would be required to make him whole for whatever injury is done him by reason of the change in the grade of this road.

Reading simply from the syllabus of the case, 50 O. S., p. 628:

"Where the grade of a public road has been established and the owner of abutting land has improved the same by erecting and maintaining buildings thereon with reference to such established grade and with reasonable reference to the prospective improvement of the road and its future enjoyment by the public, and where the board of county commissioners has improved the road by changing such established grade, an action for damages will lie in favor of the owner against the board of county commissioners, where, by such change of grade, the owner's free and safe passage from the road to and from his land and buildings thereon has been obstructed or impaired."

In the case in the 50 O. S., *supra,* the injuries arose from interference with the plaintiff's ingress and egress to his premises. We do not thnk there would be any difference in principle from that case than the one at bar. By changing the grade of this road the result is or will be that the flood waters of these streams before the improvement was made did no damage to the plaintiiff's land, but since the change the plaintiff's land has

been and will continue to be materially injured by the interference of the natural flow of the flood waters of these natural water-courses.

We think there is no question but the commissioners have the right to make the change or make the improvement, but they can not do it to the injury of plaintiff without answering in damages.

When they make the change for the benefit of the public, the public or county must answer in damages to the land owner whatever that may be. This case in the 50 O. S., *supra,* we think is useful and really determines the whole question as to the law of the case here involved.

There is a further principle recognized in this case that is useful, found in the concluding portion of the opinion at page 635, and is as follows:

"But it is urged in behalf of the defendant that the petition in the case sets forth a tort and that, therefore, the action is not maintainable against the board of county commissioners in their *quasi* corporate capacity. County commissioners have power to improve any state, county or township road or any part thereof, by grading, paving, graveling, planking or macadamizing the same. Rev. Stat., Section 4829. Having exercised the power granted by statute of changing the grade of the road or highway, for the purpose of improving the same, there is no claim that the work was done in a careless manner, and no question, consequently, arises of negligence in the discharge by the defendants of their official function. In their official capacity, as the representatives of the county having improved the road for the public beenfit by changing its grade, the sole question involved, viz., that of compensation by the county to the owner of the adjacent lands, gives rise to the inquiry as to any personal wrong, neglect or default on the part of the commissioners."

The suit in the 50 O. S., *supra,* was a suit for damages, and the principle of law there recognized is in harmony with the case in 76 O. S., p. 529, and 82 O. S., 414, and as is held in 82 O. S.:

"A road supervisor and those working upon the road under his directions are, without regard to the motive which prompts

them, liable in compensatory damages for the diversion of water from its natural course casting it upon the lands of another, no right to make such diversion having been acquired by the public."

Taking the view of the law we do in this case, we think the county commissioners in making this improvement, which is, or is supposed to be, for the benefit of the public, if they have changed the established grade of this highway whereby the flood waters are thrown in a different way and manner upon the plaintiff's lands, and thereby have substantially injured the plaintiff, he has a right of action at law for damages, and we think his right of action would be an adequate one, that he would be entitled to recover the full damage that he has sustained by reason of this act of the county commissioners; although it may be necessary in the interest of the public that it should be done, yet it can not be done to the injury of the plaintiff without answering to him in damages.

Therefore, believing there is an adequate remedy at law, the demurrer to the amended petition will be sustained, and if the plaintiff does not desire further to plead, the petition will be dismissed at the cost of plaintiff. Exceptions.

PROSECUTION FOR VIOLATION OF LOCAL OPTION.

Circuit Court of Licking County.

ROBERT FOLLIARD v. STATE OF OHIO.

Decided, 1910.

Evidence—As to Payment of Special Tax to U. S. Government as a Retail Liquor Dealer—Competent in a Prosecution for Violation of Local Option Law—Bill of Rights—Competency of Exemplified Records.

1. The provision in the Bill of Rights that an accused person shall be entitled to meet the witnesses face to face, applies to parol testi-

mony only, and does not bar the introduction of public records or other instruments in writing which may become competent in the trial of a criminal case.

2. Inasmuch as the rules of the Internal Revenue Department do not permit the removal of records from the offices of the collectors, and the state is without authority to compel the production of such records, an exemplified copy of so much of said records as will show that the defendant, on trial for alleged violation of the county local option law, had paid to the United States the special tax assessed against retail liquor dealers, of necessity becomes the best evidence that can be produced of that fact, and it is not error to permit its introduction.

BY THE COURT (TAGGART, J., DONAHUE, J., and VOORHEES, J.).

The motion of plaintiff in error to file a petition in error in this court was for good cause allowed, and the petition in error was filed, and the cause submitted to the court upon the questions raised by said petition in error and the bill of exceptions taken in the trial of the case.

The first contention of the plaintiff in error is: that the court erred in permitting the state to introduce a certified copy of the record in the internal revenue department of the United States, showing that said defendant below had paid to the United States the special tax as a retail dealer in intoxicating liquors.

It is insisted that this is in volation of Section 10 of the Bill of Rights, and particularly that part of the section which provides that the accused shall be entitled to meet the witnesses face to face. But, in the opinion of the court, this section has no application whatever. That applies to the parol testimony of a witness only, and not to the introduction of public records, or other instruments of writing, which may become competent evidence in the trial of a criminal case.

Section 4364-30*v*, Revised Statutes (Section 6100, General Code), provides that the payment of such special tax shall be held to be *prima facie* evidence that the person or persons paying the same are violating the law prohibiting the sale of intoxicating liquors as a beverage.

This same question is raised in other cases submitted to this court at this term, and what we have to say upon the subject will

be stated in this opinion, and not repeated in the opinions of the other cases.

In some of the cases it is insisted that this is made competent evidence in civil cases only. Those are the terms of Section 4364-15, Revised Statutes (Section 6092, General Code), but Section 4364-30*y* also expressly provides that the payment of such tax is competent evidence in a prosecution for the violation of the liquor laws.

It is insisted, however, that the original record itself must be introduced in evidence and that a certified copy thereof is not competent evidence. In answer to that contention it is sufficient to say that the best evidence of which a case in its nature is susceptible must be introduced This rule applies to criminal as well as civil cases. In fact the general rule as to competent evidence in criminal cases is not different from that in civil cases, except as to the constitutional provision contained in Section 10 of the Bill of Rights and such other differences as are expressly provided for by statute. Otherwise evidence that is competent in civil cases is equally competent in criminal cases.

Under the rules and regulations of the internal revenue department of the United States these records are not permitted to be taken from the office of the collector, and the state has no authority to control the policy of the general government in that respect. Therefore the best evidence that can be obtained touching the matters and things contained in this record is, of necessity, an exemplification of that record.

By Section 5245 of the Revised Statutes (Section 11500, General Code), it is specially provided that copies of any books, maps, records, papers or documents on file or deposited in any of the executive departments of the United States Government, authenticated under the seal of such department, shall be competent evidence and have the same force and effect as the originals would if produced.

To the same effect is Section 906 of the United States Statutes.

Therefore in view of this provision of the law and in view of the fact that this is not the parol evidence of a witness, the introduction of this certified copy of the record was and is author-

ized by the statute and is not in violation of the Constitution of the state, and the court was not in error in admitting it in evidence.

The next contention of the plaintiff in error is, that the evidence offered by the state does not sustain the conviction, or that the finding of the court is against the manifest weight of the evidence.

It is true that there is a serious conflict of evidence in this case, but under the statute to which we have just called attention the proof of the payment of this special tax makes a *prima facie* case, and coupled with that is the positive evidence of a witness who testifies that he bought intoxicating liquors from the accused at the time and place mentioned in the affidavit. True this witness is a detective and there are some things in connection with his cross-examination which affect his credibility, but from the whole record this court can not say that the finding of the trial court is so manifestly against the weight of the evidence as to require a reversal for that reason.

Therefore the judgment of the common pleas court is affirmed and the cause is remanded for execution.

CARE AT A PUBLIC CROSSING.

Circuit Court of Morrow County.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY v. JAMES CORNWALL.

Decided, July 10, 1911.

Negligence—Wagon and Team of Horses Injured at a Railroad Crossing—Crossing and Adjacent Tracks Obscured by Smoke of Passing Train Which Was Immediately Followed by Another Train Backing Over Crossing—Contributory Negligence—Burden of Proof—Error of Court in Refusing to Direct Verdict for Railway Company.

1. Where a person, in a wagon drawn by a team of horses, approaching a railroad crossing on a public highway, stops upon hearing the whistle of an approaching train, and, after such train passes over said crossing, which leaves said crossing and the adjacent tracks of the railroad obscured by smoke, immediately drives upon said crossing, without waiting for such smoke to disappear that he might have an unobstructed vision, and without taking other precautionary steps in the exercise of ordinary care to avoid danger, and his wagon and team of horses are injured in a collision with another train passing over said crossing, immediately after said first train, has passed over said crossing, is negligence, and will defeat a recovery for such injury to which such negligence contributed.
2. Where the danger at a railroad crossing is increased by a volume of smoke upon such crossing, or other conditions obstructing the vision, greater care and caution are imposed upon one about to pass over such crossing.
3. It is error upon the part of the trial court to refuse to sustain a motion, at the conclusion of plaintiff's evidence, to direct a verdict for the defendant, in a collision case at a railroad crossing on a public highway, where the testimony of the plaintiff raises a clear presumption of negligence on his part which directly contributed to the injury of his property, in the absence of any tangible proof given tending to rebut such presumption.
4. In an action for damages for alleged negligence, where the defense of contributory negligence is interposed, it is error upon the part of the trial court to instruct the jury that "the burden of proof is upon the plaintiff of proving the negligence of the defendant as charged in the petition, and the burden is upon the defendant to make out the evidence of contributory negligence by the plaintiff's servant or agent," without the further instruction that if plaintiff's

own testimony in support of his cause of action raises a presumption of such contributory negligence, the burden rests upon him to remove that presumption.

Cummings, McBride & Wolfe, C. H. Wood and Benjamin Olds, for plaintiff in error.

T. B. Mateer, contra.

SHIELDS, J.; VOORHEES, J., and CROW, J., concur.

This proceeding in error is prosecuted in this court to reverse the judgment of the Court of Common Pleas of Morrow County, Ohio, wherein the plaintiff in error, defendant below, recovered a judgment against the defendant in error, plaintiff below.

The defendant in error brought suit in the court below to recover damages against the plaintiff in error for its alleged negligence and carelessness in destroying a certain vehicle and harness, and so crippling his team of mules that it became necessary to kill one of said mules belonging to the defendant in error. The amended petition, in substance, recites that said railway company is an Ohio corporation, that at the time hereinafter named it operated a line of railway between Cleveland, Ohio, and Cincinnati, Ohio, running through said Morrow county, Ohio, and that said railway crossed a public road in said Morrow county, in Gilead township, known as the Brocklesby crossing, which was used by the public in traveling on foot and in vehicles.

"That on the 20th day of January, A. D. 1909, between the hours of nine o'clock and ten o'clock A. M., one Ray Cornwall was traveling in a westerly direction along said public road in a covered vehicle drawn by a team of mules, and while in the act of crossing the defendant's railroad tracks the defendant caused one of its locomotives and train of cars to approach said crossing and pass over the tracks of said railroad, and negligently and carelessly omitted while so approaching said crossing to give any signal by bell, whistle, or otherwise, and by reason thereof the said Ray Cornwall was unaware of its approach.

"Plaintiff further says that said locomotive and train, consisting of four cars and one caboose, as run by said defendant, was not properly equipped with power brakes, used and operated by the engineer of said train, as required by statute, all of which was unknown to the said Ray Cornwall and this plaintiff.

"Plaintiff further says that by reason of the negligence of the said defendant in not sounding the whistle or ringing the bell in approaching said crossing, and in running said train without

properly equipping the same with power brakes and without any fault or negligence of the said Ray Cornwall, the said locomotive struck said vehicle and team of mules and utterly destroyed said vehicle and harness and crippled said mules to such an extent that it was necessary for the humane officer of Morrow county, acting upon the request of the defendant, to kill one of said mules, and all without fault or negligence whatever on the part of the plaintiff, his agent, or servant. That said vehicle, harness and team were the property of the plaintiff, and said mule which was killed, together with the harness and wagon which were injured, were of the value of $200.00.

"That the said Ray Cornwall before driving upon said crossing had waited for a freight train to pass said crossing and immediately drove upon said tracks before the smoke of said freight train had cleared away, when the train causing the damage to this plaintiff, consisting of a locomotive, running backward and pulling four cars and a caboose, and known as the 'water train,' and in close proximity to said freight train, approached said crossing with great speed, and the said defendant negligently and carelessly neglected to either ring the bell or blow the whistle in order to warn the said Ray Cornwall of the approach of said water train, and that by reason thereof the said Ray Cornwall was unaware of the approach of said train, whereby this plaintiff sustained a loss of his vehicle, harness and one mule, all of the value of $200.00."

Then follows an allegation that the plaintiff lost the use of his mule and vehicle for a period of three months and was out of employment for said period of time and that by reason thereof he sustained the further loss of $120.00, for which sum, with the injury to the vehicle and harness and the loss of his mule, he asks a judgment for the sum of $320.00 against said railway company, with interest thereon from the date of said accident.

To this amended petition the defendant railway company answers, admitting its corporate character, that it operated a line of railway from Cleveland, Ohio, through said Morrow county to Cincinnati, Ohio, and that said railway crossed a road in said county, known as the Brocklesby crossing. It further alleges that it is ignorant as to any injury to plaintiff's vehicle, harness and mule, and denies the same, and denies the loss of employment by reason of said alleged injury, and denies that said property and loss of employment are of the value alleged. It denies that it carelessly and negligently run and operated its said train as alleged, and it denies that it was guilty of any fault, carelessness

and negligence whatever that in any way contributed to any injury to the plaintiff or to his property.

For a further defense the defendant alleges that the injury to the plaintiff or to his property, if there was any, was caused by the fault, carelessness and negligence of the plaintiff himself, his agents or servants. In short, the answer is a general denial of the negligence charged, and charges contributory negligence upon the part of the plaintiff.

To this answer the plaintiff filed a reply denying that the injury complained of was caused by the fault, carelessness and negligence of the plaintiff, his agent or servant. In short, he denies all contributory negligence.

With the issues thus made up between the parties, trial was had, and at the close of the plaintiff's testimony, the defendant, through his counsel, made a motion that the court instruct the jury to return a verdict for the defendant, which motion was overruled by the court, to which ruling of the court the defendant excepted. Thereupon said cause was further submitted to the jury and a verdict was returned by the jury in favor of the plaintiff. A motion was duly filed for a new trial which was overruled by the court and judgment entered upon said verdict.

Thereupon a bill of exceptions was prepared and signed, and a petition in error filed in this court to reverse the judgment of said court of common pleas. While several grounds of error are assigned in said petition in error for said reversal, counsel for plaintiff in error in their argument to this court rely mainly on two of said grounds of error, namely, that the court erred in refusing to sustain the motion of the plaintiff in error, defendant below, to direct a verdict in its favor upon the conclusion of the testimony of the defendant in error, plaintiff below, and that the court erred in its instructions to the jury as to the burden of proof in the case.

The testimony in the case tends to show that the plaintiff at the date named in the petition was the owner of the property injured. That between nine and ten o'clock A. M., on said date. Ray Cornwall, a son of the plaintiy, then aged fifteen years, was driving a team of mules attached to a wagon, covered with canvas in front, over a milk route for his father, and in making said route drove over the Brocklesby crossing, going eastwardly, just before the accident, to a farmer's house near to said crossing to

get a can of milk, and after getting the milk he started westwardly, driving back on the same road, until he says he heard the whistle of a locomotive attached to a freight train on the defendant's railway, going southwardly, when he stopped his team and wagon within a hundred feet of the track, and after the freight train went over the crossing it left a volume of smoke on the track, at and near the crossing and up as far as the whistling post some eighty rods north of the crossing, which smoke owing to the foggy condition of the weather "held close to the ground near the track." After the freight train passed over the crossing said witness testifies that he immediately started to go over and was on the crossing with the team and wagon when they were struck by what is known as the "water train," which backed down from the direction of said whistling post, without giving any signal, resulting in the injury complained of.

On direct examination (page 4 of the record) he testifies as follows:

"Q. Now tell the jury what happened when you come to the railway crossing there, what you done as to driving upon the railroad of the Big Four at the Brocklesby crossing? A. When I came to the railroad crossing I saw a freight coming and I stopped and waited until it went across and then I started right up just as soon as it got across, and I could not see the other train for smoke of the first one, and I pulled right on the track and when I got on the track why Mrs. Fields hollered and I raised up and looked and there was the other train right onto me."

On page 5 of the record:

"Q. State if there was anything obscured your view from the north? A. The smoke of the freight train for one thing.

"Q. Anything else? A. There wasn't much of anything else except the smoke of this first train.

"Q. How long had you been driving on the milk route? A. Abourt a year, put it all together."

On cross-examination (page 8 of the record):

"Q. You passed over that track very frequently? A. Yes, sir.

"Q. Now what do you say the condition of the weather was that morning? A. It was kind of foggy that morning.

"Q. And after the train went by did the smoke clear immediately away? A. Well, kind of rolled back of the train.

"Q. It was a foggy morning you say, and the smoke held close to the ground near the track? A. Yes, sir.

"Q. And how far back of the train did that condition occur, this smoke? A. Oh, just quite a ways.

"Q. And was the smoke on the crossing there yet when you drove up on it? Had it cleared away, or was it yet smoky there? A. A little smoky, but not so much when I drove up on the track. it kept rolling back.

"Q. After you drove on the track it began to get a little smoky and still the smoke came on as you got on the track, is that the way I understand you? A. I seen the smoke when I drove on the track, yes."

On pages 11 and 12 of the record:

"Q. Now when you come right up close to the track, Ray, how far can you see up the track? A. You can see quite a ways up the track.

"Q. See to St. James? A. Very nearly, see the smoke of St. James when you get right on the track.

"Q. Is the track straight or otherwise? A. It is straight.

"Q. It is a straight track from the crossing up to St. James, isn't it? A. I think so.

"Q. When you get up to the track, you can see just as far as your eye will carry you, isn't that a fact? A. Yes.

"Q. How soon after this first train had passed did you drive on the track? A. Just as soon as it had passed I started up and drove right on the track.

"Q. You didn't think another train was coming? A. No; I had no idea of another train coming.

"Q. You thought when that train had gone by, that's all there was of it, you could drive right across, and that's what you attempted to do? A. Yes.

"Q. Just as soon as that train went by you just started your mules and went right across the track? A. Yes.

"Q. Without attempting to see if there was another train coming? A. I looked up the track but I didn't suppose another train was coming though.

"Q. Why did you look up the track? A. I don't know what drawed my attention up that way.

"Q. You just happened to look up there? A. Yes.

"Q. You didn't look up to see if a train was coming? A. Not particular.

"Q. Did you listen to hear if there was another train coming? A. No, sir; just as soon as the other train passed I pulled up.

"Q. You just took it for granted that another train wasn't coming and drove right up on the railroad? A. Yes."

Testimony was given upon the trial below, tending to support the allegations in the amended petition that no statutory signals were given by the locomotive attached to the water train as it approached the crossing, and that it was not properly equipped with power brakes, although it does appear in testimony that two or more "short blasts" were given by said locomotive when said train was within a few feet from said crossing, not at such distance from the crossing, however, as the statute requires, the necessity of which, for the protection of the traveling public, becomes apparent in a case of a backing train upon and over a public crossing, but the omission to give such signals would not relieve the witness from the necessity of exercising ordinary care, for the protection of himself and his property, when about to go over this crossing, nor would the omission of the railway company to *properly* equip its cars with air-brakes, excuse such care, unless it be made to appear that such omission produced the injury complained of. But aside from the alleged negligence of the railway company in the respects complained of, does the evidence introduced upon the trial show such contributory negligence upon the part of the witness, Ray Cornwall, who was in charge of the property of the defendant in error at the crossing on the day mentioned, as to have warranted the court in sustaining the motion of the plaintiff in error, made at the close of the evidence of the defendant in error, to direct a verdict for the plaintiff in error? It appears by the evidence that said witness was familiar with said crossing, that the track of the said railway was unobstructed and could be seen for a long distance north of said crossing, perhaps twenty-five hundred feet, and except for the smoke emitted by the locomotive attached to the passing freight train, the approach of the water train could easily have been seen for a long distance north of said crossing. A person approaching a steam railroad crossing, which is a known place of danger, is presumed to exercise his or her faculties of sight and hearing—to look for the purpose and with the intent of seeing, and to listen for the purpose and with the intent of hearing the approach of trains. True, the witness says that he stopped his mules and vehicle on hearing the whistle of the locomotive attached to the freight train until it passed over the crossing, but did the duty of exercising ordinary

care then cease? Was he then relieved of further watchfulness? The railway company had the right-of-way over its tracks and had the right to run as many trains as its business called for, hence the duty of stopping, looking and listening was a continuing duty of the witness, not only until he approached, but until he passed over the crossing, and failing to do this, and the property of the defendant in error having thereby been injured, it was negligence on his part by which his right of recovery would be defeated. Among other things, the witness testified on cross-examination, that after the freight train had passed he didn't look *to see if a train was coming,* nor did he listen to hear if there was another train coming, but proceeded to go over the crossing as soon as the freight train passed. Under this testimony, the conclusion is clear that the witness failed in exercising the precaution necessary to authorize a recovery. He testifies that he could not see the water train approach because of the smoke left on the track by the passing freight train. If this is true, it only imposed upon him greater care and caution before attempting to drive upon the crossing. *Railroad Co.* v. *Kistler*, 66 O. S., 326-344; *The Penna. Co.* v. *Morel,* 40 O. S., 388.

Again, in the case of *The Baltimore & Ohio Railroad Company* v. *McClellan, Admrx.,* reported in the 69 Ohio State, at page 142, it is held by our Supreme Court that:

"1. The rule that a person in full possession of his senses of sight and hearing should exercise them to protect himself from danger when about to cross a known track of a steam railroad at a street crossing, applies to a condition where the atmosphere is more or less clouded by steam and smoke, and it is negligence on his part which will defeat a recovery for injuries received from a passing train, to undertake to cross without waiting for the atmosphere to clear so that his vision may be unobstructed, or taking other adequate means to ascertain the presence of danger.

"2. Where the testimony of the plaintiff raises a clear presumption of negligence on his part which directly contributed to his injury, but no testimony is offered by him tending to rebut that presumption, it is the duty of the trial court to sustain a motion by the defendant made at the conclusion of plaintiff's evidence to direct a verdict, and a refusal to sustain such motion is error."

In the case at bar the undisputed facts are that the witness drove upon the crossing without looking or listening for a train,

and it is held in the case of *The Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co.* v. *Edgar H. Elliott,* reported in the 28 Ohio State, at page 340 that:

"1. The omission to ring the bell or sound the whistle at public crossings is not of itself sufficient ground to authorize a recovery, if the party, notwithstanding such omission, might, by the exercise of ordinary care, have avoided the accident.

"2. What is such contributory negligence as will defeat a recovery is usually a question of mixed law and fact, to be determined by the jury from all the circumstances of the case and under proper instructions from the court, but where the undisputed facts show that by the exercise of ordinary care a party might have avoided injury, he can not recover."

The evidence submitted upon the part of the defendant in error, plaintiff below, being undisputed and without conflict on the main and vital issues involved, we are of the opinion that the motion to direct a verdict for the plaintiff in error, defendant below, should have been sustained.

Exceptions are taken to the charge of the court to the jury in respect to the burden of proof. On page 65 of the record the court instructed the jury as follows:

"The burden of proof is upon the plaintiff, as I charged you, of proving the negligence of the defendant as charged in the petition, and the burden is upon the defendant to make out the evidence of contributory negligence by the plaintiff's servant or agent."

The charge in this respect, in our judgment, was not a full and correct statement of the law in this case. True, the burden of proving the negligence of the defendant was upon the plaintiff, but where the plaintiff's own testimony raises a presumption of contributory negligence, the burden rests upon him to prove it. In the case of *The Baltimore & Ohio Railroad Co.* v. *Thomas Whitacre,* reported in the 35 Ohio State, at page 627, it is held by our Supreme Court that:

"If plaintiff's own testimony in support of his cause of action raises a presumption of such contributory negligence, the burden rests upon him to remove that presumption."

Other authorities might likewise be cited to the same effect, so that we think the jury was entitled to the further instruction that

if the plaintiff's own testimony raised a presumption of contributory negligence the burden was on him to remove it, and failing to give such instruction we think there was prejudicial error to the legal rights of the plaintiff in error.

Further exceptions are taken to the charge of the court in respect to the burden of proof, as the same appears on page 67 of the record, where the court instructed the jury "that if it appears in your judgment that the probabilities are in favor of the truth of such fact or circumstance, then such fact or circumstance is said to be proved by a preponderance of the evidence, and you should so find, although you are not satisfied or convinced of the truth of such fact or circumstance." This instruction we think is open to objection as not containing a correct statement of the law, and we, therefore, hold it to be prejudicial to the rights of the plaintiff in error.

Other questions are made upon the record, but counsel were content to argue and rely upon the foregoing grounds of error, and we, therefore, do not deem it necessary to pass upon them in view of our conclusions reached in respect to the motion to direct a verdict and as to the burden of proof.

The judgment of the court of common pleas will be reversed and said cause remanded to that court for further proceedings according to law. Exceptions noted.

IMPROPER VERIFICATION.

Circuit Court of Hamilton County.

BANTZ, GUARDIAN, v. ROVER ET AL.

Decided, January, 1911.

Verification of Pleadings—Proper Procedure upon Discovery of—Construction of Will in Action for Partition and an Accounting.

Failure to properly verify an answer and cross-petition should be cured by amendment, and the dismissal of such a pleading because not properly verified constitutes reversible error.

W. M. Tugman, for plaintiff in error.
Chas. M. Cist, contra.

SWING, J.; GIFFEN, P. J., and SMITH, J., concur.

We think it was error in the court to dismiss the answer and

cross-petition of Adam Bantz on the ground that the "answer and cross-petition is not verified by the signature of the attorney and does not show the name or seal of the notary public before whom it purports to have been signed by Adam Bantz." Under Section 5114, Revised Statutes, the court should have permitted the pleading to have been amended. 70 O. S., 88.

We are further of the opinion that the court should have sustained the demurrer to the original petition. But as no error is prosecuted to this judgment, this court can take no action in regard to it.

The original action was evidently brought under Section 6202, Revised Statutes, and asked for the construction of the will of Herman Rudolph Rover and for an accounting. Adam Bantz, as guardian of Hedwig Bantz, was not entitled to bring such an action. He had no trust to administer under said will and therefore could not maintain such an action (19 O. S., 468; 29 O. S., 147). But in an action for partition and for an accounting between the parties the will could be construed and the rights of all the parties could be adjusted. 19 O. S., 51; 33 O. S., 128; 39 O. S., 590.

Judgment reversed and cause remanded for further proceedings.

BASIS OF ADDITIONAL COMPENSATION TO COMMON PLEAS JUDGES.

Circuit Court of Morrow County.

THE STATE OF OHIO, EX REL EDWIN MANSFIELD, V. CLIFTON SIPES, AUDITOR OF MORROW COUNTY.

Decided, June, 1911.

Salaries of Common Pleas Judges—Statutory Regulation Based Upon Population Because Litigation is in Proportion to Population—Regard May Be Had for Consideration of Injustice in Construing a Statute which is Ambiguous—Sections 1284a, Revised Statutes, and 2252, General Code.

A judge of the court of common pleas in a judicial subdivision containing more than one county, whose term of office began before the adoption of the present code, is entitled under Section 1284a, Revised Statutes, to extra compensation calculated on the basis of the

population of the subdivision, rather than on the basis of the population of the county where he happens to reside.

Edwin Mansfield, for relator.

J. C. Williamson, Prosecuting Attorney, contra.

VOORHEES, J.; SHIELDS, J., concurs; CROW, J., dissents.

The relator, Edwin Mansfield, represents to this court that on the 6th of November, 1906, he was elected judge of the court of common pleas in and for the second subdivision of the sixth judicial district of the state of Ohio, for the term of six years from the 9th day of February, 1907; and that he duly qualified and entered upon his duties as such judge and has ever since said date and now is one of the judges of the court of common pleas of said subdivision and district.

That the defendant, Clifton Sipes, is now and at the time of the grievance hereinafter recited was the duly elected, qualified and acting auditor of the county of Morrow and state of Ohio.

That said second subdivision of said judicial district at the time of relator's election and qualification as such judge, as aforesaid, was and now is composed of the following counties in said state of Ohio, to-wit: Ashland, Richland and Morrow.

That said counties by the last federal census preceding the election and qualification of relator, to-wit, the census of 1900, had the following population, to-wit: Ashland county, 21,184; Richland county, 44,289; Morrow county, 17,879; total, 83,352.

That said relator at the time of his election and qualification as aforesaid, was and now is a resident of said Richland county. At the time of relator's election and qualification as such judge the statutes of Ohio then in force, Section 1284, Revised Statutes, fixed the salary of common pleas judges each at three thousand dollars. Section 1284*a* provided that each judge of the court of common pleas shall receive in addition to the salary allowed by Section 1284, Revised Statutes, as annual salary, equal to sixteen dollars per thousand for each one thousand population of the county in which he resided at the time of his election or appointment, as ascertained by the federal census next preceding his assuming the duties of his office, payable quarterly out of the treasury of the county of which he is a resident as aforesaid, if

said county is a separate judicial subdivision, upon the warrant of the county auditor of said county, or if he resides in a judicial subdivision comprising more than one county, out of the treasuries of the several counties comprising said judicial subdivision, in proportion to the population of the several counties of said judicial subdivision, ascertained as aforesaid upon the warrant of the county auditor of said counties.

That on the 9th day of November, 1910, there was due to your relator, as judge of said court of common pleas in and for said subdivision from the county of Morrow the sum of sixty-eight dollars, for the quarter ending on said 9th day of November, 1910; that your relator has made a demand upon said defendant for said sum of sixty-eight dollars for the payment of the same, but the defendant has neglected and refused to issue his warrant to your relator in payment of the same.

Whereupon your relator prays that a writ of mandamus commanding the said auditor of Morrow county to issue a voucher to relator for said sum of sixty-eight dollars and interest from November 9th, 1910, and commanding said Clifton Sipes, the auditor aforesaid, to deliver his warrant on the treasurer of Morrow county in favor of relator for said amount.

The prosecuting attorney of said Morrow county demurred to said petition on the ground that the petition does not state facts sufficient to constitute a cause of action.

The cause was submitted to this court at its May term, 1911, upon the petition and the demurrer thereto.

A solution of this question involves a construction and interpretation of the sections of the statutes referred to, being Sections 1284 and 1284*a*, the terms of which are substantially set forth in the petition. Although the section of Revised Statutes, 1284*a*, has been changed somewhat in its language, form and punctuation by the General Code, Section 2252, it does not materially affect the question we have here, as the relator's term of office began before the adoption of the code, but it may be useful, as reflecting the legislative intent, to notice Section 2252 of the General Code. It will be observed that the section last named is logically divisible into two parts, the first making provision for the additional salary of common pleas judges where the county of his residence comprises an entire subdivision of a dis-

trict; the second where the county of his residence is one of two or more counties comprising a subdivision.

The statute provides that each judge shall receive an annual salary equal to sixteen dollars for each one thousand population of the county in which he resided when elected or appointed, if in a separate judicial subdivision.

In the latter clause it provides that if he resides in a judicial subdivision comprising more than one county such salary shall be paid from the treasuries of the several counties of the subdivision in proportion to such population thereof.

Where the subdivision comprises but a single county the statute has specifically fixed the basis of the judge's salary at sixteen dollars per thousand inhabitants. Where the subdivision comprises more than one county the statute is silent as to the basis of the salary, providing only for division of the same proportionately among the counties; hence the basis for fixing the salary is left to the intendment of the statute.

In fixing the salary in the former case, the Legislature has chosen the population of the county as the equitable basis, on the theory that the more people in the subdivision the more labor would be required. Hence, in fixing the salary for the latter class, the rational deduction would be that the population of the subdivision would be the proper basis.

This basis of fixing salaries in the second class of subdivisions gives to all the judges in a subdivision (who are supposed to apportion the work equitably between them), the same salary and follows the distinction made by the Legislature between populous and sparsely settled subdivisions.

There are certain facts, circumstances and conditions concerning the work and compensation of the common pleas judges in the state, and the various judicial subdivisions that courts should and can of right take judicial notice of in considering a question of construction such as we have here. It may be assumed that:

The amount of labor of common pleas judges is in proportion to the population of the counties or subdivisions of the district over which the judges have jurisdiction, and that the amount of litigation bears a reasonable proportion to the population of

the county or subdivision in which the judge resides. This fact furnished a reason for the statute creating the difference in the amount of compensation of common pleas judges.

It is also judicially known that the population of the counties composing a judicial subdivision are not always equal, and the judge of the common pleas court is not exclusively a judge in the county where he may reside. He is a judge for the whole district, for that matter, and by Section 648, Revised Statutes, the work of the district shall be divided and apportioned among the judges as nearly equal as practicable. As heretofore observed, judicial districts of the state and the subdivisions therein are not all equal in population or in the volume of business to be transacted, or that is expected to come before the court. A judge of a district or subdivision is subject to be assigned, or may be required to hold court in any county in the subdivision or district.

Now, that being so, is it, or would it be fair, just or reasonable that a judge residing in a small county should be required to serve in a county in his district or subdivision where the volume of business is much larger and requires more time in the discharge thereof, than in his own county? Yet when the state comes to pay him, his compensation is to be measured by the population of his county, while his more fortunate associates who reside in the more populous county, who are not required or expected to do any more work than he does, receives several hundred dollars more compensation.

It may be urged in answer to this unjust interpretation of the law that it is an argument that should be addressed to the Legislature and not to the court. That is doubtless true as an abstract legal proposition, as it is the province of courts to simply construe and enforce, but not to make a statute. Considerations of injustice, inconvenience and absurdity must be addressed to the Legislature, and if the legislative intent is clear it must prevail; but where it is ambiguous and susceptible of two constructions the courts will give that construction which best comports with principles of reason, justice and convenience.

Now, we know from experience and from the history of the practice in the state, under this statute, that in many subdivisions and districts the practice is to compute the extra compensa-

tion of the common pleas judges on the basis of the population of the subdivision and not the county where the judge may reside. This being true, it shows that this statute is not clear in its terms and the legislative intent is subject to two constructions; therefore the courts should give the statute that construction which best comports with the principles of reason and justice. It is presumed that the Legislature intended the law to operate justly.

It may be urged that the construction that has been given in some of the subdivisions as to the interpretation of the statute as to the population of a subdivision being the basis of the extra compensation rather than the county where the judge resides, is not binding on this court, yet it is strongly persuasive, especially when it seems so manifestly just that such construction should be considered as the legislative intent.

Therefore, we hold that the relator is entitled to have a writ of mandamus issued in this case as prayed for in his petition.

The principle and rule of construction contended for in this opinion finds support in many decisions of the Supreme Court of the United States, as shown by Enc. of U. S. Sup. C. Rep., Vol. 11, p. 151, subdivision 11, and authorities cited in notes 97, 98 and 99; as well as the Supreme Court of our own state. Among the latter may be cited, *Moore* v. *Given,* 39 O. S., 661; 1 O. S., p. 365; 31 O. S., p. 285, and cases outside of our state cited in the opinion of 39 O. S., *supra,* at page 658.

The demurrer to the petition in this case is overruled and the writ of mandamus ordered to be issued as aforesaid. Exceptions.

DAMAGES ON ACCOUNT OF THE FREEZING OF APPLES IN TRANSIT.

Circuit Court of Hamilton County.

THE LOUISVILLE & CINCINNATI PACKET COMPANY v. J. W. LONG.

Decided, August 5, 1911.

Carriers—Negligence in Permitting Apples to Freeze While in Transit—Acts of God Can Not be Interposed as a Defense When Not Pleaded.

1. The introduction into a charge to the jury of acts of God as a matter of defense, when no such defense had been pleaded, constitutes error, but in the case of a carrier sued for the value of a shipment of apples frozen in transit the error was prejudicial to the plaintiff rather than the defendant and therefore not ground for reversing the judgment on the application of the defendant.
2. The freezing of a shipment of apples while in transit is not due to any inherent nature of the fruit which could not be guarded against, but to the negligence of the carrier.

Stephens, Lincoln & Stephens, for plaintiff in error.
Charles Broadwell, contra.

JONES, J.; SMITH, P. J., and SWING, J., concur.

The petition filed in the common pleas court by defendant in error, alleges that, "on the 12th day of December, 1904, at Louisville, Kentucky, plaintiff delivered to the defendant, in good order, certain goods, the property of the plaintiff, to-wit: 102 barrels of apples of the value of $230, and in consideration of $31.15 paid by plaintiff to the defendant, the defendant agreed to carry said goods from Louisville to Cincinnati and there deliver said goods to plaintiff in good condition. The plaintiff did not safely carry and deliver said goods in accordance with said agreement, but so negligently and carelessly conducted itself in that behalf that said goods were wholly lost to plaintiff to his damage in the sum of $230."

The damage as disclosed by the evidence consisted in the freezing of the apples while in transit.

To this petition defendant below (plaintiff in error here) filed its answer, admiting that it received certain goods on the 12th day of December, 1904, at Louisville, Kentucky, to-wit, 102 barrels of apples, and agreed to carry the said goods to Cincinnati, Ohio, and denied each and every other allegation of the petition. For further answer, defendant says:

"That said shipment of apples was made at New Amsterdam, Indiana, December 1, 1904, under a bill of lading, which provided that the said 102 barrels of apples would be delivered at Cincinnati, Ohio, without unnecessary delay, the danger of navigation, fire, explosions, mobs, riots, insurrection, bridges and all other known and unknown restrictions or accidents excepted, unto the consignee, with privilege of lightering, storing, towing, re-shipping and changing carrier. * * * That said apples were carried in an open barge from New Amsterdam to Louisville for a period of about twelve days, and were not delivered to or re-shipped upon the defendant's boat under said bill of lading until the 12th day of December, 1904, and defendant believes and alleges that if said apples were frozen they were frozen upon said open barge and before delivery to this defendant."

For further defense, this defendant says, "that if said apples were frozen while in its possession, which it denies, said freezing was caused by the inherent nature of the goods carried and the unusual condition of the weather and without any negligence on the part of this defendant whatsoever." The defendant also says for further defense "that immediately upon the arrival of said goods at Cincinnati December 13, 1904, it notified the plaintiff, but that the plaintiff failed to remove said goods within a reasonable time under the circumstances, and that if said goods were frozen while on the wharf boat of the defendant, which this defendant denies, said accident was caused by the negligence of the plaintiff in failing to remove said goods promptly."

The case went to trial before a jury upon these issues. It will be seen that the plaintiff charged the loss of the goods wholly on account of the negligence of the defendant. The defendant on the other hand denied that the goods were damaged, and further answering, said that if frozen, they were not frozen through any negligence on its part; that said freezing occurred either on the open barge between New Amsterdam and Louisville and before delivery to it, or they were frozen after being unloaded and placed

upon the wharfboat in Cincinnati, owing to the negligence of the plaintiff in not removing them within a reasonable time.

The other defense is as to the nature of the goods and the unusual condition of the weather at that time and needs no further re-statement. The case went to the trial upon these issues which were clearly set out in the pleadings and upon the issues as made in the pleadings and the law applicable thereto.

We find no error except in the charge of the court. Plaintiff in error complains of the following language in the general charge of the court, which is also contained in substance in a special charge given "nothing would excuse the carrier for failure to safely deliver the goods committed to its charge for transportation, except the acts of God and the public enemy."

We are of the opinion that it was error in the trial court to inject into the charge a defense not made in the pleadings. It will be seen that nowhere in the answer does the defendant below seek to defend on the ground that the freezing of this cargo of apples was the act of God. This being the case it must be conceded that it was error for the court to refer to such a defense, but after careful consideration, we fail to see how this could have been prejudicial to the defendant. If it had any influence upon the minds of the jury, it certainly must have been such as would lead them to believe that the court took the view that the freezing of the apples may have been occasioned by the act of God for which the defendant would not be liable, and thus a great burden was placed upon plaintiff.

In all other respects we find that this case was tried upon the issues and that the charge of the court upon the doctrine of negligence was correct. It may be that the reference to the act of God in the charge was caused by something said during the arguments of the counsel to the jury; but however that may be, the doctrine had no place in this case. The freezing of fruit in this latitude in the month of December must be attributable to the negligence of man, rather than to the act of the Almighty.

The plaintiff in error also contends that this judgment should be reversed because the evidence shows conclusively that the freezing of the apples was due to their inherent nature and could not be guarded against. The question as to whether the carrier

exercised the proper degree of care to protect the fruit after arriving in Cincinnati was fully presented to the jury; also as to whether the consignee had exercised due care in removing the apples from the wharfboat within a reasonable time. These questions were fully presented by the evidence and the charge of the court and the jury found in favor of the plaintiff. We can not disturb this verdict. It is an inherent quality of apples, and indeed all kinds of fruit after it has been gathered, to decay, but we doubt that it can be truthfully said that it is an inherent quality of apples to freeze any more than it is an inherent quality of man to freeze. The freezing of either is usually, if not always, caused by man's negligence, rather than by any inherent nature or any act of God.

Finding no error therefore prejudicial to the plaintiff in error the judgment of the court of common pleas will be affirmed.

CONSTRUCTION OF A LAND SYNDICATE CONTRACT.

Circuit Court of Hamilton County.

JAMES E. MOONEY, TRUSTEE, v. C. W. NAGEL, ASSIGNEE, ET AL.*

Decided, July 29, 1911.

Agreement to Unite Together in the Purchase and Sale of Lands—Status of One of the Parties Thereto Who Rendered Services in Lieu of Advancing Money for Carrying Out the Enterprise.

The agreement involved in this action and set forth in the opinion is construed to have made B a partner in the contemplated purchase and sale of lands; and having performed all the conditions by him to be performed, B is entitled to receive his share of the proceeds of the enterprise after repayment to the other shareholders of the amounts advanced by them without interest.

Rufus B. Smith, for the trustee.

Edward Colston, Lawrence Maxwell, Jr., and *Simeon M. Johnson,* for Wallace Burch.

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* Affirming *Mooney, Trustee,* v. *Nagel et al,* 9 N.P.(N.S.), 385.

SMITH, P. J.; SWING, J., and JONES, J., concur.

The court is of the opinion in the above case that the appeal of James E. Mooney, trustee, brings before this court the whole case from the court of common pleas and that the case stands for trial here as it did originally in the court below. This being so upon the claim between the plaintiff and the defendant, Wallace Burch, the court is called upon to construe the following contract:

"We, James E. Mooney, T. B. Youtsey, A. S. Berry, Charles H. Kilgour, John Kilgour, John Zumstein and Wallace Burch, severally agree to and with each other, each in consideration of the agreements of the other, as follows:

"1. To form a syndicate to purchase such real estate as may be determined upon by two-thirds of the shareholders herein.

"2. The number of shares shall be limited to six, five whole shares and two one-half shares, distributed as follows: to James E. Mooney, one share; to T. B. Youtsey, one share; to A. S. Berry, one share; to Charles H. Kilgour, one share; to John Kilgour, one share; to John Zumstein, one-half share; to Wallace Burch, one-half share.

"3. The shareholders other than Wallace Burch shall each pay their proportional part of the money to be advanced for said one-half share held by him. The said Wallace Burch shall not be paid any of the proceeds of the sale of said real estate until the sums advanced for the purchase thereof, together with all interest and other costs shall first have been repaid to the said shareholders, advancing the same out of the sales of the lands purchased under this agreement. The said Wallace Burch, in consideration of the profits in said one-twelfth interest, is to devote such time and attention as may be necessary to purchase the real estate hereunder; and by the direction of the officers of said syndicate, is to attend generally to all matters that may be necessary to carry out this agreement.

"4. The title of all real estate purchased shall be conveyed to James E. Mooney, trustee, who shall hold the same in trust for the shareholders hereof in accordance with this agreement, and make such disposition of the same as he may be directed from time to time by two-thirds of the said shareholders herein. Said trustee shall receive one ($1.00) dollar for his services.

"5. The said shareholders shall elect from their number, the President, Treasurer and such other officers as they may deem necessary. The compensation of said officers, for each shall be one ($1.00) dollar per year.

"6. Promptly upon being notified so to do, each shareholder shall pay to the treasurer his proportional share of such sums of money as may be required to make the purchases of the real estate as aforesaid.

"7. It is agreed that the death of any of the shareholders herein, shall not determine this agreement; and each of the said shareholders agree that in the event of his death, prior to the termination of this agreement, his said share shall pass to his executors or other legal representatives, who shall carry out in his stead the purpose of this agreement to all intents and purposes the same as if he had not deceased.

"8. This agreement to date from the 30th day of June, 1887. and to cover the purchases of all real estate made since said date.

"JAMES E. MOONEY,
"T. B. YOUTSEY,
"A. S. BERRY,
"CHARLES H. KILGOUR,
"JOHN KILGOUR,.
"JOHN ZUMSTEIN,
"WALLACE BURCH."

The evidence clearly shows, and indeed it is not disputed, that the defendant, Wallace Burch, performed all the conditions of the above contract on his part to be performed and rendered all services required of him thereunder, and that for his services, for which he was given a one-half share in the syndicate, he has received nothing.

The trustee claims that Wallace Burch was not a partner with the other shareholders under the contract, and that the said Burch was not to receive anything from the sale of the real estate until the sums advanced by the parties thereto should be repaid to those advancing the money for the same with interest thereon.

As to the first contention, the court is of the opinion that the defendant Burch is a partner with the other shareholders in the syndicate; while the contract relates back to 1887, it was executed in 1889, before which time the defendant Burch was not a member of the syndicate, but had performed labor in relation thereto for which he had not been paid. He is mentioned and carried through the entire agreement; being given a one-half share, and in consideration of the profits in said one-half share

he is to devote such time and attention as may be necessary to purchase the real estate, and is to attend generally to all matters that may be necessary to carry out the agreement. He also had a vote in the election of the officers in said syndicate and seems in nowise to have differed from the other members except in the manner in which his one-twelfth share was to be paid for, to-wit, by services, which in this case was equivalent to money. We think, therefore, that he was in all respects a full partner under the terms of the agreement with the other members of the syndicate.

As to the second claim of plaintiff, the court is of the opinion that the plaintiff and the remaining shareholders, other than Burch, are not entitled to receive the sums advanced by them with interest thereon before Burch shall receive any of the proceeds of the sale of said real estate.

The agreement does not so declare. Before he is to paid any of the proceeds of the sale of said real estate, the sum advanced for the purchase thereof, together with all interest and other costs shall first be repaid to the shareholders advancing the same. Nothing can be repaid unless it has been theretofore paid out. Interest on the sums advanced would not be a payment by the shareholders which could be repaid to them, but would be a charge upon such sums; besides, the phrase "together with all interest and other costs" would seem to indicate that the "interest" here referred to was an expense to which the shareholders might be put as a part of the expense or cost in purchasing, organizing and maintaining the syndicate. What is to be repaid to the shareholders before Burch is to receive any of the proceeds of sale is such monies as have been advanced; but interest charged against the syndicate upon such sums would not be money advanced. It seems therefore clear, that the "interest" referred to in the agreement means such interest as might be paid by the shareholders that was necessary to place the real estate in proper shape upon the market, whether on deferred payments, loans, discounts, etc.

The court is of the opinion, therefore, that the prayer of the cross-petition of Wallace Burch should be granted and a decree may be taken similar to that in the court below.

THE AMENDED ACT RELATING TO THE RENEWAL OF CHATTEL MORTGAGES.

Circuit Court of Franklin County.

ARLINGTON C. HARVEY v. ANTONIO CIOCCO ET AL.

Decided, January 17, 1911.

Constitutional Law—Validity of the Act Relating to the Refiling of Chattel Mortgages—Lengthening the Life of a Mortgage Not an Impairment of the Contract.

Section 8565, General Code, as amended (99 O. L., 230), is not unconstitutional because an impairment of the obligation of contracts, nor retroactive as affecting the rights of creditors, but applies to chattel mortgages then on file, and the lien created thereby will be continued if the mortgage is refiled within thirty days next preceding the expiration of three years from the time the mortgage was originally filed.

Raymond & Gibson, for plaintiff in error.

P. M. Glish, contra.

ROCKEL, J.; DUSTIN, J., and ALLREAD, J., concur.

Error to Common Pleas Court.

The question involved in this case is whether under the act (99 O. L., 230) extending the time of refiling chattel mortgages from one to three years, a mortgage that was filed before the passage of the amended act was void as to creditors if not refiled within thirty days from one year from the time of its original filing.

The amended act is word for word similar to the original law with the exception that the phrase "one year" is changed to "three years," and it is clear to our mind that the amended act only related to the time of refiling, and had no other effect or purpose.

It did not change the original contract; it merely extended the life of the lien from one to three years without the necessity of refiling within thirty days from the expiration of one year from its date.

At common law, a lien did not exist on personal property unless it was also accompanied by possession. This rule was. no doubt, founded on public policy. To have permitted such a lien without possession would have opened wide the door for fraud not only upon creditors but upon others.

So, when it was decided to permit a lien to exist upon personal property without possession, in order that the same might not be used to work a fraud, two things were required:

(1) That the mortgage be filed, for inspection by the public, with some public official.

(2) That such mortgage lien would only be valid, as against *bona fide* creditors for one year unless within thirty days before the expiration of such one year, it was refiled with a statement under oath of the amount still due.

This was required as stated by the Supreme Court in *Seaman* v. *Eager,* 16 Ohio St., 209:

"In order to prevent fraud or deception against the same classes of persons, by means of leaving mortgages on file in the proper office long after they have been wholly satisfied by payments or other discharges of which the public would have no means of knowledge."

And the court went so far as to hold that the mortgage was absolutely dead as to creditors under this act if not refiled within the required time. *Cooper* v. *Koppes,* 45 Ohio St., 625.

The Legislature, however, evidently became convinced that public policy did not demand that the life of a chattel mortgage should only exist for one year unless it was refiled within thirty days from the expiration of one year from its original filing, and, therefore, the law was amended in its present form. In so acting the Legislature was within the province of its constitutional powers. It was for it to decide, if it saw fit so to do what conditions should attach to a chattel mortgage after it was given as to its continued life and efficiency just as much as it was within its power to pass a law, permitting a lien to be acquired by means of a chattel mortgage in the first instance.

The Legislature was the sole judge whether the life of a chattel mortgage should be one or three or more years, and the

manner in which it could thereafter be continued as a valid mortgage.

In the case at bar, when the mortgage was filed, it was a valid lien upon the chattels covered by its terms for at least one year. If the owner wished to continue it for a longer period. he must refile it within thirty days from the expiration of one year from its original filing. But before the time had arrived at which it must be refiled, the Legislature concludes that the public will be best subserved by a requirement that a chattel mortgage shall be a valid lien for three years from its original filing without a refiling in the intermediate time.

It is not questioned but what the Legislature may pass such an act as to mortgages thereafter filed, but if the Legislature deemed it wise to pass the law as affecting after filed or executed mortgages, why should it not apply to those already on file? For necessarily, those on file, a part of the time having already expired, will have to be refiled in a less period of time than the mortgages filed after the passage of the act. The greater necessarily includes the less. There can be no good reason why, so far as the policy of the law is concerned, that it should not apply to a mortgage already on file.

The plaintiff, however, contends that the Legislature had no power to so lengthen the life of a mortgage then executed and on file, because so to do would work an impairment of the obligation contracts. And he argues that as the law is a part of all contracts, that the creditors were parties to the original contract in relation to this mortgage.

But we search in vain to find in what manner creditors sustain a contractual relation to this mortgage. For their benefit. and by grace of legislative enactment they may have an interest in the property, if the mortgage holder does not comply with the conditions attached by the law permitting the existence of such mortgage. The law in existence at the time the required condition is to be exercised certainly is the law that should govern.

It is also contended that the amended act if applied to mortgages that had already been filed would be retroactive, and. therefore, it could not be so applied.

But this law has nothing to do with the execution of the mortgage or its filing. These matters are provided for by other sections. It only applies to the time of refiling. In this case the time for refiling had not yet occurred. It was an event to occur in the future upon which the law was to or could act. It did not give life to something that was long since dead or place new conditions or restrictions upon a past transaction. It was prospective and not retroactive in its effect and operation.

It is also claimed that if allowed to apply to the mortgage it would be an impairment of vested rights.

As indicated before, we do not see how it could so act. These creditors had no vested right in or to the property covered by this mortgage. They did not even have a judgment until long after the mortgage was given. At most, their interest was remote and speculative, and until the mortgage was satisfied they had nothing or could claim nothing.

It is clear from the act itself that it was intended to supplant the act which it repealed, and that every chattel mortgage then on file, or thereafter filed, must be refiled within thirty days from the expiration of three years from the time of its original filing, or it would thereafter be void as to *bona fide* creditors.

We find no error in the judgment of the court below and the same will therefore be affirmed.

REPLEVIN UNDER A CONDITIONAL SALES CONTRACT.

Circuit Court of Richland County.

TISCHLER v. SEELEY.*

Replevin—Not Defeated by Transfer of Property, When—Conditional Sales—Tender of Money Paid Not Necessary, When—As to Time for Filing the Contract.

1. An action in replevin, or an action for damages where the property is not taken, is not defeated by the fact that the defendant did not have actual possession of the property at the commencement of the action, where it appears that the defendant sold the property just previous to the commencement of the action and that the plaintiff was ignorant of that fact.
2. Where an action in replevin is brought by the vendor under a conditional sale contract against a subsequent mortgagee of the property, a tender under Section 4155-3, Revised Statutes, requiring refunder of money paid, is unnecessary.
3. A conditional sale contract, withheld from record for six months, but filed a few minutes before the filing of a chattel mortgage on the same property, is sufficient to preserve the lien, in the absence of any statutory provision as to when such contracts shall be filed.

ADAMS, J.; DOUGLASS, J., and VOORHEES, J., concur.

This was a replevin suit brought by Seeley against Tischler to recover possession of a dental chair, table and bracket alleged to be worth $160. The prayer is for judgment for that amount with interest, for possession can not be obtained. The property was not taken in replevin. The answer of Tischler is a general denial.

It seems from this record that Seeley did give the possession of this property to Searle, under a conditional contract whereby the property was to become Searle's after the payment of an agreed price, the price to be paid in installments. That conditional contract was in writing, properly executed and verified and was filed in the proper place six minutes before the chattel mortgage which Tischler had taken on the same property was

* Affirmed without opinion, *Tischler* v. *Seeley*, 60 Ohio State, 629.

filed, Tischler's chattel mortgage being filed in Crestline and the conditional sale contract being filed here in Mansfield. Searle had made some payments. There was evidence tending to show that Tischler knew of this conditional sale of the rights of Seeley under the conditional contract. The bill of exceptions contains all the evidence and the charge of the court, but there are some eight requests to charge the jury which are in no way identified as a part of the bill of exceptions and they are not attached to the bill as exhibits.

Now, counsel for plaintiff in error claims that this judgment is erroneous because it appeared from the evidence that, at the time this action was commenced, Tischler did not have possession of the property; but it nowhere appears in the record, as we think, that Seeley knew of that disposition of the property. The claim is further made that there was no tender made to Tischler of any part of the amount that had been paid by Searle.

Counsel argues at length that an action in replevin, or an action in damages where the property is not taken in replevin, can not be maintained where, at the commencement of the action, the defendant did not have the actual possession of the property.

Now, Section 5827, Revised Statutes, provides that, if the property is not taken or is returned for want of the undertaking, the action may proceed as one for damages. The statute does not specify any particular reasons or instances in which the property is not taken, but it is general and unqualified that, if the property is not taken, the action may proceed as one for damages.

Some authorities have been cited in support of the claim of counsel for plaintiff in error, but, in *Cobbey on Replevin,* Section 66, we find this exception to the general rule:

"Where the property was in defendant's possession and wrongfully transferred by him shortly before the commencement of the action, or where the statute allows a replevin action to proceed as one for damages if the property is not taken, the rule is different. In Michigan the action has been allowed to proceed, under their statute, even where the defendant pointed out part of the property named in the writ and plaintiff refused to take possession of it."

The plaintiff, under such circumstances, was not bound to give a new bond. Of course, the only result of a suit under such circumstances would be a money judgment. The property has passed beyond the process of the court.

We think that *McBrian* v. *Morrison,* 21 N. W. Rep., 368 (55 Mich., 351), has a case cited in the foot-note of the Michigan statute very similar to our statute on that subject, and we follow the principle laid down in that section.

Now, so far as Section 4155-3, Revised Statutes, and under that Section 2 is concerned, which provides that the vendor of property conditionally sold can not retake possession without repaying part of the price paid, that is, he must tender or refund the sum or sums of money so paid after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed fifty per cent. of the amount so paid, Tischler was not the purchaser of the property, but, assuming that he stood in the shoes of Searle, so far as the repaying of these sums is concerned, the Supreme Court in *Weil* v. *State,* 46 Ohio St., 450, 455, expressly hold that the requisites of this section of the statute as to the refunder of the money paid do not apply where the property is taken by legal process; it only applies where the party takes possession of the property without resorting to the courts. Where it is by legal process, by replevin suit, foreclosure of chattel mortgage, or by suit on contract or conditional sale contract, where the rights of the parties can be adjudicated by the court, that tender is not necessary.

Another question is made, that this conditional sale contract was not filed immediately after its execution and delivery. The statute does not provide when these conditional sale contracts shall be filed. The provision is that until filed they are void as against purchasers and mortgages in good faith, etc.

We think that this disposes of all the assignments of error, and, after reviewing the evidence and the charge of the court in the light of the statutes and decisions of the Supreme Court, we find no error in the record and the judgment is affirmed.

EXTENT TO WHICH IRREGULAR SEWER ASSESSMENTS ARE ENFORCIBLE.

Circuit Court of Montgomery County.

CYRUS V. OSBORNE ET AL v. FRANK T. HUFFMAN, TREASURER, ET AL. *

Municipal Corporations—Assessment for Sewers—Extent to Which Collections Irregularly Levied May Be Enforced.

Under the curative provisions of the statute sewer assessments, which are illegal for irregularity in the proceedings, are enforcible to the extent to which expense has been incurred which is properly chargeable against the property assessed and is not in excess of benefits.

WILSON, J.; SUMMERS, J., and SULLIVAN, J., concur.

This is an action to enjoin the collection of certain sewer assessments on account of irregularities in the proceedings.

It appears that after the authorities had divided the city into sewer districts, as provided by law, and let the contract for building the sewers in district number one according to law, they attached certain additional territory, embracing the real estate of the plaintiffs, to said district, extended the sewer system into the added territory, and let the extended work to the same contractor, upon the same terms as in the contract for the original district, without advertising the same, and without competition. No other irregularity is complained of.

At the time this action was commenced no work had been done under the contract so irregularly entered into, affecting the property of the plaintiffs, but pending the action the work has been completed and a number of the plaintiffs have connected their property with the sewer so constructed. It is alleged in the answer filed by the city, that it had accepted and paid for the work; that there are no defects in the construction; that it has been completed at a reasonable cost; that strict regard has

* Affirmed without opinion, *Osborn et al* v. *Huffman, Treasurer*, 58 Ohio State, 697.

been paid to the limitations of assessments, and that the real estate of the plaintiffs has been greatly benefitted. These allegations are admitted to be true, no reply having been filed in the case.

It was also conceded on the trial, that the contract price paid for the work was the reasonable cost price.

The question to be determined here is: What are the rights of the parties under the existing circumstances?

Upon the facts stated, under the authority of *Uptington* v. *Oviatt,* 24 Ohio St., 232, and *Becher* v. *McCloud,* 2 Circ. Dec., 561, we conclude that the assessments in this case, though not conclusive, are enforcible to the extent expense has been incurred which is properly chargeable against the property assessed, and that within the meaning of the statute the expense so chargeable to the added territory is the whole of the contract price for the additional work, together with a proportionate share of the cost of the main in sewer district number one, not in excess of benefits.

It is therefore ordered that the temporary restraining order herein be dissolved; that the plaintiffs be adjudged to pay the assessments respectively as entered upon the tax duplicate, and that the parties hereto pay the costs made by them respectively.

INSUFFICIENT SHOWING TO DEFEAT A WILL.

Circuit Court of Licking County.

FRANK WILSON ET AL v. JOSERH B. WILSON.

Decided, March Term, 1909.

Wills—Want of Mental Capacity Not Shown, When—Testimony in Favor of Contestants Without Value, Where Based on Ideas of the Witnesses as to the Kind of a Will the Testator Should Have Made.

Want of mental capacity on the part of a testator is not shown by a recital of circumstances and incidents which go no further than to indicate some physical weakness, or failure of memory, or mistake of an unimportant character in connection with his business affairs; nor can an attack on a will be successfully maintained where the witnesses for the contestants seem to have reached the belief that the testator was incompetent to make a will because he did not make the kind of a will which they would have made or which they thought he ought to have made.

A. A. Stasel and *Flory & Flory,* for plaintiff in error.
Kibler & Montgomery, contra.

VOORHEES, J.; TAGGART, J., and DONAHUE, J., concur.

The will of James P. Wilson. the validity of which is the question in controversy in this action, and under review in these proceedings in error, was made on the 5th day of January. 1900, at his office or place of business at the village of Granville, in the county of Licking, Ohio. The testator died June 7, 1906, being then of the age of about seventy-six years. At the time the will was executed, he was about seventy years old. He died leaving Susan Wilson. his widow, and three children, two sons and a daughter, namely: Joseph B. Wilson, Frank Wilson and Mary Wilson.

The said Joseph B. Wilson contests the will on two grounds. namely:

1st. That by reason of age, disease and other causes. said James P. Wilson was incompetent mentally to do or understand ordinary business transactions, or to understand or appreciate

what he was doing when he signed said will; that he was then of unsound mind and memory; that he had not sufficient mental capacity to know or understand the extent of his estate and the persons who would naturally be the objects of his bounty.

2d. That said will was procured to be made and executed by the defendant, Frank Wilson, by persuasion and undue influence exercised by him at and before the time of the making of said will, over and upon the mind and will of said James P. Wilson, by which said James P. Wilson, against his will, was wrongfully induced to favor said Frank Wilson and his children, namely: James Perry Wilson and Eva Wilson (who are made defendants in said action), in the disposition of testator's property; that testator's mind, without any just cause or reason, became set against said contestant, Joseph B. Wilson, causing testator to discriminate against him in making said will.

After the death of said James P. Wilson, said will was admitted to probate and record by the probate court of said Licking county.

The testator by the will in question gives all his property, real and personal, wherever located, to his wife, Susan Wilson, during her natural life. At the death of his wife, he devises and bequeaths to his son, Joseph B. Wilson, the farm on which he, Joseph, then lived, containing 111 acres, more or less. If the said Joseph should die without issue of his body then at his death said farm of 111 acres goes back to his, testator's, legal heirs.

To his daughter, Mary Wilson, he gives his farm situated in Crawford county, Ohio, containing seventy-seven acres, more or less; also the old Water Cure house and lot 120 and lot 128 situated in the village of Granville, Licking county, Ohio; also all his household goods.

To his son, Frank Wilson, he gives what he designates his home place of fifteen acres, lying just south of Raccoon creek in Granville township, Licking county, Ohio; also the three lots in the village of Granville, with the appurtenances thereto belonging; also to his son Frank, the Eggleston farm, containing 126 acres, more or less, said farm lying along the Alexandria road in said county.

To his grandson, James Perry Wilson, he gives $1,000; and to his grand-daughter, Eva Wilson, he gives the property known as the Aiken property, situated in the village of Granville. If any property should be left after paying the demises provided for, the balance to be divided equally betwen his said daughter, Mary, and his son, Frank.

He named his daughter Mary and his son Frank executors, without bond.

The testator had made a prior will in the year 1898 or 1899, written by J. C. Malone (who was a witness for the contestant in this trial), and through or by the disclosure by this witness of the contents of said will written by him, to some of the family, among them, to the contestant Joseph, the old gentleman afterwards, and in about a year or less from the making of said will, made the will in question securing the services of a different scrivener to write the second or last will. Just what the provisions of the first will were, or wherein it differed, if at all, from the last will, is not disclosed by the record in this case.

The testator at the time the will in question was made, owned an estate, real and personal, estimated in amount in the neighborhood of $50,000. He had been a thrifty man in the accumulation of property. He was an uneducated man; in the language of some of the witnesses "a self-made man," and a shrewed dealer in business matters. He was able to make money at times when others were feeling the effects of general depression and dullness in business affairs. He continued to carry on his business (that of a lumber dealer) some four or five years after the making of the will in question, being assisted at times in some of the office work, in the way of keeping his accounts, by his daughter Mary, and his son Frank was in some way connected with the lumber business with his father, but as a general thing the business was managed by the old gentleman himself.

The facts bearing upon the want of testamentary capacity offered by witnesses in behalf of the contestant, namely Richards, Partridge, Jones, Agey, Malone, Jos. B. Wilson and Scott Ramey, show an inherent weakness in their testimony in the facts and circumstances related and detailed by them, upon

which their opinion is based, as to the want of mental capacity of the testator to transact ordinary business. Without undertaking to give in detail the facts, incidents and circumstances related by these several witnesses upon which their opinions are based, it will be sufficient to state that the circumstances and incidents tend to show some physical weakness, failure of memory, and slight mistakes made by the testator in connection with his business affairs, but when tested by reason and the experience of mankind, these circumstances and incidents are such that may occur with persons where there would be no question of their ability to transact ordinary business. Take, for example, the incident where the old gentleman on one occasion had lost his pocketbook, and spent some hours in hunting for it. It was lost in the office. Just how it was lost or what he was doing with his pocketbook when it was misplaced is not disclosed, but it seems that this incident is greatly magnified by the witnesses in giving an account of it.

Take the incident mentioned by Mr. Jones, where he had settled a business matter with the old gentleman, whereby a note was given by Mr. Jones to Mr. Wilson. After the note was executed, the old gentleman requested Mr. Jones to keep it in his Jones' safe. It seems that the old gentleman had no safe at his place of business at the lumber yard. If this circumstance or incident has any significance at all, it is simply this, showing the great confidence that Mr. Wilson had in Mr. Jones, a man with whom he had had numerous dealings. He seems to have had more confidence in the honesty of Mr. Jones than Mr. Jones had himself, because Mr. Jones gives this as an incident or circumstance, in his judgment, showing want of business capacity in Mr. Wilson.

Mr. Richards, the scrivener who wrote the will, gives as the reasons why, in his judgment, the old gentleman was incompetent to do business, that when he (Richards) called at the office at the lumber yard on the morning to write the will, he was there some fifteen minutes and nothing was said by the old gentleman as to the business that he wished Richards to transact. Finally, Richards said to the old gentleman that "Frank (meaning the son of the testator) came to my house and re-

quested me to come down and write your (Mr. Wilson's) will"; to which the old gentleman answered: "I suppose I will have to." The witness then said to him: "You don't have to do anything of the kind," and the old gentleman then said: "Well, write it"; and witness sat down and wrote the will. The witness testifies that the items and terms of the will were given and dictated to him by the old gentleman; that they were at the office alone; Frank, the son, coming into the office once or twice while the will was being prepared. He said nothing the first time he came in, but the second time he mentioned the Eggleston farm, but what he said about the Eggleston farm witness does not remember. After the will was finished and the witness and Frank were going out of the office up street, Frank said that "Joe's wife ought not to have that property after his death," that is, the property on which Joseph resided. The testimony of this witness seems to be very indefinite in many of the details as to the transactions that occurred at the time the will was written; and in the cross-examination his capricious answers to many of the questions tend largely to weaken his testimony.

When you examine the testimony of the witnesses for the contestant, who have given opinions as to the mental capacity of Mr. Wilson to transact business, it seems to be influenced very largely by their notions as to what kind of a will Mr. Wilson should have made. In other words, because he did not make such a will as they would have made or thought he should make they were led to believe that he was mentally incompetent to transact business. Taking the will itself, its terms and conditions, dictated, as the scrivener says it was, by Mr. Wilson himself without suggestions from him or any one, or the items given, there is nothing inherent in the will or language used that tends in any way to show a want of comprehension of the business in which he was engaged, the extent of his property, or the objects of his bounty. The only thing that these witnesses are inclined to complain about was, that the devise to Joseph was not what they would have made or thought it should be. The theory of the law is that a testator who is competent and free from restraint, has a right to dispose of his estate in any way he may deem best.

He is not required to hake an equitable will, and he may, if he chooses, exclude his children, or divide the estate among them unequally. The question in all such cases is: was the will the free act of a competent testator?

Looking to the testimony and evidence offered by the propounders of the will, and the experience that these witnesses had with Mr. Wilson in a business way, and the numerous transactions had with him, covering a long period of time, not only before the making of the will in question, but for some years after its execution, it would seem that the opinions they gave as to the competency of Mr. Wilson are based upon facts and circumstances entitled, in the judgment of this court, to greater weight than the circumstances and facts detailed by the witnesses for the contestant, and without going into detail, the court is of the opinion that, from all the testimony in this case, the verdict of the jury is so clearly unsupported by the weight of the evidence as to indicate some misapprehension or mistake, or bias on the part of the jury or of willful disregard of the law as given by the court in its charge.

We think it comes within the rule that, where the verdict of a jury is manifestly against the weight of the evidence, that it is the duty of a reviewing court to set aside the verdict and grant a new trial.

Upon the issue as to undue influence, we think that the weight of the testimony is against this proposition, and there is not that preponderance of evidence upon either issue that would warrant the jury in returning the verdict they did in this case. Therefore, for these reasons, the judgment in this case will be reversed.

So far as the charge of the court is concerned, and its rulings upon the requests asked by the respective parties, we do no think there was any error committed. Some of the requests that were refused were abstract legal propositions, in the main correct, but there was no special reason why they should be given because they had no application especially to the facts and circumstances of this case; and, therefore, we think that where the court refused to give the special requests there was no error committed.

In the general charge, the court covers substantially the whole of this case, and had the jury applied the facts to the law as given by the court, we think that there necessarily would have been a different verdict returned. It seems that the verdict is the result either of a misapprehension of the charge of the court as to the law, or bias and prejudice in favor of the contestant, and that they must have caught the spirit that was breathed forth in the testimony of several of the witnesses that they thought the old gentleman was not competent to make a will because he made a will different from what they would have made.

The verdict and judgment of the court rendered in this case are reversed, with costs, and the cause remanded to the common pleas court for further proceedings and trial according to law.

CONTROL OF JUDICIAL DISCRETION BY MANDAMUS.

Circuit Court of Hamilton County.

THE STATE OF OHIO ON THE RELATION OF HENRY T. HUNT, PROSECUTING ATTORNEY OF HAMILTON COUNTY, OHIO, v. WILLIAM L. DICKSON, JUDGE OF THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO.

PETITION.

Decided, June, 1911.

Procedure in Criminal Cases—Election Between Indictments—Motions to Quash—Discretion of Trial Judge with Reference to—Extent to Which It May Be Controlled by Mandamus.

1. Where a prosecuting attorney has intituted an action in mandamus in the circuit court to compel a common pleas judge to endorse an entry of election as between two indictments against the same defendant, which entry the judge has refused to endorse for the reason that he has granted a motion to quash as to one of the indictments and purposes to make it applicable to both, the question whether the judge erred in his view as to the validity of the indictments is not raised, and the circuit court will look only to the soundness of the procedure, and if it is found not to be in accordance with law determine whether it may be corrected in an action in mandamus.
2. When the prosecutor elected upon which indictment he desired to proceed, it was the imperative duty of the trial judge (defendant

here) to enter the election upon the minutes of the court without waiting to pass upon the motion to quash.

3. But inasmuch as the circuit court could control the discretion of the trial judge no further than to require that the election of the prosecutor be noted, and would be without jurisdiction to require him to desist from making entries on the motions to quash pending a hearing in mandamus, the only relief which can be granted is to require that the election of the prosecutor be noted in order that he may preserve any legal right to a review which he may have in the premises.

The relator is the duly elected, qualified and acting prosecuting attorney of Hamilton county, Ohio, and is required by law to prosecute on behalf of the state of Ohio all complaints, suits and controversies in which the state is a party within said county.

Defendant is a duly elected, qualified and acting judge of the Court of Common Pleas of Hamilton County, Ohio, and was on the 4th day of April, 1911, designated and assigned by Hon. Charles J. Hunt, Presiding Judge of the Court of Common Pleas of Hamilton County, Ohio, under the compulsion of a writ of mandamus issued against him by this court, to hear the causes of the State of Ohio v. George B. Cox, then pending in said court of common pleas, and being indictments for perjury.

On the 10th day of April, 1911, there were pending against said George B. Cox in said court two indictments for the same offense, perjury, to-wit, the indictment in case No. 16408, and the indictment in case No. 16466, as known and numbered on the docket of said court, and on said 10th day of April, 1911, defendant by his counsel filed in each of said causes, to-wit, No. 16408 and No. 16466, a motion to require the prosecuting attorney to elect upon which of said indictments he would proceed.

On the 29th day of April, 1911, said Henry T. Hunt, as prosecuting attorney of Hamilton county, Ohio, presented to said William L. Dickson, as judge aforesaid, in each of said causes, to-wit, No. 16408 and No. 16466, an entry of election by which said entries he elected, in accordance with the statute in such case made and provided, to proceed against said defendant, George B. Cox, on the indictment in case No. 16408, copies of which said entries together with orders requiring said election to be made are hereto attached, and requested said defendant,

William L. Dickson, as judge as aforesaid, to order said entries of election to be made and entered in each of such cases, to-wit. No. 16408 and No. 16466, which said William L. Dickson, as judge aforesaid, then declined and refused to do and still declines and refuses to do.

Wherefore relator prays that a writ of mandamus issue commanding said William L. Dickson, as judge of the court of common pleas, to order said entries of election by said relator to be made and entered in said causes, to-wit, No. 16408 and No. 16466 on the docket of the Court of Common Pleas of Hamilton County, Ohio, said causes being entitled "State of Ohio v. George B. Cox," and being indictments for perjury, and that said William L. Dickson be ordered to refrain from taking any other steps or making any other orders or entries in said cause No. 16466.

ENTRIES OF ELECTION.

"Now comes Henry T. Hunt, Prosecuting Attorney of Hamilton County, Ohio, in accordance with the former order of the court and the statute in such case made and provided, and elects to proceed to trial against this defendant upon the indictment filed in this case, to-wit, No. 16408, State of Ohio vs George B. Cox, indictment for perjury."

"Now comes Henry T. Hunt, Prosecuting Attorney of Hamilton County, Ohio, in accordance with the former order of the court and the statute in such case made and provided, and elects to proceed to trial against this defendant upon the indictment filed in case No. 16408, State of Ohio vs George B. Cox, indictment for perjury."

ORDER FOR ELECTION BETWEEN TWO INDICTMENTS.

It appearing to the court, on the motion of defendant, that the prosecuting attorney be ordered to elect upon which of two indictments he will proceed to trial, that there are pending against this defendant two indictments for the same crime, to-wit, that in case No. 16408, State of Ohio vs George B. Cox, indictment for perjury, and that in case No. 16466, State of Ohio vs George B. Cox, indictment for perjury, it is ordered that the prosecuting attorney elect upon which he will proceed to trial.

ORDERS FOR ELECTION BETWEEN TWO INDICTMENTS.

It appearing to the court, on the motion of defendant, that the prosecuting attorney be ordered to elect upon which of two indictments he will proceed to trial, that there are pending against this defendant two indictments for the same crime, to-wit, that in case No. 16408, State of Ohio vs George B. Cox, indictment for perjury, and that in case No. 16466, State of Ohio vs George B. Cox, indictment for perjury, it is ordered that the prosecuting attorney elect upon which he will proceed to trial.

BY THE COURT (DUSTIN, ALLREAD AND FERNEDING, JJ., of the Second Circuit, sitting in place of the Judges of the First Circuit).

It is conceded that the action of the defendant as judge of the common pleas court in quashing the indictments hereinafter referred to, is not before us for consideration on its merits, viz., as to whether said judge erred in his views of the law with reference to the validity of said indictments.

We are called upon merely to determine the soundness of his procedure; and, if not in accordance with law, whether, in an action in mandamus, we may correct it.

The proceedings involved are as follows: two indictments were brought to the court's attention, No. 16408 and No. 16466, each charging the crime of perjury against George B. Cox. They are identical, except that in the second the word "lawfully" is introduced in a certain place before the word "sworn." It is conceded that both indictments charge the same criminal act.

With reference to these indictments, defendant Cox first filed a motion to require the prosecutor to elect upon which one he would proceed.

Without waiting for action upon that motion the defendant filed motions to quash both indictments. Subsequently, and before action by the court upon the motions to quash, the prosecutor himself elected to proceed upon indictment No. 16408, and asked the court to note this election of record. Without taking any action upon the prosecutor's election, and his demand for an order with reference thereto, the court proceeded to pass upon the motions to quash, sustaining the same, in a written decision filed with the clerk. A motion for a rehearing was filed

in each case, but neither one of them has yet been formally disposed of.

On the same day, and before any entry of the court's decision was made in the journal, this action was brought to compel the defendant to enter upon the minutes of the common pleas court the election of the prosecutor to proceed upon indictment No. 16408.

Responding to the prayer of the petition (which contained no mention of the action of defendant upon the motions to quash), the circuit court issued an alternative writ of mandamus requiring the defendant to enter the "election" referred to, or show cause why he should not do so, on a day fixed by the court; and, meantime, ordered him "to refrain from taking any other steps, or making any other orders or entries in case No. 16466."

After conferences between counsel on both sides and the judge, with reference to the form of journal entries to be made concerning the action of the court on the motions to quash, without reaching an agreement, entries in both cases were finally recorded by the clerk in the absence and without the consent of the prosecutor, and without indorsement by the judge, upon the theory that it was the clerk's duty to enter up the judgments of the court; the judge, by refusing indorsement, seeming to act in obedience to the command of the circuit court forbidding him to make orders of any kind in reference to indictment No. 16466.

Upon discovery of the entries made by the clerk, the prosecutor filed motions to expunge the same from the record.

Upon the above record and findings of facts, we have reached the following conclusions:

First. The majority of the court are of the opinion that the prosecutor having elected to proceed under indictment No. 16408 (in accordance with Section 13578 of the statutes), it then became the imperative duty of the defendant judge to order such election entered upon the journal, without waiting to pass upon the motions to quash.

(The minority member of the court is of the opinion that Judge Dickson exercised a judicial discretion in passing first upon the motions to quash, rather than the prosecutor's motion to enter an election; the former being first in order and vital to the case; and the sustaining of which would render an election unnecessary.)

Second. We are unanimously of the opinion that the circuit court was without authority (in mandamus) to direct the common pleas judge "to refrain from taking any other steps or making any other orders or entries in case No. 16466." That was an attempt to control his judicial discretion. The authority of the circuit court to direct the action of the common pleas in the matter in controversy is, under the most favorable view, limited to the requirement of noting an election.

Third. These views make it unnecessary to pass upon the questions as to when the action of the court on the motions to quash became effective, and as to the validity of the record made therein by the clerk; for, even if the judgment of the court be not yet effective (as the prosecutor claims), it may be made so at any instant.

It therefore appears that any action of this court will probably be wholly ineffective to keep alive either of said indictments; but entertaining the view (as the majority of the court do) that the common pleas judge should have immediately ordered the entry of election, pursuant to the request of the prosecutor, the writ prayed for is granted to that extent, in order to enable the prosecutor to save any legal rights of review he may have in the premises. Exceptions may be noted.

JUDGMENT ALLOWING PEREMPTORY WRIT.

This cause came on to be heard upon the demurrer of the defendant to the reply and was argued by counsel; on consideration whereof the court overruled said demurrer; to which defendant excepted. And thereupon the cause coming on to be heard upon the petition, the answer, the reply and the evidence and being argued by counsel, the court find upon the issue joined for the relator and that he is entitled to a peremptory writ of mandamus herein.

It is therefore ordered, adjudged and decreed that a peremptory writ of mandamus issue against the said William L. Dickson, Judge of the Court of Common Pleas of Hamilton County, Ohio, commanding him to make the following entry on the journal of said court as of April 29, 1911, in said case No. 16408, to-wit: "Now comes Henry T. Hunt, Prosecuting Attorney of Hamilton County, Ohio, in accordance with Section 13578 of the General

Code, and elects to proceed to trial against the defendant upon the indictment filed in this case, to-wit, No. 16408, State of Ohio vs George B. Cox, indictment for perjury," and to make the following entry on the journal of said court as of April 29, 1911, in said case No. 16466, to-wit: "Now comes Henry T. Hunt, Prosecuting Attorney of Hamilton County, Ohio, in accordance with Section 13578 of the General Code, and elects to proceed to trial against the defendant upon the indictment filed in case No. 16408, State of Ohio vs George B. Cox, indictment for perjury."

The court finds that the order entered herein on May 22, 1911, in so far as it directed the defendant to refrain from taking any other steps or making any other orders or entries in said case No. 16466 was without authority of law and the defendant is hereby relieved from compliance therewith. Said writ of mandamus shall issue without penalty. To all of which counsel for the defendant excepts.

CONSTRUCTION OF THE STATUTE RELATING TO SODOMY.

Circuit Court of Richland County.

DAN FRANKLIN v. STATE OF OHIO.

Decided, September 9, 1910.

Criminal Law—Prosecution for Sodomy—Construction of the Statutory Phrase "Any Opening of the Body"—Section 13043.

The word body as used in Section 13043, General Code, is not restricted in meaning to the human trunk excluding the head and limbs, but is synonymous with the words "person" or "human being."

Van C. Cook and *C. L. McClellan*, for plaintiff in error.
Jas W. Galbreath, Prosecuting Attorney, contra.

BY THE COURT (TAGGART, DONAHUE and VOORHEES, JJ.)

The question in this case arises upon the construction which the court of common pleas gave to Section 7020-1 of the Revised Statutes of Ohio (General Code, 13043), or more particularly to that part of the section wherein the court instructed the jury as to the meaning of the word "body." The court, in its instruction to the jury, defined the word "body" as synonomous with

"person" or "human being." If this was a correct construction, then the verdict and judgment was right.

It is contended by plaintiff in error that that the true construction to be given to this section of the statute, and to this portion thereof, is that the word "body" is to be construed as the human trunk excluding the head and limbs. If that is the true construction of this section of the statute, then the verdict and judgment was not sustained by the evidence and the instruction of the trial court was erroneous and prejudicial.

At common law, the crime of sodomy would not have been established by the proof in this case, but this crime was not recognized as a crime in the state of Ohio until the enactment of this section of the statute, and we think the manifest purpose and object of this section of the statute was to punish this character of unnatural crimes.

The contention of counsel for plaintiff in error that criminal statutes should receive strict construction and be limited to the express terms of the statute is undoubtedly correct, and the courts have uniformly so held as a safeguard to the rights of the citizen, but our Supreme Court, in a recent decision in the case of *Conrad, alias Castor,* v. *State of Ohio,* 75 O. S., 52, lays down this rule:

"The rule as to strict construction of penal statutes does not require the courts to go to the extent of defeating the purpose of the statute by a severely technical application of the rule."

As we have said, we think the purpose of the enactment of this statute was to punish this unnatural crime, and approved lexicographers define "body" as a "person," a "human being," and with such a construction as this, and the manifest purpose of the Legislature in enacting the law, we are not inclined to say that the construction the court of common pleas placed upon this section of the statute was wrong, nor to adopt such a severe technical construction as would defeat the manifest purpose of the Legislature in its enactment.

Finding no error in this record to the prejudice of the plaintiff in error, the judgment of the court of common pleas is affirmed with costs and remanded for execution.

Exceptions of plaintiff in error noted.

AS TO UNDUE INFLUENCE OVER A TESTATOR.

Circuit Court of Hamilton County.

RUSSEL M. WILDER v. FRANK H. TAYLOR ET AL.*

Decided, January 21, 1911.

Wills—Contest of, for Undue Influence—Character of Influence or How Acquired Immaterial, When—Effect of Request Made by Deceased Husband of Testatrix as to Disposition of Property to be Made in Her Will—Presumption of Validity Arising from Probate.

Where a woman of fine character and delicate sensibilities executes a will, after long deliberation and the full knowledge of her children, in which contrary to her own strong desire to give the property received by her from her deceased husband to her children, she disposes of the property in accordance with a written request received from her husband, the influence so operating upon her will not be treated, in an action brought by a grandchild to set the will aside, as an undue or improper influence.

Joseph W. O'Hara, for plaintiff in error.
Robert Ramsey and *Joseph Wilby*, contra.

SMITH, J.; GIFFEN, P. J., and SWING, J., concur.

As it is the policy of the law to secure to everyone the right to dispose of his property in accordance with his individual will. that influence alone is illegal which places the freedom of a testator's will under some kind of restraint. If this be so, it follows that it matters not what may be the origin or character of any influence operating upon a testator, if it does not place him under any restraint. It would seem to follow, also, that it would be equally immaterial how an individual may have acquired an influence over a testator, unless such influence is exerted in a manner that tends to restrain a free exercise of his will in the disposition of his property. *Monroe* v. *Barclay*, 17 O. S., 302.

A will that is invalid by reason of being made under restraint. lacks what has been called the essence of the act, "consent."

Our statute provides "that the order of probate shall be *prima facie* evidence of the true attestation, execution and validity of the will or codicil."

* Affirming *Wilder* v. *Taylor et al*, 10 N.P.(N.S.), 209.

At the outset, therefore, it is incumbent upon the contestant to adduce evidence that outweighs this presumption before the defendant is called upon to present evidence on his own behalf to sustain the will. *Hall* v. *Hall,* 78 O. S., 415.

What have we in the case at bar?

The evidence clearly shows that the testatrix was a woman of strong character, highly intelligent and of very keen sensibilities. In making her will she conformed to the wishes of her deceased husband as expressed in a letter addressed to and found by her after his death. She also had the advice of her son in whom she had every confidence. She deliberated, counseled and advised concerning the making of her will for several years before its execution; and after its execution permitted it to remain as executed until her death, which was some years later.

There is no evidence that in any way tends to show that the will as executed by her was made under any restraint, or that it lacked the essence of the act "consent." Indeed, she distinctly says in one of her letters to her son, dated November 23, 1910. that she is "*glad* it is finally done with, for I very much fear if I were making it *now* I should at least do just what I did, *unwillingly,*" which seems to indicate that she executed her will "willingly," and was satisfied with it.

She also has in her will the solemn declaration that the bequests in item No. 1 "are made with the knowledge of my children and in accordance with my husband's desire that a portion of my estate should be so divided."

Under the evidence, we firmly believe the testatrix intended to make, and willingly executed the will in question; that instead of being under any restraint she acted freely, consistently and honestly. She did the most natural thing under the circumstances.

The evidence adduced at the trial not only does not overcome the presumption as to the validity of the will, but strengthens it to such a degree of certainty, that there is but one conclusion reached, to-wit, that the will in question is the *will* of the testatrix.

There was no error in directing a verdict sustaining the same and the judgment is affirmed.

CONTRIBUTING TOWARDS DELINQUENCY OF A MINOR.

Circuit Court of Montgomery County.

CHRISTINA SMITH v. STATE OF OHIO.

Decided, December 23, 1910.

Delinquency of Minors—Prosecution for Contributing Toward—Competency of Testimony as to Reputation of House Visited—Proprietor of Liable for Penalty Although Acting Through a Subordinate—Error—Charge of Court.

1. Where a person is charged under 1654, General Code, with contributing to the delinquency of a minor under seventeen years of age, by renting a room to her for the purpose of illicit intercourse, and the testimony shows that the minor went there for that purpose, it is not error to permit testimony o be given as to the reputation of the house in which such room is located.
2. Where the charge of the court, taken in its entirety, is such that it is evident that the jury understood it in a manner so as to correctly apply the law, it will not be held erroneous even though it contains some statements that are not strictly clear or proper.
3. A person owning and conducting a house of ill-repute is guilty of contributing to the delinquency of a minor under seventeen years of age, where it is shown that such minor was admitted by a person apparently acting as a servant or employe and making no inquiry as to the age of the minor.
4. Where a person owns and conducts a house of ill-repue, the duty is imposed on her to know that those whom she permits in her house and to act apparently as her servants, shall obey the law, and in case they do not she as principal and proprietor of the house in which the delinquency occurs is liable to pay the penalty of the statute.

Nevin & Kalbus, for plaintiff in error.

Carl W. Lenz, contra.

ROCKEL, J. (orally); DUSTIN, J., and ALLREAD, J., concur.

The plaintiff in error was tried in the juvenile court (1639 to 1683, General Code), the affidavit charging the offense being as follows:

"Before me, Roland W. Baggott, judge and ex-officio clerk of the probate court in and for said county, personally came Carl

W. Lenz, who, being duly sworn according to law, deposes and says, that on or about the 30th day of April, 1910, at the county of Montgomery aforesaid, one Christina Smith then and there being, did aid, abet, cause, encourage and contribute toward the delinquency of Madeline Shultz and Marjorie Spear then and there minors under the age of seventeen years, to-wit, of the age of sixteen years, in this, to-wit: that she the said Christina Smith did on or about April 30th, 1910, rent to the said Madeline Shultz and Marjorie Spear and Edward Grimes and John Young, a room for the purpose of illicit intercourse and in divers other ways and times she the said Christina Smith did willfully and unlawfully contribute toward the delinquency of the said minors, Madeline Shultz and Marjorie Spear, she the said Christina Smith well knowing the said Madeline Shultz and Marjorie Spear to be such minors contrary to the statute in such case made and provided." * * *

The case was submitted to a jury and the jury returned a verdict for the state; a motion was filed to set aside the said verdict and the same was overruled; the plaintiff in error then filed her petition in this court alleging the usual grounds of error, the verdict not supported by sufficient evidence, contrary to law and for error occurring in the trial of the case. One of the principal contentions of error was in reference to the admission of testimony introduced establishing the reputation of this house and of the place where it was charged that these persons went upon that occasion. There are cases to be found upon both sides of this proposition, but we think that the authorities support the contention principally that such testimony may be introduced. *Wigmore on Evidence,* Section 78, says:

"If it distinctly appears in the statute that the repute of the house is the essential criminal fact, so that merely to keep a house of that reputation is the offense, then the reputation is a fact in issue, and the reputation may be shown, irrespective of the actual character or use of the house."

Now, I might call attention to the statute (1644, General Code) in this respect, charging what would constitute a delinquency—one of the phrases being as follows: "or who knowingly visits or enters a house of ill-repute." Ill-repute of itself means bad reputation and therefore to enter a house of that kind it becomes

one of the elements of the crime. In another place Wigmore has this statement, Section 204:

"It has already been seen (*ante*, par. 78) that, apart from statutes constituting the repute of the house as the sole element of the crime of professional pandering, the character or use of the house and the character or occupation of the inmates may come into issue. Two questions having a bearing here are thus presented: (1) May particular instances of prostitution in the house be offered, as showing its habitual use or character? (2) May particular acts of prostitution by the inmates be offered, as showing their occupation or character as prostitutes? Both these questions should be answered in the affirmative, for the same reasons as in the preceding class of cases."

I might say further that in this case the evidence unquestionably shows that these girls had been in this house before and went there for the purpose of prostitution. So it seems there is no doubt of that question being proved and that there was no error in the admission of the testimony as to reputation.

Another matter relied upon in error is the charge of the court. To be properly understood it is necessary to give it in its entirety:

"Before you enter upon your duties it is incumbent upon the court to charge you upon the law that is considered applicable to the case; such is the court's duty and it is your duty to act in accordance therewith. You, however, are the sole judges of the facts and you are not to be guided by anything counsel might say to you, or that the court might say to you.

"This is a case wherein the defendant, Christina Smith, is charged with aiding, abetting, causing, encouraging and contributing towards the delinquency of one Madeline Shultz, a minor under the age of seventeen years. To this charge the defendant has entered a plea of not guilty, which puts the matter in issue before you."

Then the charge quotes the sections of the statutes and continues:

"You are not interested with the amount of the fine; that you have nothing to do with; but whoever aids, abets, entices, encourages or contributes towards the delinquency of a minor, and then provides what the penalty shall be,

"You are to find in this case that on or about the 30th day of April, 1910, that Christina Smith did aid, abet, cause, encourage towards the delinquency of Madeline Shultz; you are also to find that beyond a reasonable doubt.

"You are to find beyond a reasonable doubt that on the 30th day of April, 1910, that Madeline Shultz was then a minor under the age of seventeen years. This as I say, you are to find beyond a reasonable doubt, and that is a doubt that may, or rather an honest uncertainty that may exist in the mind of a candid impartial juror having a full and careful consideration of all the testimony, having the sole desire to ascertain the truth, not a mere speculative doubt voluntarily excited in your mind to avoid the rendition of disagreeable verdict.

"You are to find, of course, that this offense was committed in Montgomery county, state of Ohio.

"There has been some testimony introduced in this case to show the reputation of Madeline Shultz for chastity before April 30th. The testimony might indicate that that reputation for chastity before that time was bad, and that the reputation of Marjorie Spear and Marie Shultz was bad. With that you are solely concerned as to their right to be believed. Their veracity, their credibility, whether or not they were good girls in nowise concerns you.

"You must find that when you find that they are guilty or when you find that this defendant is guilty of an offense, that Madeline Shultz was under the age of seventeen years on April 30th; further than that you have nothing to do with her reputation.

"And I also charge you as a matter of law if you find beyond a reasonable doubt that Madaline Shultz was under the age of seventeen years on April 30th, 1910; that she in company with anyone went to the house of Christina Smith on or about the date named in the affidavit and you find that the house conducted by Christina Smith was one of assignation, and a place where persons of opposite sex met for the purpose of illicit intercourse. in determining the guilt or innocence of this defendant, it is not necessary that said Christina Smith had actual knowledge of the presence of said Madeline Shultz. As I charge you, and as I believe the law views it, it is her business to know. She is to satisfy herself and if you find all these things to be true beyond a reasonable doubt, your duty would be to return a verdict of guilty.

"If you do not so find beyond a reasonable doubt it will be your duty to return a verdict of not guilty."

The objection made to this charge is that the court in effect told the jury that they must find certain things by not putting it in the alternative, but we think that the jury was not misled by this charge; that they understood fairly well from it that they must find all these things, as stated in the conclusion of the charge, these things, beyond a reasonable doubt. It is true the charge might have been better upon that question and ought, perhaps, to have been stated in the alternative, but trial courts sometimes inadvertently with the numerous matters that arise in the trial of a case do not state all things as plainly as they should be. We think, however, the jury was not misled in this charge that they knew what they were to find and how they were to come to that conclusion—they must find all these things beyond a reasonable doubt.

Another question raised is whether the verdict is sustained by the testimony or the weight of the evidence. There is no direct testimony offered in this case that Christina Smith was actually present in this house when these girls were there, or that she actually did know that they were there at the time alleged, and it is argued that in a charge of this kind she could not be convicted under the statutes unless it be shown that she had knowledge that these people were there. The testimony shows conclusively that Madam Smith lived there—a number of persons testified to that fact; had for twenty-five years one person testified—and these people, John Young and Grimes, the young men who went with these girls, had been in this house before for the express purpose of assignation. Marjorie Spear had been in this house before for that purpose; and when they were there before they saw Madam Smith in charge. Now, then, when these young people met at Lafayette Hall for the purpose, for the express purpose of going to this place for assignation, they went there because they knew or testified that they knew, that it was a place of that character. When they went there the person that let them in was a maid, it was not Madam Smith, because they knew Madam Smith; it was some one apparently in charge of the house; the maid, a person who let them in the door, assigned the rooms to them and came afterwards to collect the

toll. So it seems that they were justified in believing that this person was the maid of Madam Smith and that Madam Smith was still the proprietor. However, as to the testimony of Madam Smith being present at this time, we have the testimony of John Young, one of the parties, who says that he saw her in the morning. These people stayed there all night and left next day about ten or eleven o'clock. He says he saw her in the morning; he personally knew who she was. Marjorie Spear saw her in the morning; she knew her because she had been there before. During the time that they were there some one called up from down stairs telling them that they should not make so much noise. This wasn't the maid, as they all testify. So we think that the testimony would support the finding of the jury that she really was there, and a maid in her employ who was in charge. The maid didn't ask the girls their age; no inquiry was made upon that question there or at a previous time they were there. There is a line of cases in Ohio which seen to be proper to be followed in cases of this kind. In the "Sale of oleomargarine at retail," a case reported in 4 C.C.(N.S.), 193, affirmed without opinion, 69 O. S., 570, *Williams* v. *State,* in the syllabus it is said:

"1. Where an affidavit charges one with unlawfully selling oleomargarine, and the evidence shows that the sale was made by an employe who was authorized to sell the article, this is not a variance. It was not necessary to allege that the sale was made by an agent or employe. In misdemeanors all are principals.

"2. (In part): Where the oleomargarine was sold by a clerk in the store of the accused, who was engaged in the business of selling oleomargarine to the public, with other merchandise, and who authorized its sale by his clerks, in the ordinary course of business, it is no defense that he had instructed such clerk and all of his clerks in the store not to sell oleomargarine, except under its true name." * * *

"3. One who engages in the business of selling oleomargarine to the public and permits and authorizes its sale by his clerks or employes, is bound to see that the law regulating its sale is complied with, and if it is violated by such employes or clerks, the employer is liable under the statute."

In the case at bar, at least, the state made out a *prima facie* case, when it showed that these persons went there, and some person

apparently in authority permitted them to enter the house. If this person admitting them was not a person in authority or there was a defense that Madam Smith did not know or had no opportunity of knowing the age of this child, she could have made a defense of that character. The opinion in the last quoted case is quite lengthy. Several intoxicating liquor cases are cited in support, one from Wisconsin: "The sale of intoxicating liquors to a minor is an offense under Section 1, Chapter 128, though the vendor does not know that the purchaser is a minor." And then there is cited the case in 54 Ohio State, *State* v. *Kelley:*

"An affidavit to charge a violation of the act of March 20, 1884, Section 8805, 'to provide against the adulteration of food and drugs' need not charge that an adulterated article of food is sold to be used as human food.

"In a prosecution under said act, it is not a defense that the accused is ignorant of the adulteration of the article which he sells or offers for sale."

At the conclusion of *Williams* v. *State,* (*supra*), this language occurs which we think is applicable to the case at bar:

"We think in holding as we do, we are following the principles and spirit of the case in the 54th Ohio St. In the absence of a decision directly in point, we are of the opinion it ought to be the law, and we hold it to be the law, that where one engages in a business of this kind, he does it at his peril, and that the duty is imposed upon him to *know* that those whom he employs to sell this article to the public obey the law in the manner of selling it, and in case they do not, that he, as the principal and proprietor of the establishment, is liable to pay the penalty assessed by the statute. We feel that any other holding would practically destroy this statute and thwart the object and purpose that the Legislature had in view. We believe it to be a wholesome law and that it should be construed so that it may be enforced."

The judgment of the court below will be affirmed.

ACTION BY A TENANT IN COMMON FOR RENTS AND PROFITS.

Circuit Court of Morrow County.

FANNY D. KUESTER v. ALBAN YOEMAN.

Decided, June, 1911.

Wills—Construction of Evidence Indicating Purpose of Testator Competent—Use of the Word "Heirs" Where There are Living Children—Adverse Possession Against a Tenant in Common—Statute of Limitations—Rents and Profits.

1. The word "heirs" where used by a testator having living children will be regarded as synonymous with children.
2. The grantee of a one-half interest in lands does not by merely going upon the lands and remaining in possession thereof and failing to account to the owner of the other half interest for rents and profits, thereby oust the said owner of the remaining half interest from possession or set the statute of limitations running against him.
3. Testimony showing that the son of the testator was heavily in debt is competent for the purpose of indicating the purpose of the testator in making no provision for said son and giving his entire estate to his son's wife and their children, thereby protecting the estate against the creditors of the said son.

VOORHEES, J.; SHIELDS, J., and CROW, J., (of the Third Circuit, sitting in place of Powell J.), concur.

This action in the court below was a proceeding in ejectment brought by the plaintiff in error against the defendant in error for the possession of the real estate described in the first cause of action set forth in the plaintiff's petition.

In a second cause of action the plaintiff says that the defendant ever since the 20th day of June, 1908, excluded the plaintiff from the rents and issues and profits of said premises and refused to account to the plaintiff therefor or pay to her any part of the value thereof. The value of the rents, issues and profits from said date and the damage for withholding the said premises from the plaintiff amounted to the sum of $240.

Wherefore, plaintiff asks judgment for the delivery of said real property and for the said sum of $240, and for all other further and different relief to which she is entitled. The action was commenced June 18, 1910.

The defendant by answer and in his first defense denies each and every allegation in the petition contained, and in a second defense pleads the statute of limitations; that the plaintiff's first cause of action did not accrue to her within twenty-one years next preceding the commencement of the action, nor within ten years after plaintiff arrived at the age of majority, and that by reason thereof her causes of action are barred by the statute of limitations.

The plaintiff by reply denies each and every allegation of defendant's second defense.

The cause was tried to the court without a jury upon an agreed statement of facts and certain evidence introduced at the trial.

From the agreed statement of facts it appears that one Lewis Barge was the common source of title to the premises involved in this action; that said Lewis Barge died testate June 20, 1884. that his will and a codicil thereto were admitted to probate and record August 1, 1884, in the Probate Court of Morrow County. Ohio; that he was the owner in fee of the premises described in the petition. That Robert T. Barge was a son of said Lewis Barge, and he died July 18, 1904. Louisa Jane Barge was the wife of said Robert T. Barge; she died June 20, 1908. The said plaintiff, Fanny D. Kuester, was the only child and heir of said Robert T. Barge, deceased, and said Louisa Jane Barge. Said Fanny arrived at the age of majority in the year 1895. On March 24, 1885, said Louisa Jane Barge and her husband. Robert T. Barge, for the consideration of $2,500, expressed in the deed *quit-claimed* all their right, title and interest in said premises to one Daniel Benson, which deed recited: "Being the title and interest in the real estate of Lewis Barge, deceased, devised to grantors or either of them by the last will and testament of said Lewis Barge, deceased, being all their interest in the lands owned by said Lewis Barge at the time of his death." It is further stipulated that, "Should said will be

broken and set aside by the court, it is then intended by said grantors that said Daniel Benson, his heirs and assigns shall by this conveyance convey all our right, title and interest in all of said estate of said Lewis Barge, deceased."

That on March 25, 1885, the said Daniel Benson and wife quit-claimed said real estate to Hattie Smalley with the same description and recitation in said deed. Hattie Smalley and her husband of May 27, 1886, quit-claimed all their interest in said premises to John H. Rodes, excepting therefrom two and a half acres deeded to Huldah Yeoman, who was the wife of said defendant, Alban Yeoman.

That John H. Rodes and wife in July, 1887, quit-claimed all their right, title and interest in said premises to Alban Yeoman. the defendant herein, who has been in possession of said premises from said date to present time. That the said defendant. Alban Yeoman, was a brother-in-law of said Louisa Jane Barge and Robert T. Barge, and was familiar with the will of said Lewis Barge, deceased, and all the deeds above set forth at the time he purchased said premises from John H. Rodes.

Huldah Yeoman by her last will and testament "bequeathed," devised to the defendant, Alban Yeoman, all the right, title and interest she had in the two and a half acres purchased of Hattie Smalley and being part of the premises described in said plaintiff's petition.

The testimony outside of the agreed statement of facts does not materially affect the legal status of the case, so the principal and controlling element in the case is the will of Lewis Barge, deceased. What estate, if any, did the will of Lewis Barge, deceased, give to the plaintiff, Fanny D. Kuester, in the premises described in her petition? And what estate did the will of said Lewis Barge, deceased, give to Louisa Jane Barge, wife of Robert T. Barge?

To determine these questions resort must be had to the will of said Lewis Barge, deceased. The will was made February 19, 1880. At the time of making the will Robert T. Barge, the son, was living and had then living the plaintiff as his only child.

The first item of the will, after providing for a life estate in said premises in favor of his wife, Sibbia Barge, who died be-

fore the testator, among other things provides that, "At the death of my said wife the real estate aforesaid I give and devise to Louisa Jane Barge, wife of my son, Robert T. Barge, and to his lawful heirs."

It will be observed that the will gives Robert T. Barge nothing. His name is used to designate more clearly those who were intended to receive his estate or who were to be the objects of his bounty, viz.: Louisa Jane Barge, wife of his son, Robert T. Barge, and to his lawful heirs. Robert survives his father and the plaintiff, Robert's only child, was living at the date of the will.

Technically, persons in life can have no heirs, and therefore when property is given to the heirs of one living, the heirs mean the child or children of such person. From the fact that the estates of deceased persons usually descend to their children, the term "heirs" is frequently regarded as synonomous with "children."

The words "heir" or "heirs" in a will, if such was the clear intention of the testator, may be construed "child" or "children," and they will take as purchasers. *King* v. *Beck,* 15 O. R., page 555; 6 O. S., 563; 12 O. S., 320; 17 O. S., 166; 22 O. S., 255, and 58 O. S., 238.

The wife of Robert T. Barge is given a fee in the premises described in the first item of the will of Lewis Barge and jointly with her is given to the heirs or children of Robert T. Barge a fee in said premises, making the only child of Robert T. Barge and his wife joint tenants in the premises described in said item one of said will, and being the same premises described in the petition.

Therefore Louisa Jane Barge and the plaintiff were tenants in common in the ownership of said premises and the quit-claim deed of Louisa Jane Barge and Robert T. Barge of March 24 1885, to Daniel Benson only conveyed to him an undivided half of said premises, and the plaintiff, Fanny D. Kuester, is the owner of the other undivided half unless the defendant's defense of the statute of limitations bars her right to recovery in this action.

It is contended by the defendant that he has been in possession of said premises for twenty-one years and for ten years since the plaintiff has arrived of age.

The deed from Robert T. Barge and Louisa Barge did not undertake or assume to convey more than the interest of said Louisa Barge and Robert T. Barge to said Daniel Benson, hence he and his grantee became tenants in common with said plaintiff in the occupancy of said premises.

There is nothing in the agreed statement of facts or the testimony that tends even to show that defendant had taken such possession or control of said premises as to oust the plaintiff of possession or set the statute of limitations to running against her.

Therefore, we hold that the defendant's plea of the statute of limitations is not good and is not established by any evidence. *Youngs* v. *Heffner,* 36 O. S., 232; *Gill et al* v. *Fletcher,* 74 O. S.. 295; *Hogg* v. *Beerman,* 41 O. S., 81.

We think the court erred in ruling out the testimony of the plaintiff to show the indebtedness of the son, Robert T. Barge, as this testimony tended to show the intention of the testator in not giving Robert any of his bounty, but to give it to his child, as he was not willing to pay the debts of his son out of his estate. This he had a right to do, and it furnishes a reason for the construction of item one of his will as hereinbefore found.

We find Lewis Barge's intention was to give to Robert T.'s wife and their child, the plaintiff, this property rather than to Robert, who was largely in debt and doubtless would have lost the property if it had been given to him. We think this evidence was competent and the court erred in excluding it.

Therefore, the judgment and finding of the court below is reversed with costs. Exceptions allowed. And coming now to render the judgment the court should have rendered, we hold that the plaintiff is entitled to hold and be possessed as tenant in common with the defendant and to have an accounting upon her second cause of action for rents and profits according to law. Exceptions allowed. Cause remanded to the common pleas for further proceedings according to law.

FINALITY OF A DIVORCE DECREE.

Circuit Court of Knox County.

MARY DURBIN SAPP v. JOHN H. SAPP.

Decided, March 9, 1909.

Divorce and Alimony—Finality of Decree—No Appeal Lies to the Grant of a Divorce—Nor can a Motion for a New Trial be Entertained.

The rendition of a decree of divorce fixes the status of the parties *eo instanti*, and the marital relation thus severed can be restored only by consent of the parties and their remarriage.

BY THE COURT (Voorhees, J., Taggart, J., and Donahue, J.)

This proceeding in error is brought to reverse the judgment of the court of common pleas wherein said court by its order and judgment dismissed the petition of the plaintiff in error, then plaintiff, in said court and rendered a judgment against her.

On the 22d day of December, 1908, in a certain proceeding brought by the plaintiff in error against the defendant in error for divorce the court of common pleas on the trial docket of said court entered a "Decree for plaintiff and restored to maiden name. 12-22-08." On said day a proper journal entry was filed with the clerk of the court decreeing that the marital relation existing between the said Mary Durbin Sapp and John H. Sapp "be and the same is dissolved and both parties released from the obligation of said marital relation, and the said plaintiff is restored to her maiden name of Mary Durbin. It is further ordered by the said court that said plaintiff recover from the defendant her costs taxed at $——." It further appears from the record that the costs on said case were on that day paid. The record further discloses that on the 24th, day of December the court, of its own motion, entered on the trial docket the following: "12-24-08. Case reopened. Heard further upon the testimony of the defendant. Decree dismissing petition." And the court, as appears by the bill of exceptions, on the 23d day of January, 1909, furnished to the clerk of said court an entry reopening the hearing of said case and

heard further testimony and found in favor of the defendant and dismissed the petition of the plaintiff, and ordered the former entry in favor of the plaintiff stricken from the files; to all of which ruling of the court the plaintiff excepted,and perfected a bill of exceptions, and the question is now before this court whether the court was without jurisdiction and without authority of law to dismiss said proceeding or to strike from the files said journal entry and enter a judgment and decree different from that which he had entered on the 22d day of December.

The section of the statute in respect to divorce and alimony does not furnish any provision for an appeal from the judgment of the court of common pleas or for prosecuting error therefrom, and when said court enters a decree or judgment dissolving the marital relation of the parties, in a divorce proceeding it exercises its jurisdiction to a finality, and it can not thereafter change or modify said decree or judgment. The judgment of the court when so rendered is not subject to change or modification as in other cases, there being no time fixed for the filing of a motion for a new trial, nor providing for otherwise contesting said judgment and decree, nor is it one of that class of decrees that the court has control of during the entire term. A judgment in a divorce case fixes the status of the parties.

If the decree is for divorce the status of the parties then becomes fixed "*eo instanti*" upon the rendition of the judgment and decree.

If the decree be a severing of the marital relation, it can only be restored by the consent of the parties thereto and the parties remarrying. This holding is supported by the case of *Parrish* v *Parrish*, 9 Ohio State, p. 534, and the case of *Nauman* v. *Nauman*, 4 C.C.(N.S.), p. 298.

In the case of *Nauman* v. *Nauman* it is held:

"Failure to enter a decree of divorce upon the journal does not deprive it of validity, but where the granting of the decree has been noted on the apearance docket, it will be regarded as operative between the parties from its rendition.

"A court is not authorized to reopen a divorce case upon a motion filed two days after the decree was rendered, where it

appears that on the day the motion was filed one of the parties without knowledge of the filing remarried.

"A proceeding for divorce is terminated by an order of court that the petition be dismissed, and the fact that no reference is made in such order as to the defendant's cross-petition does not give to the defendant the right to thereafter move for an allowance of temporary alimony."

It is the judgment of this court that the court of common pleas was without jurisdiction to open the decree and dismiss the petition, and for that error of the court in so doing the judgment of the court of common pleas is reversed and this case is remanded with instructions to said court to enter on its journal the decree of divorce so rendered on the 22d day of December, 1908. Exceptions will be noted.

ACTION ON A CONTRACT FOR ERECTION OF ELEVATORS.

Circuit Court of Hamilton County.

THE H. J. REEDY COMPANY v. CHARLES L. HARRISON ET AL.

Decided, July 29, 1911.

Action Prematurely Brought—Contract for Work to be Delivered Free from Liens—Not Fulfilled, When.

Where a contract for the erection of certain elevators provides that the work shall be delivered free from all claims, liens or other charges, an action for recovery of balance due is prematurely brought where instituted while there is in force a mechanic's lien in favor of a sub-contractor.

Healy, Ferris & McAvoy, for plaintiff in error.
Stephens, Lincoln & Stephens, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

The action below was to recover a balance due for the erection and construction of certain elevators in the building situated at the southwest corner of Fourth and Elm streets, in Cincinnati. Ohio, as per a certain contract entered into between the parties hereto.

At the close of plaintiff's evidence, the trial court dismissed the action without prejudice on the ground that the same had been prematurely brought. The contract provided, among other things, "that the work was to be delivered to the owner completely finished and free from all claims, liens and other charges with the utmost dispatch. That payments on account should be made upon the written certificate issued by the architect from time to time as the work proceeded, and that a final settlement as to the remainder, and for all extras, if any, should be had and payment made forty days after the work should have been completed, free from all liens, charges, and claims whatsoever and after the architect should have so certified in writing."

The evidence discloses that these clauses in the contract were not carried out on the part of plaintiff in error, but on the contrary, a sub-contractor, the Marine Engine & Machine Company, a non-resident of Ohio, on June 4, 1910, filed a petition with the court of common pleas of this county against plaintiff in error and defendants in error, setting up a mechanic's lien upon said property, which it claimed to hold, asking that said claim be declared a lien on the premises and that the same be sold in satisfaction thereof.

It would seem under this state of the record that the fulfillment of this part of the contract on the part of plaintiff in error was a condition precedent to final payment or suit, and is in the contract, without doubt, for the protection of the owners. *Titus* v. *Gunn*, 69 N. J. L., 410; *Leverone* v. *Arancio*, 179 Mass., 439.

Indeed, the application of plaintiff in error to have the Marine Engine & Machine Company made a party defendant in this case would seem to indicate that it asserted a claim or lien, and as the work was to be delivered by the contractor free from all liens or claims, this was a requirement which the plaintiff in error had not fulfilled prior to its suit upon the contract.

We think the court, therefore, committed no error in dismissing the action without prejudice to the bringing of a new suit whenever the conditions precedent on its part to be performed had been so performed.

Judgment affirmed.

STATUTORY PROVISIONS TO BE OBSERVED IN THE EXECUTION OF A WILL.

Circuit Court of Knox County.

WILMER A. TIMS v. CORNELIUS V. TIMS ET AL.

Decided, March 17, 1911.

Wills—Requisites in the Execution of Same—Subscription and Attestation Necessary—Error in the Exclusion of Testimony.

1. Upon a contest of a will, its validity will be sustained only when it appears that such will was executed in accordance with the provisions of Section 5916, Revised Statutes.
2. The provisions of said section require that the testator shall not only subscribe but acknowledge the will as *his* will, in the presence of two subscribing witnesses.
3. T signed what purported to be his will and the same was signed by the scrivener thereof and a son of said testator as witnesses thereto, but the latter was not present when said paper writing was written, nor did said testator make known to him that said paper writing was his will. *Held:* that said paper writing was not subscribed and acknowledged as contemplated by the provisions of said Section 5916, Revised Statutes, and the same is not therefore a valid will.
4. Where testimony is offered on the trial by the contestants of an alleged will tending to show that one of the witnesses thereto made contradictory statements at different times touching his knowledge that the paper writing signed by him as such witness was subscribed and acknowledged as testator's will, it is error upon the part of the trial court to exclude such testimony.

Wilkins, Owens & Carr, for plaintiff in error.

F. O. Levering, contra.

SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.

This proceeding in error is prosecuted to reverse a judgment of the Court of Common Pleas of Knox County, Ohio.

The proceeding in the court below was brought to contest the validity of the last will and testament of A. W. Tims, deceased.

The petition is in the usual form, and in substance alleges that on the 26th day of September, 1907, A. W. Tims, a resi-

dent of Knox county, Ohio, died in this county, and was possessed of certain real and chattel property; that the plaintiff is an heir at law, being a son of said decedent; that a certain paper writing purporting to be the last will and testament of the said A. W. Tims, under date of September 14, 1907, was presented to the probate court of said county and was on the 23d day of November, 1907, admitted to probate by the probate court of said county; that letters testamentary were issued thereon by said probate court to the defendant, Cornelius V. Tims, as executor; that the defendants, except Caroline Sheedy, are heirs of said A. W. Tims, and his children, and by the terms of said paper writing are named as devisees and legatees of the said A. W. Tims, including the plaintiff, Wilmer A. Tims, and Caroline Sheedy, the wife or relict of A. W. Tims, named as devisee, and Caroline Sheedy, as administratrix of John Tims, deceased. The plaintiff avers that said paper writing is not the last will and testament of the said A. W. Tims, and therefore prays that an issue may be made up and tried as to whether said paper writing is the last will and testament of the said A. W. Tims, and that the same may be set aside, and that the same may be found and declared not to be the last will and testament of said A. W. Tims.

The defendants, Cornelius V. Tims, Rosa Coile, Joan Tims and Caroline Sheedy, individually as well as administratrix of John Tims, deceased, answer and say that they admit the death of A. W. Tims, who was possessed of certain real estate and chattel property, and that the plaintiff is an heir of said decedent; they admit that said A. E. Tims made a last will and testament under date of September 14th, 1907, which was admitted to probate by the probate judge of said Knox county on the 23d day of November, 1907, and that letters testamentary thereon were duly issued to the defendant, Cornelius V. Tims, as executor, who qualified and has been acting as such; they further admit that all the defendants named in the petition, except Caroline Sheedy are heirs at law and legatees in said last will and testament, and that the defendant, Caroline Sheedy, formerly Caroline Tims, was made a devisee and legatee under

said last will and testament, as the widow of A. W. Tims; they further answer, denying all the allegations in the petition other than those expressly admitted to be true, and say that A. W. Tims was, at the time of making said last will and testament, of sound mind and memory; that he was not under any undue influence whatever, and that he was not persuaded or coerced into signing said last will and testament, and that he made the same freely and voluntarily, and they pray that the issue may be made up as to whether said paper writing is the last will and testament of the said A. W. Tims, and that the same may be declared to be the valid last will and testament of A. W. Tims.

With the issue thus made up by the petition and answer of the defendants, trial was had, and at the close of the evidence on behalf of the plaintiff a motion was made by the defendants that the court instruct the jury to return a verdict for the defendants, which motion was sustained by the court, and the jury was so instructed, and a verdict was thereupon returned for the defendants, and in favor of sustaining said last will and testament. A motion for a new trial was filed, to set aside the verdict for numerous errors assigned, which motion was overruled, and exceptions taken, and judgment was rendered on the verdict. Error is now prosecuted to this court, and the petition in error recites the following grounds of error:

First. Said court erred in overruling the motion of plaintiff in error for a new trial.

Second. Said court erred in its directing the jury to bring in a verdict sustaining the will.

Fourth. Said judgment was given for the defendants when it ought to have been given for the plaintiff.

The principal error complained of is that said last will and testament is invalid for want of due execution under the law. The record discloses that A. W. Tims died September 26th, 1907, leaving what purports to be his last will and testament, in the words following, to-wit:

"In the name of the Benevolent Father of All:

"I, A. W. Tims, knowing the uncertainty of human life, do this 14th day of September, 1907, make and publish this, my last will and testament.

"Item 1st. I do hereby give and bequeath to my wife, Caroline Tims, during her natural lifetime, if she does not re-marry, all of my real estate, consisting of about one hundred acres, upon which I now live. If she re-marry, the property is then to be divided equally among my six children. At the death of my wife the farm shall be sold and each of children share equally.

"Item 2nd: I give and bequeath to my son Cornelius V. Three Thousand Dollars in money or promissory notes of which I am seized at my death.

"Item 3rd. To my son John I give and bequeath the sum of Two Thousand Dollars in money or promissory notes of which I am seized at my death.

"I authorize my son Cornelius to collect enough on outstanding notes to pay him for notes which he holds against me, and also $105.00 for which he holds no note. All money or notes not disposed of in this will shall be put on interest and used by the family. (Over).

"I do hereby make and appoint my son Cornelius V. Tims, without bond, as executor of this instrument.

"(Signed) A. W. TIMS.
"A. W. TIMS.

"Signed and sealed in the presence of us:
"SAMUEL WRIGHT.
"CORNELIUS TIMS."

The record also discloses that the said A. W. Tims, on the said 14th day of September, 1907, requested his son, Cornelius V. Tims, to call Samuel Wright to the house of said decedent, as said decedent desired to see him. The son did so, and then returned to his work upon decedent's farm, and while so at work on said day said Wright called at the house of decedent and conferred with him in his bedroom; that at the request of decedent said Wright, who was a justice of the peace (and who has since deceased), wrote said paper writing, and after it was written the son was again called from the farm into the room of the decedent where said Wright and the decedent were, and where he says he saw his father sign his name to said paper writing, and after so signing it he asked for his glasses, and asked said Wright to sign his (decedent's) name for him, which he did. Said Wright and said Cornelius V. Tims signed said paper writing as witnesses. Some time after said paper writing was so signed, and while in said bedroom, the said Cornelius V.

Tims says that his father told him that he had designated him as executor in said paper writing. This, in substance, is the testimony with respect to the paper writing in question, as shown by the record.

Section 5914 of the Revised Statutes provides who may make a will and Section 5916 of the Revised Statutes provides how a will may be made; said latter section provides as follows:

"Every last will and testament (except nuncupative wills, hereinafter provided for) shall be in writing, and may be hand-written or type-written, and said will shall be signed at the end thereof by the party making the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of such party by two or more witnesses who saw the testator subscribe or heard him acknowledge the same."

In an action authorized by Section 5858, Revised Statutes, to contest the validity of a will, the issue to be made up and tried is prescribed by Section 5861, Revised Statutes, and is whether the writing produced is the last will, or codicil, of the testator, or not. In the case at bar the testamentary capacity or the intention of the testator were not in issue, but it is urged by the plaintiff in error that it was not executed according to law. It is contended that the law requires certain formalities to be observed in the execution of a will, and that these formalities must be complied with before it can be said to be clothed with the characteristics of a will; that under the laws of this state the manner of the execution of a will is governed solely by statute, which must be followed, and which can not be changed or departed from if the instrument is to be regarded as a will under the law (*Irwin et al* v. *Jacque et al,* 71 O. S., 395-409). It must be executed as required by the statute with reference to the signatures of the testator and attesting witnesses. When a will is to be proven, and the sanity of the testator, for instance, is put in issue, the law does not presume that the testator was sane at the time of signing the will, as in the case of other instruments, but his sanity is to be proved, and the subscribing witnesses are required to attest to the capacity of the testator,

including his sanity. So, too, with any other claim that may be made with reference to the condition of the testator: The attesting witnesses, before the will can be admitted to probate, must make oath that he or she was of sound mind and memory, and not under any restraint at the time of the execution of the will.

Counsel for defendants in error contended that the provisions of said Section 5916 were fully complied with in the execution of the said paper writing, and that the court was warranted, under the evidence submitted upon the trial, in directing the jury to return a verdict upholding said paper writing as a will. True, the court is authorized to direct the jury to return a verdict sustaining a will when the evidence does not tend to prove the issue on the part of the contestants, but was such action on the part of the court, under the evidence, warranted in the case at bar? The son, who was one of the subscribing witnesses to the said paper writing, testified that his father had spoken of his intention to make a will some time before said paper writing was made on the day named, and that on said day his father told him, some time *after* he had witnessed the said paper writing, that he had been named as executor in his will; but it appears that when he signed said paper writing as one of the witnesses thereto nothing was said or made known to him by anyone as to what paper he was signing, nor did his father or said Wright make known to him why he was called from his work on the farm into the room where they were. Under this evidence, can it be said that said paper writing was executed according to law as a will?

As stated, Section 5916 provides that every last will and testament * * * "shall be attested and subscribed in the presence of such party by two or more competent witnesses who saw the testator subscribe, or heard him acknowledge the same." This statute has at various times been construed by our courts, and we are therefore not without authority or precedent. It appears that the decedent was not entirely satisfied with his own signature to the paper, and he thereupon requested said Wright, the scrivener, to write decedent's signature thereto, which he

did, placing it immediately below that as made by the decedent. This was not open to objection, but is expressly authorized by statute. But was said paper writing attested and subscribed in the presence of the testator by the witnesses who saw the testator subscribe or heard him acknowledge the same, as contemplated by the statute referred to? In the case of *Keyl et al* v. *Feuchter et al,* 56 O. S., 424, the court say:

"One essential to the admission of the paper writing purporting to be a will to probate is that it shall have been acknowledged by the maker as his will, and his siguature also acknowledged, and in the presence of two subscribing witnesses."

And in *Haynes* v. *Haynes,* 33 O. S., page 612, in discussing the requisities of a will the judge announcing the opinion says:

"Subscription by the testator and publication of the same are independent facts, each of which is essential to the due execution of the instrument."

And again on page 614, in the same opinion, it is said that "The testator must in some way acknowledge and publish the paper as *his will.*"

In a legal sense attestation and subscription, as applied to the execution of wills have different meanings, and are clearly distinguishable. As laid down by eminent text-writers, and interpreted by the courts, the distinction is made that to attest the publication of a paper as a last will, and to subscribe to that paper the name of the witness, are very different things:

"Attestation is the act of the senses; subscription is the act of the hand; the one is mental, and the other mechanical, and to attest a will is to know that it is published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will is only to write upon the same paper the name of the witness for the sole purpose of identification. There may be a perfect attestation, in fact, without subscription." *Schouler on Wills,* 2d Ed., Section 330.

Hence it is that the fact that a paper writing when signed as a will must be made known to the witnesses attesting the will, and it would seem that there are good reasons why the

courts should thus hold. The attesting witnesses by statute are required to make oath as to the testator's mental condition, and they are therefore entitled to be advised as to what they are signing. Unlike signing a deed or mortgage, or other written instrument, the solemnity of the act at once impresses them, and they instinctively canvas the mental condition of the testator, because of the responsibility that the incident imposes.

Applying these principles to the facts as disclosed in the record in this case, we are of the opinion that the evidence was lacking in meeting the requirments of the statute in respect to the execution of this alleged last will and testament of A. W. Tims, deceased, and that the action of the court in directing the jury to return a verdict sustaining said alleged last will and testament, under the evidence, was erroneous.

It is further contended by the plaintiff in error that the court erred in excluding the testimony of the witnesses, P. L. Wilkins and T. F. McKinney, offered by the contestants as to certain conversations had with the said Cornelius V. Tims touching his knowledge that said paper writing was his father's will, when he signed it as a witness, to which action of the court plaintiff in error objected and took exceptions. On page 13 of the record said McKinney testified that he had a conversation with the said Cornelius V. Tims, in the probate office of said Knox county, at the time said alleged last will and testament was admitted to probate, when he said to him that when he signed the same as a witness he did not know what it was; and that on the occasion of the hearing of the exceptions to the account of said Cornelius V. Tims, as executor, said Wilkins testified that said Cornelius V. Tims told him that he did not know what the paper writing was that he signed. This testimony, we think, was competent, and entitled to be considered by the jury as affecting the credibility of the witness, Cornelius V. Tims; and in excluding the same from the jury, there was prejudicial error to the legal rights of the plaintiff in error.

For the foregoing reasons the judgment of the court of common pleas is reversed and said cause will be remanded to the said court of common pleas for further trial and proceedings according to law. Exceptions noted.

PROOF WITH REFERENCE TO DISPUTED WRITINGS.

Circuit Court of Pickaway County.

JOHN SULLIVAN v. IVA STARKEY.

Decided, 1911.

Evidence—Disputed Writings—Proper Method of Determining Authenticity of—When a Writing may be Exhibited to Witness with the Requirement that He Furnish in Open Court a Specimen of His Writing for Comparison.

1. When a witness has denied the authenticity of a document, purporting to have been written and signed by him, containing statements material to the issue in the case, he may be required on cross-examination to write specimens of his handwriting for the purpose of comparison. But this rule does not apply to the direct examination of the witness.
2. In such a case where testimony has been given by another that the document is in the handwriting of the party, it may be offered for the purpose of impeachment; and if the witness be a party, for the additional reason that it is a declaration against interest.

Barton Walters, for plaintiff in error.
Geo. W. Lindsay and *Irene F. Snyder,* contra.

JONES, C. J.; WALTERS, J., and SAYRE, J., concur,

This action arose on a complaint in bastardy filed by Iva Starkey against John Sullivan. The cause was tried in the common pleas court, before the court and jury, and the defenadnt was found to be the reputed father of the child. A motion for a new trial was filed and overruled, a judgment entered upon the verdict, and a bill of exceptions taken. The petition in error in this court alleges that there is error in the rejection of certain testimony, and in the refusal to give special charge No. 10, asked to be given by the defendant below.

Iva Starkey, the complainant, took the witness stand in her own behalf and testified, as shown by the bill, when a certain letter was shown to her, that this letter was written by a friend of her's; that she did not dictate it, and knew but very little of its contents; that she didn't direct that it be sent to John Sulli-

van, the defendant below, and that she did not know it was being sent. She, however, did state that she knew some of the things contained in the letter. This letter was claimed by the defendant to have been written by the prosecuting witness, and it purports to be signed by her initials. This letter, as shown by the bill of exceptions, was inclosed in an envelope and directed to the defendant at his address in the city of Circleville, and purports to have been written during the time of her pregnancy. The letter, among other things, contained this statement:

"Don't worry about what we were talking about Sunday night, for it don't belong to you. I would not lay it on you if it was yours."

It appears from the record, after the direct examination of the complaining witness had been completed, this letter being in the possession of counsel for the defendant and exhibited to the witness, he asked the witness as follows:

"I wish you would take that sheet of paper and pencil, and write what I dictate to you."

"Thereupon counsel for the defendant presented a sheet of paper and pencil to the witness, and requested that she, in the presence of the jury, write out a copy of the letter above offered in evidence, for the purpose of enabling the jury to say upon the comparison of the handwriting whether or not the letter in question was written by the plaintiff."

The court refused this request by counsel for the defendant, and an exception was taken to the refusal of the court.

In Ohio this is a new question, and has never been passed upon in any case reported so far as we know. It is unquestionably the rule as shown by the great weight of authority, that the claimed author of disputed handwriting can not exhibit, for the purpose of comparison, any writing made by him after the controversy arose. This rule has been amplified and extended in proper cases, that signatures and writing after the controversy arose may be offered in certain cases; that is, where it appears that the signatures and handwriting were not manufactured, and had been used in the ordinary course of business, and could not

have any connection with the disputed point. However that may be, it has never been held in any case we can find that upon the direct examination of the party, or a witness in the case, he may be asked, in support of his declaration that the disputed writing is not authentic, to write out his signature or a portion of the disputed document for the purpose of comparison. That can not be asked, I say, upon the direct examination of a witness for the reason, as the courts say, that a signature, or handwriting, could at the time, upon the trial, and during the examination in chief, be so disguised so as to prevent a proper standard of comparison to be made. And furthermore, the witness himself might have in his mind the idea of procuring at the trial such handwriting or signatures as would be self-serving in its nature, especially if he should be a party. But an examination of authorities cited, carefully and discriminately, will show that there is quite a difference whether this question is asked in chief or upon cross-examination. The opposite party, of course, may take the risk of the fact that the witness will disguise his handwriting. But the rule is, that upon the cross-examination of a witness, upon a point that is material to the issues in the case and upon a point which he has orally denied, the document may be displayed to the witness and he may be required to write in open court for the purpose of making a standard of comparison for any disputed document, and he may be required to furnish specimens of his handwriting therefor.

One of the cases frequently referred to and cited in the other cases, is the case of *Huff* v. *Nims*, 11 Nebraska, 363. There is was said by the judge:

"The only point relied on worthy of attention is the alleged error in requiring the witness Huff to write certain words in the presence of the jury, and for their inspection and comparison with the same words contained in the note on which the action was brought.

"In view of the testimony the handwriting of the witness was an important factor in the case, and it was certainly competent to disprove his oral statement as to the words of the note then before the jury. This could be done in various ways; one of which was by a comparison of the writing of the note with other writ-

ing, either admitted or proven to be his own. That written in the presence of the court and jury was certainly his own, and ought to have been acceptable to the witness and the party calling him. If not dissembled, and of the possibility of this the party conducting the cross-examination took the risk, the writing thus exhibited enabled the jury to form a pretty accurate estimate of the value of the witness' oral testimony on this point."

To the same effect is the case of *Bradford* v. *People,* 22 Colorado, 157, where the court held that when the accused comes on the stand as a witness in his own behalf and denies writing the document alleged to have been written by him, he may be required on cross-examination to write in the presence of the jury for the purpose of comparison.

The case of *Minnie Sanderson* v. *Charles Osgood,* 52 Vermont, 309, was a bastardy case in which evidence of this character had been offered and admitted and where the complaining witness had written in open court a portion of the disputed writing. Judge Ross in the decision of that case closes the opinion with the following language:

"The utmost limit to which the cases and practice go in this respect is to allow the opposite party, when the upholding party takes the stand as a witness, in cross-examination to call upon him to write in the presence of the jury, that he may use such specimens of his writings for comparison with the disputed writing, by the jury, and experts against him."

Another case frequently referred to in these cases is the case of *Catherine King* v. *James Donahue,* 110 Mass. Reports, 155, where the court say:

"A party to an action is not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which he denies. There are cases to the effect that where a witness has denied his signature to a document, he may be called upon in cross-examination to write in open court that the jury may compare such writing with the controverted signature, but this is merely as a part of the cross-examination and for the purpose of contradicting the witness."

In the case of *People* v. *Dekroft*, 49 Hun., 71, it was held that:

"On a trial for forgery, where the defendant introduced one of the parties whose name was signed to the note as a witness to show that she wrote the name alleged to have been forged, and that defendant wrote her name by her authority, she may be required on cross-examination to write her own name and that alleged to have been forged, and the signatures may be submitted to the jury for comparison as a test of her veracity."

This is also supported by the case of *Chandler* v. *LeBarron*, 45 Maine, 534. And to the same effect is the case of *Doe* v. *Wilson*, 10 Moore, P. C., 502-530.

While in some of these cases the handwriting of the witness was obtained in open court, either on the direct examination without objection or upon the cross-examination, the rule of practice is distinguished in the opinions.

In the case of *Hickory* v. *United States*, 151 U. S. Reports, p. 376. Chief Justice Fuller recognizes the distinction wherein a witness in a case of this kind upon examination in chief may not be asked to write in support of his declaration in open court, but the rule is that upon cross-examination by the other side he may be required to do so.

We think that the court erred in refusing to permit the witness on her cross-examination to write a portion of the letter that was claimed to have been written by her, and signed by what purported to have been her initials.

On pages 15 and 16 of the record, after she testified that she knew some of the things that was in this letter, she was asked this question:

"Now I wish you would tell us so that I can get it in the record, what parts of that letter you are acquainted with?"

The court refused to permit her to answer that question. On the next page of the record, after testifying that she knew it was being written but did not know what was in it with the exception of a few things, she was asked the question:

"Will you tell us what statements were in that letter that you did not know were in there before it was mailed?"

The court refused to allow that question to be answered, and an exception was taken by the defendant to the refusal of the

court to allow the questions to be answered in both instances. Here was a witness who knew that this letter was being written to Sullivan, and knew some of the contents of the letter; yet, in spite of the admissions made by the witness on the stand, she was not permitted to testify what things were contained in the letter that she knew; and one of the statements in the letter is the statement referred to in the first part of the opinion, viz:

"Don't worry about what we were talking about Sunday night for it don't belong to you. I would not lay it on you if it was yours."

We think the court erred in refusing to permit the witness to answer as to the contents of that letter. We think, also, that the court erred in not admitting the letter itself in evidence upon the case made out by the defendant.

The defendant introduced one witness by the name of Love McKinley, who testified that the writing in the letter was the handwriting of the complainant, that she knew it; in some portions of the testimony she makes it positive, but upon cross-examination her credibility is questioned seriously; but all this is a matter of fact for the jury; and having made a *prima facie* case by testifying to the fact that this handwriting was the handwriting of the complaining witness, this letter should have been admitted by the court, because of the *prima facie* case made by the testimony of the witness, Mrs. McKinley.

This is supported by the opinion in the case of *Schriedly* v. *State*, 23 O. S., 130. The fifth proposition of the syllabus is as follows:

"Where, upon such trial, a witness testified in behalf of the state that the goods were received and bought of him by the defendant, knowing that they were stolen; and, on cross-examination, he denied that he had any knowledge whatever of a letter, shown to him, purporting to be written by him to the defendant, stating that he knew nothing against the accused relating to the transaction: *Held:* that, for the purpose of impeaching the witness, the letter might be given in evidence by the defendant, on making *prima facie* proof that it was written at the dictation of the witness, and was in fact sent by him to the defendant."

This case is a little stronger than the case at bar, but it is in principle the same. So is also the case of *Insurance Co.* v. *Sarnahan*, 19 C. C., 98. The fifth proposition of the syllabus is as follows:

"Where a witness on cross-examination is shown a paper with his name signed thereto, which is at variance with his testimony in chief, but denies to have signed it, it is competent to introduce witnesses to testify that he did sign it, and such writing may be admitted in evidence."

That was exactly the course sought to be taken in this case. As to whether or not she signed it, that was a question for the jury; but the defendant sought to introduce this letter as a declaration against self-interest and also for the purpose of impeaching the credibility of the complaining witness.

Special Instruction No. 10, which was refused by the court, is as follows:

"The plaintiff alleges that she became pregnant by the defendant on August 22d, 1909; now I charge you that she must establish by a preponderance of the evidence that she became pregnant at that time; and you can not return a verdict against the defendant if you are in doubt as to when she became pregnant or in the event you believe that she became pregnant at some other time."

The trouble with that charge is, it attempts to bind the plaintiff on a question in controversy: the pregnancy of the complainant to beginning on the date of August 22d, 1909. The plaintiff was not, and could not, be bound by that exact date. There is no error on the part of the court in refusing to give this charge.

We think, because of the errors named, that the judgment of the court below should be reversed and the cause remanded to that court for a new trial.

PRIVILEGED COMMUNICATIONS.

Circuit Court of Hamilton County.

JESSIE PARKER v. MAMIE RODDY.

Decided, July 29, 1911.

Libel and Slander—False Imprisonment—Expression of a Suspicion as to Who Committed a Larceny is Privileged, When.

The expression to a police officer of a suspicion, by the owner of property which has been stolen, as to who it was who committed the theft, is privileged and can not be made the basis of an action for damages for slander or false arrest.

Scott Bonham, for plaintiff in error.
M. C. Lykins, contra.

JONES, J.; SMITH, P. J., and SWING, J., concur.

The action below was one for damages by defendant in error against plaintiff in error. The petition contained two causes of action namely—slander and false imprisonment.

The evidence disclosed that several articles had been stolen from the Parker residence. Shortly thereafter a detective of the city police department called upon Mrs. Parker and it was to him that she first divulged her suspicion that Miss Roddy was the guilty party.

Later interviews with police officers followed in the presence of Miss Roddy and at the trial of the case below the detectives and Miss Roddy were permitted to testify as to accusations made by Mrs. Parker on those occasions. We think these communications were privileged and that it was error to admit them. *Liles* v. *Gaster*, 42 O. S., 631, 635, 636; *Cooley on Torts*, 211; *1 Cooley on Torts*, 3d Ed., 434, 436; *Garn* v. *Lockard*, 108 Mich., 196.

Reversed.

PROSECUTION FOR AIDING IN THE SOLICITATION OF A BRIBE.

Circuit Court of Franklin County.

RODNEY J. DIEGLE v. THE STATE OF OHIO.*

Decided, October 17, 1911.

Bribery—Aiding and Abetting in the Procurement of—Sufficiency of Averments in Indictment—Competency of Evidence—Entrapment—Reference to Defendant's Failure to Take the Stand—Co-ercion of Jury—Sections 12380, 12823 and 13661.

1. An indictment which charges a sergeant at arms of the state Senate with knowingly aiding and abetting A, a member of the Senate, in the solicitation of a bribe, is not rendered insufficient by reason of failure to aver knowledge on the part of the defendant that A was a member of the Senate, or to aver how the defendant aided and abetted in the commission of the offense, or in stating the corrupt purpose to be that A "might be then and there influenced," whereas the statute uses the words "to influence."
2. Where the character of the witness is attacked by showing his indictment and conviction upon a charge of felony wholly disconnected from the issue on trial, the trial court is not bound to permit counsel to go into details with reference to the crime so charged or specifically into the history of the witness' past life where the same is wholly immaterial and collateral.
3. The entrapment complained of not having been originated by the prosecuting attorney or any officer of the state in this case was not of such a character as to bar prosecution for the offense alleged to have been committed by the defendant.
4. The remark by a prosecuting attorney in his argument to the jury with reference to a certain statement that the "defense had an opportunity to deny it, and it stands uncontradicted," is not such misconduct as necessitates the setting aside of a verdict of guilty, where the remark was immediately withdrawn by the speaker and the jury were instructed by the court to disregard it.

C. J. Mattern, Belcher & Connor and *J. E. Egan,* for plaintiff in error.

Timothy S. Hogan, Attorney General, and *E. C. Turner,* Prosecuting Attorney, contra.

*Affirming *State* v. *Diegle*, 11 N.P.(N.S.), 593, and *State* v. *Andrews and Diegle*, 11 N.P.(N.S.), 605.

FERNEDING, J.; DUSTIN, J., and ALLREAD, J., concur.

The plaintiff in error was indicted and convicted of aiding and abetting Senator Andrews in soliciting a bribe as a member of the General Assembly. A motion for a new trial was overruled and the case brought to this court upon a petition in error to review the regularity of the conviction.

I.

The first contention made by counsel for plaintiff in error to set aside said verdict is that the indictment is defective in the following particulars, to-wit:

(*a*) That it does not expressly aver that Deigle, sergeant-at-arms of the Senate, knew that Andrews was a member of the state Senate.

(*b*) That the indictment is defective in not stating the nature and character of the messages Diegle is alleged to have carried to Andrews.

(*c*) That the indictment in charging a corrupt purpose states that said Andrews "might be" then and there influenced, whereas the statute prescribing such offense provides that the corrupt purpose was "to influence."

(*a*) Relative to the first objection to the indictment, it is sufficient to say the form adopted is in harmony with that generally accepted by the courts of this state. The general averment that Diegle *knowingly* aided and abetted Andrews in the commission of the crime taken in connection with all the other averments of the indictment is in our judgment sufficient.

Section 12380 of the General Code provides:

"Whoever aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender."

(*b*) In respect to the second objection, an examination of the indictment in connection with the foregoing statute, Section 12380, General Code, quoted, convinces us that the general averment that Diegle knowingly aided and abetted Andrews in the commission of the offense charged, without stating specifically as to *how* he did so, is a proper compliance.

The manner employed in the aiding and abetting, such as the carrying of messages and arranging of meetings, might well be considered surplusage in the indictment and is unnecessary.

(c) For the third objection raised, there is here a slight departure from the statute. Section 12823, General Code, provides:

"Whoever corruptly gives, promises, or offers to a member or officer of the General Assembly * * * any valuable thing, or corruptly offers or promises to do any act beneficial to such person, *to influence* his action, vote, opinion or judgment in a matter pending * * * and whoever being a member of the General Assembly * * * or agent or employe of the state * * * solicits or accepts any valuable or beneficial thing *to influence* his action, vote, opinion or judgment in a matter pending * * * shall be fined * * * or imprisoned * * * or both."

The indictment charges Andrews as a member of the Senate with having solicited and accepted a bribe "with the intent and purpose that he, the said L. R. Andrews, *might be then and there influenced* with respect to his official duty," etc. The distinction is in the use of the words "might be then and there influenced" instead of "to influence," the language of the statute. Upon a careful reading and examination of the indictment, however, we are of the opinion that such departure is not substantial.

"It is requisite that every indictment should contain a substantial description of all the circumstances descriptive of the offense as defined in the statute, so as to bring the defendant precisely within it." *Hirn* v. *State*, 1 O. S., 24.

II.

Rulings on Evidence.

Numerous exceptions have been taken by counsel to the rulings of the court on the admission and rejection of evidence. It is impracticable to review all these in detail. We have, however, considered all the exceptions taken as we came to them in reading the record and have also examined carefully the briefs submitted in relation thereto.

Chief among the objections raised by counsel for plaintiff in error is, that the trial court erred:

(a) In limiting the cross-examination of Detective Smiley.

(*b*) In refusing to permit Senator Andrews to give the conversation he had with Senator Cetone before leaving for the Chittenden Hotel, and his (Andrews) position on the insurance bill which became the subject of the bribery.

(*c*) In admitting certain conversations had between Smiley, the detective, and Huffman and Cetone on the theory of conspiracy.

(*a*) The trial court permitted counsel for Diegle to cross-examine Smiley as to his plea of guilty to an indictment to defraud as returned by the grand jury of Cook county, Illinois, and also permitted Smiley to explain why said plea was made, the witness stating the plea was subsequently withdrawn with the permission of the court and the case nollied. We think this was not error. The trial court was not required under the rules of evidence to permit counsel to go beyond this and into the details of the crime charged nor into specific history affecting the witness' past life.

As to the alleged transcript of said criminal proceedings in Cook county, Illinois, offered by the defense to challenge the credibility of the witness Smiley, and excluded by the trial court, we do not think the court erred in this respect for the obvious reason that said transcript as offered did not purport to be nor was in fact a complete record.

(*b*) As to the conversation Senator Andrews had with Senator Cetone before leaving for the Chittenden Hotel to interview Smiley, the detective, and the declared attitude of Senator Andrews on the bill in question, is not, we think, a part of the *res gestae* of the case and was properly excluded.

(*c*) The testimony offered by the state to make out a *prima facie* case of conspiracy was in our opinion of sufficient weight as to justify the trial court in admitting the conversations had between Smiley, Diegle, Huffman and Cetone in furtherance of said conspiracy and that said court did not err in respect thereto.

III.

As to Proof.

It is urged by counsel for plaintiff in error that there was an entire failure of proof to connect Diegle and Andrews with the

crime charged; that Diegle was the agent of Detective Smiley and not Senator Andrews; that no proof was made of the carrying of messages between Smiley and Andrews.

We are of the opinion that the proof offered by the state is capable of the construction contended for by the state, and that under all the evidence submitted, the question was for the jury to determine whether or not Diegle aided and abetted Andrews in the solicitation and procurement of the bribe.

IV.

Entrapment.

It is strenuously urged that the record shows a case of entrapment and that such entrapment bars the state from prosecuting for the offense so originated by entrapment. This proposition is founded upon alleged connection of the detective, Smiley, with the origin, detection and exposure of the case at bar.

Briefly stated, the record discloses that two detectives, Arthur Charles Bailey and David H. Barry, of the Burns detective agency, were detailed early in April, 1911, to come to Columbus and investigate alleged bribery in the Legislature. This appears to have been done at the instance of the secretary of the Ohio Manufacturers' Association. There is no evidence that the detectives were employed or brought to Columbus by any other authority, nor their expenses paid, or promised to be paid, by the state or county, or an officer of either.

Arriving in Columbus they were engaged for about two weeks in an investigation of this subject, and then departed. On or about April 24th, they returned, about which time a third detective, F. H. Smiley, known as Harrison, arrived. On Tuesday, April 25th, a dictagraph was installed by the detectives in Room 317 of the Chittenden Hotel. A wire was attached to this dictagraph to transmit conversations and extended to the receiver in Room 316 adjoining.

The prosecuting attorney learned of the presence of these detectives, and on Tuesday, April 25th, Roscoe R. Walcutt, an official court stenographer, was at the request of the prosecuting attorney installed in Room 316 to report said conversations.

On Thursday, April 27th, Rodney J. Diegle, now plaintiff in error, at the instance of Detectives Bailey and Barry, called

upon Detective Smiley at Room 317, Chittenden Hotel, at which time it was arranged that Diegle should aid in securing a sufficient number of Senators to report out of the committee on insurance, the Cetone-Whittemore insurance bill then pending in the Senate. At this meeting were present Diegle, Harrison and Bailey. Diegle at this meeting promised to secure the necessary number of votes for this purpose at a certain stipulated price. He himself was to receive for his services $200, of which $50 was paid him at the time in cash, in marked bills. The names of the members of the state Senate to be involved were not given at this meeting. Shortly after 2 o'clock of the same day, Diegle again called at said Room 317 and reported to Smiley the names. About 5:30 of the same day, two of the Senators whose names had been furnished by Diegle reported at said Room 317. According to the testimony of Detective Smiley, and the conversation as reported by the official stenographer taken over the dictagraph, the two Senators present accepted the promised money, $200 each, for their support in getting the bill out of committee, the money also being paid in marked bills.

After some difficulty in having Senator Andrews report at Room 317, Smiley, about 3 o'clock P. M. the next day, April 28th, and at the suggestion of Diegle, called at the Senate chamber to see Andrews. Failing to find the Senator, Smiley, who was known as Harrison, returned to the Chittenden Hotel and on his arrival was handed a note by the hotel clerk from Senator Andrews saying:

"Mr. Harrison, owing to a mistake I went to the Neil House and missed you. Am going to make a 4 o'clock train for Ironton, O., but will be back Monday 11 A. M. when you can see me."

Senator Andrews in his testimony, admitted writing the note. Shortly after the receipt of the note, Andrews, who had remained in the Chittenden Hotel lobby, was pointed out to Smiley. The latter introduced himself to the Senator and the two then went to Room 317, where according to the testimony of Smiley, and as reported over the dictagraph, the arrangements previously made by Diegle were confirmed, and $200, according to the testimony, was then paid Andrews by Smiley, also in marked bills.

It also appears in the record that Smiley at the instance of Diegle had a telephone conversation with Andrews in relation to the arrangements Diegle had made, and which was previous to Andrews coming to the Chittenden Hotel.

Detective Bailey testified he said to Diegle on the way to the Chittenden Hotel, immediately prior to the first meeting between Diegle and Smiley:

"This man Harrison evidently had some money and I would look to Col. Diegle to see that I was taken care of."

Bailey also testified that previous to any steps taken by Smiley toward interesting Diegle the latter had a conversation with Barry and Bailey in the bar room of the Neil House when a telephone merger bill was the topic of conversation, and made the remark that some people are trying to put through a two million dollars proposition on a bottle of pop. While this conversation had no direct reference to the case at bar, it is significant as tending to show a corrupt motive on the part of Diegle and in that respect has a bearing on the question of entrapment.

There are many other details, but the foregoing in substance is the case of the state, so far as it concerns the question of entrapment.

The testimony given by the official stenographer in reporting the aforesaid conversations taken over the dictagraph was by agreement of counsel on both sides permitted to go to the jury with the reservation that no names were to be mentioned in referring to Diegle and associates, but they were to be designated as a voice, second voice, third voice, fourth voice and fifth voice.

Counsel have argued at length upon the proposition of entrapment and submitted many authorities in support of their positions, respectively. Notable among the line of cases cited by the Attorney-General and the prosecuting attorney on behalf of the state are the so-called decoy letter cases instituted and prosecuted by the United States Government. *Grinnis* v. *U. S.*, 150 U. S., 604, *Price* v. *U. S.*, 165 U. S., 311.

We think the case most clearly in point is the case of *State* v. *Fox* (unreported), from Meigs county. This resulted in a conviction in the trial court, was affirmed in the circuit court and

afterwards presented to the Supreme Court which refused leave to file a petition in error. The Fox case may, therefore, be considered as an expression of the Supreme Court on the law of entrapment in this state. The Fox case originated at the instance of the prossecuting attorney, who invited Fox to his home where the alleged entrapment took place, two witnesses being secreted in an adjoining room with a door partly opened between. Fox was interested in having certain criminal cases then pending against him continued and testified that his object in seeing the prosecutor was for the purpose of inducing the latter to consent to a postponement of the trial on the indictment. At this meeting and after said request had been made, the prosecuting attorney asked Fox, "What is there in it for me," to which Fox at said interview later replies, "I have laid away a thousand dollars"; the past tense indicating that this amount had been set aside for this purpose prior to his going to the prosecutor's house.

In this case the question of entrapment was properly made in the trial court, and in the circuit court, and the conviction in effect affirmed by the Supreme Court. Following the authority so laid down, we are bound to hold in the case at bar that all the testimony offered does not amount to such an entrapment as would bar prosecution. The facts adduced in the Fox case in our judgment are much stronger in favor of the contention of entrapment than the Diegle case under consideration, for in the case here it does not appear that the prosecuting attorney had anything to do with the bringing of the detectives to Columbus, and that his connection arose merely by the designation of an official stenographer to report the dictagraph conversations.

We have carefully examined the charge of the court on the subject of entrapment and are of the opinion the law was correctly given.

V.

Charge of the Court.

From what has been said as to the scope of the indictment, it would follow that the court properly refused special requests

3 and 4, which assumed to limit the charge to the mere delivery of messages and arranging of meetings.

Special requests 5, 6, 7, 8 and 9 were on the subject of entrapment and were properly refused.

Special request 12 was not appropriate to the facts of the case and was therefore properly refused. There are quite a number of objections to separate and disconnected paragraphs of the general charge, but when the charge is considered as an entirety, we are of the opinion there is not prejudicial error.

VI.

Comments by Counsel on Defendant's Failure to Testify.

We have examined carefully the record as to the comments made by Mr. McGhee, assistant attorney-general, in his argument to the jury in speaking of the dictagraph conversation in which he reported to the court as having stated,

"That Rodney Diegle made that statement and the defense had the opportunity to deny it, and it stands uncontradicted."

While Section 13661, General Code, provides that the neglect or refusal of a defendant to testify shall not create a presumption against him, nor shall reference be made to nor comment made upon such neglect or refusal, yet we think what was said by counsel under the circumstances in referring to the *defense* and *not the defendant,* and the prompt instruction of the court to the jury to disregard the remark so made by counsel of what was said, and the immediate and complete withdrawal thereof by counsel, does not constitute prejudicial error and furnish sufficient ground for reversal.

VII.

Alleged Coercion of the Jury.

In respect to the alleged coercion of the jury in agreeing to a verdict, we hold to the view that nothing was said by the court that might not properly be said in urging the jury to agree, nor was the length of time such as to indicate coercion. The law encourages the agreement of juries rather than disagreement and proper cautionary instructions to that effect may be given.

VIII.

ALLEGED MISCONDUCT OF THE JURY.

We have examined the affidavits of the jurors and of others as to misconduct of the jury and as to matters affecting their deliberations. We are of the opinion that much of the matter testified to is incompetent to be shown by the affidavit of a juror in opposition to his own verdict. But taking all that is properly shown, we think it is not sufficient to call for a new trial.

Considering the whole record, we are of the opinion that the evidence offered sustains the verdict, and we find no prejudicial error.

The judgment is, therefore, affirmed.

TRACTION CONDUCTOR CAUGHT BETWEEN CAR AND BUILDING.

Circuit Court of Lucas County.

GEORGE W. STRANG v. THE TOLEDO TRACTION COMPANY AND THE TOLEDO RAILWAYS & LIGHT COMPANY.*

Decided, February 24, 1908.

Negligence—Conductor Injured While Obeying an Order—Whether He Acted with Prudence and Care a Question for the Jury—Construction to be Placed on the Order as Shown by Surrounding Circumstances—Error in Directing Verdict for Defendant.

1. If by a fair construction of an order given by a superior to a servant, a person acting with ordinary prudence and exercising ordinary care would, under the circumstances, have considered it an unequivocal specific order to do a certain thing, the master can not escape liability for the consequences by showing that the order was open to another construction, and was not in fact intended to be understood as the servant understood it in acting, as he supposed, in obedience thereto.
2. Whether the servant failed to exercise ordinary care in interpreting the order in the manner in which he did interpet it is a question for determination by the jury in the light of all the surrounding circumstances.

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* Dismissed in the Supreme Court, February 23, 1909, on motion of the Toledo Railway & Light Co., plaintiff in error, at its costs.

C. A. Thatcher, for plaintiff in error.

Smith & Baker, contra.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

George W. Strang was a conductor on one of the cars of the traction company in this city. On the 23d day of February, 1901, the car upon which he was acting as conductor became disabled, and it became his duty to take it to the car barn, on Water and Monroe streets. There he and his motorman, Mr. Lorenz, left the car upon the street and proceeded over to the barn to take out another car, which was in readiness for them and which they had been directed to take. As they approached the front of the car barn, the doorway from which the cars issue onto the street, the car which they were to board and manage was being brought out from the car barn onto the street by a Mr. Struck, who was a superintendent and who was the superior of Strang and Lorenz in authority. Mr. Struck was upon the front of the car, managing it, but it appears that there was no one at the rear of the car to manage the trolley. As the car came out of the barn and came toward Strang and Lorenz, and while Strang and Lorenz were proceeding toward the car barn, Struck, on the front of the car, came near to where Strang and Lorenz had, for the time being, paused, and as the front of the car upon which Struck stood passed by Lorenz and Strang, Strang says that Struck, looking toward him, and, as he supposed, addressing him, said: "Look out for the trolley back there." Lorenz states the matter in nearly the same way, but does not put exactly the same words into the mouth of Struck; he says that the words used were: "Take care of the trolley."

There appears to be no dispute but what the duty of looking after the trolley and managing it—taking care of it—devolved upon the conductor, and that the duty to take care of this particular trolley on this car did then, or would have soon thereafter devolved upon Strang. Strang seems to have understood the direction, according to his testimony, as one to him to proceed immediately to the rear of the car and to board it and take care of the trolley. In his third amended petition, he says, among other things:

"It was necessary in the operation of the said car from said barn that some person should be at the trolley-rope so as to govern and control said trolley, so that no damage would be done to the overhead construction of the wires and other appliances belonging to the defendant company should said trolley-pole come off the wire."

It appears that upon the utterance of these words by Struck, Strang proceeded into the door as the car was coming out. The car was one of the larger patterns of cars used in the city. The door was wide enough—there was enough space between the side of the car and the side of the door, or jamb, to admit of Strang passing through and going to the rear of the car, provided the track had continued straight out of the barn; but, after the front of the car had gone some distance from the barn, it began to turn toward the right—that is toward the right of Struck, who was upon the car managing it. It turned in a track which it had to follow in order to bring it into Monroe street. The effect of the car thus turning upon the track was to swing the rear end of the car toward the left, that is toward the side of the door where Mr. Strang had entered, and the construction of the opening, and of the doors that were swung open there was such, that when the car swung in this way, it did not leave sufficient room for Strang to proceed upon his way toward the rear of the car. The operation of the car resulted in pocketing him there—it operated as a sort of a trap, so that he was caught between the rear end of the car and the jamb of the door. As the car was brought onto Monroe street and the rear end of the car came out of the door, it left but a few inches between the jamb of the door and the rear end of the car and there Strang was caught and pinched—crushed, so that he sustained very serious injuries.

It is charged by Strang, the plaintiff and the plaintiff in error, that there was negligence on that occasion upon the part of Struck in thus directing him to look out for the trolley or to take care of the trolley; that Struck, his superior, was well acquainted with the situation and the conditions prevailing there: that Strang himself was unacquainted with the place and was not aware of the fact that the car continuing in this way would be swung around in such a way as to catch him between the car and the door jamb.

There are other grounds of negligence alleged in the petition, but this is the only one that we think the evidence tended fairly to sustain, and, therefore, it is the only one to which we will give attention.

After the evidence had been put in on behalf of the plaintiff, on motion of the defendant, the cause was withdrawn from the jury, or rather, the jury was instructed to return a verdict in favor of the defendant, which it did. Of this action Strang complains. The case is evidently founded upon the doctrine of what is known as the Schelies case, found in 61 Ohio State, at page 298, and we think the evidence tends to establish a case coming within the principles laid down in that case.

It is true that the order to look out for the trolley, or to take care of the trolley, was not a distinct and unequivocal order to Mr. Strang to pass through that door at that time and to undertake to board the car; it was an order which, possibly, was not directed to him. It might have been, perhaps, intended as a warning to him to look out for himself that he might not be injured by the trolley-pole; it might, perhaps, have been intended as a direction to some other person in that vicinity to look out for the trolley-pole, but under the circumstances, we think it was open fairly to the construction upon the part of Strang that it was an order directed to him to at once proceed to his duty to board the car and take care of the trolley. Whether it was so intended and whether it was so understood, were questions, we think, that under the state of the case as it was submitted or as it stood at the time the plaintiff's evidence was in, should have been submitted to the jury. The question whether Struck intended to direct Strang to proceed at once to board the car, which would have required Strang to attempt to pass through the door; the question whether it was so understood by Strang, were, in our judgment, questions to be submitted to the jury. If an unequivocal order is given by a representative of a company in authority, to one who is under him and subject to his order, that such servant shall proceed in a certain way, or that might be understood by the servant as an order to him to proceed in a certain way, if such order might be so understood by the servant without negligence upon his part, if in the exercise

of ordinary care he might have so understood the order, then the servant may act upon the order and the employer will be responsible for the consequence, and the employer in that case could not escape responsibility by showing that something else was intended. If, in other words, by a fair construction, an ordinarily prudent person, in the exercise of ordinary care under the circumstances, would understand the order as Mr. Strang seems to have understood it, and would have proceeded as Mr. Strang appears to have proceeded, then responsibility for the results can not be escaped by showing that the order was open to another construction—that it was not in fact intended as the employe understood it; for the giving of such unequivocal order, under the circumstances, where harm might naturally follow from it, is of itself a kind of negligence.

We think the evidence tended to show that this order was given, that it was given to Strang, that it was understood by Strang as he says and that a fair and reasonable interpretation of it would require the action upon the part of Strang that he took upon this occasion, and that since the evidence tended to show all these things, there was a case which should have been submitted to the jury.

At page 10 of the record Mr. Lorenz, the motorman who worked with Strang, was asked this question: "What if any danger was there to the overhead construction if the trolley is not attended when coming out of the barn?" That was objected to and the objection sustained. The plaintiff excepted and offered to show that there was danger of the trolley jumping the wire and tearing down the overhead construction. We are not advised of the reason that moved the court to sustain this objection. It may be that there was something in the form of the question that seemed to be objectionable; it may be that it would have been better to ask what the effect would have been, rather than to ask what if any injury there would be; but, passing by questions of mere form, we have to say that we think the witness should have been permitted to state the probable effect of inattention to the trolley while the car was being operated out of the barn, for it is alleged, as I have read, that the effect would have been, if the trolley had slipped off—as it was apt to

do—that the overhead construction would have been destroyed. If that were shown, if it were shown furthermore, as it might have been, perhaps, that Strang knew this, it would go a great ways towards throwing light upon the question of what was meant by the direction to "Look out for the trolley," and what was understood by Strang as his duty under such directions—in other words, if it were true that the trolley was apt to slip off and destroy the overhead work and do damage to the company's property—if that were a thing known to the superintendent who gave the direction and known to Strang, who may be found by the jury to be the person to whom the direction was given, then the jury might well find that it was not intended by that direction—was not fairly understood by Strang that he should simply stay in the position where he was until the car came out to him, allowing whatever might to happen to the overhead construction through inattention to the trolley; but the jury might from evidence of such conditions, find that it was intended and that it was understood by Strang that he should proceed immediately to the rear of the car and board it and take care of the trolley before the trolley had reached the point where such damage might result from inattention to it.

The judgment will be reversed and the cause remanded because of error of the court in withdrawing the case from the jury and directing a verdict.

INSUFFICIENT GROUND FOR AN INSTRUCTED VERDICT.

Circuit Court of Hamilton County.

ALVA GREEN v. C., L. & A. TRACTION COMPANY.

Decided, January, 1911.

Negligence—Pony Cart in Collision with Traction Car—Variance in Plaintiff's Testimony.

Variance in the testimony of a plaintiff on direct and cross-examination is not, taken alone, sufficient ground for a non-suit.

Plaintiff, a fourteen year old girl, was injured by a collision with a car of defendant company while driving a pony cart in the village of North Bend. She claims permanent injury.

T. R. Snyder and *T. L. Michie,* for plaintiff in error.
Stanley Shaffer, contra.

SMITH, J.; GIFFEN, P. J., and SWING, J., concur.

While the evidence of the plaintiff in error upon the direct examination was in variance with that given by him upon his cross-examination, yet we do not think this discrepancy would entitle defendant in error to a non-suit.

"A motion to arrest the testimony from the jury and render a judgment against the party on whom the burden of proof rests, involves an admission of all the facts which the evidence tends to prove, and presents only a question of law for the court; but if there is evidence tending to prove each material fact put in issue, and indispensable to a recovery, it should be submitted to the jury under proper instructions." *Dick* v. *Railroad Co.*, 38 O. S., 389.

So long as there is evidence tending to prove the whole issue the case should be submitted to the jury. *Ellis & Morton* v. *Ohio Life Ins. & Trust Co.*, 4 O. S., 628.

As the court therefore erred in instructing the jury to return a verdict for the defendant in error at the close of plaintiff in error's testimony, the judgment thereon is reversed and a new trial awarded.

VALIDITY OF CONVEYANCE BY AGED MAN.

Circuit Court of Fairfield County.

JOHN BOYER v. JOHN J. BOYER.

Decided, September Term, 1911.

Deed—Attack Upon, for Invalidity on Ground of Undue Influence and Mental Incapacity—Persuasion which is Not Illegal—Mental Capacity to Dispose of Property Sufficiently Shown, When—Burden of Proof as to Presumptions Arising.

1. As between an uncle who is advanced in years and a nephew who is young, no presumption of inequality exists, and the question whether undue influence was exerted over the uncle whereby he was induced to make a conveyance of property to the nephew is a question of fact to be determined from the circumstances of the case.
2. Fair argument or persuasion, or appeals to the conscience or sense of justice of a grantor, especially where made by one having a claim upon his bounty or sense of justice, does not, if such persuasion is fairly made, lay a foundation for vacating a deed executed as an apparent or possible result of such persuasion.
3. Where incapacity on the part of a grantor to execute a deed is charged, and the conveyance was itself reasonable and proper, the burden is upon the one assailing the transaction to show incapacity at the time the deed was executed; and where the testimony shows that the grantor selected the notary whom he desired to draw the deed and gave him instructions as to what he desired to have done, and when the deed was ready for signature himself discovered that a life estate had not been reserved as he had directed, and this omission having been supplied he executed the deed and gave directions that it be placed on record, and its execution seems to have been in accordance with a purpose of the testator to make a testamentary disposition of the property in question, the deed will not be set aside on the ground of mental incapacity or the feebleness of old age.

Lane & Daugherty, for plaintiffs.

Davidson & McCleary, contra.

VOORHEES, J.; SHIELDS, J., and POWELL, J., concur.

This action comes into this court on appeal. The object of the plaintiff's suit is to set aside a deed made by John Boyer to the defendant, John J. Boyer, on the 13th day of April, 1909. The grounds on which it is sought to set aside the deed are—

First. That the grantor, John Boyer, at the time the deed was made, to-wit, on April 13, 1909, was suffering from severe illness and was so greatly enfeebled, physically and mentally, because of his age—he then being of the age of seventy-four years—that he was mentally incapable of transacting ordinary business, or the execution and delivery of any deed of conveyance of his real estate.

Second. That the defendant, intending and contriving to cheat and defraud the said John Boyer out of his farm, and without paying any valuable consideration therefor to the plaintiff or any other person for him and by the undue influence of the defendant and others in his employ, procured from the plaintiff a deed of conveyance in fee for his farm, and immediately thereafter caused said deed to be filed for record with the recorder of Fairfield county.

Third. That, at the time of the execution of said deed, the plaintiff did not know or understand the nature of his act in so making said deed, or the contents of the same, or that he was then parting with the title to his farm; but, by the undue influence of the defendant and others in his employ, when the plaintiff was incapacitated, as the defendant well knew, the plaintiff was induced to execute said deed to the defendant, and he, the plaintiff, was then overcome by undue persuasion, entreaties, and arts of the defendant and fraudulently coerced into signing said deed.

The case was tried in this court on the testimony taken in the court below, and by agreement of the parties, the transcript of the testimony so taken, was submitted to the court on behalf of the respective parties, plaintiff and defendant, the same as if the witnesses were offered and examined in open court. Said transcript and evidence offered by both parties on the trial, was all the evidence in the case.

One of the contentions of the plaintiff is that, from the relationship existing between the plaintiff and the defendant, at the time the deed was executed, an undue influence over the plaintiff by the defendant is presumed to exist. The plaintiff was the uncle of the defendant, and when the defendant was about nine years of age, the uncle took the defendant into his family, as a member thereof, where he lived until he was a man of about

twenty-two years of age and upwards, when the defendant married and moved upon a farm of his own. The uncle never married and had no relatives other than brothers and sisters, and children of deceased brothers and sisters. The uncle and the defendant always sustained friendly relations toward each other.

To state the contention of the plaintiff more concisely, it is claimed that, where such relationship does exist, and a grantor is partially incapacitated by age, physical and mental infirmaties, and the deed is without valuable consideration, the burden is upon the grantee to show affirmatively that the grantor clearly understood the nature and effect of the transaction, and voluntarily executed the instrument.

It is true the law presumes, in the case of guardian and ward, trustee and *cestui que trust,* attorney and client, physician and patient, that their situation is unequal, and that relation appearing, itself throws the burden upon the party occupying such position of trust, in dealing with the trust, or the beneficiary thereof, to prove the fairness of his dealing. But the law does not presume fraud or undue influence from the fact that one party is old and an uncle, and the other is a nephew and young. The question as to parties so situated is a question of fact dependent upon the circumstances in each case. There is *no presumption* of inequality either way from these relations merely.

We think, in this case, there is convincing proof of facts and circumstances which show that when the deed in question here was executed and delivered, the grantor, John Boyer, was not misled by reason of any confidential relations existing between himself and the grantee, John J. Boyer, nor was there any act done by the grantee, tending to show that the deed did not express the grantor's intention at the time he executed and delivered it.

It is contended on behalf of the plaintiff, that he was, by undue persuasions, entreaties, and practices, used by the defendant and others, coerced into signing said deed.

This the defendant denies, and the proof shows, that on the day the deed was made to Elizabeth Looker, the defendant had a conversation with his uncle, in which he said to his uncle:

"Uncle John, while you are making this deed for Mrs. Looker, don't you think it would be no more than right that you should do something in like manner for me?"

The plaintiff says, "What is it you want?"

"Why," he replied, "make me a deed for this farm," meaning the farm here in question, and the one on which the plaintiff resided.

Plaintiff said, "No; that is entirely too much."

When the defendant said to him, "Do as you see fit and I will be satisfied."

The record shows that, at the same time this conversation occurred, the plaintiff and the defendant were on the porch at the plaintiff's home, when the defendant made the suggestion for the plaintiff to do as he saw fit, etc. The plaintiff said, "Ask Mrs. Looker to come out."

She was called, and the defendant repeated what he had before said to his uncle, viz.:

"While you are making the deed to Mrs. Looker for that farm, I don't think it would be any more than right that you should do something in like manner for me."

Mrs. Looker said, "Yes; I think you ought to favor him and his sister Wilda both." The plaintiff made no reply.

This transaction is given and urged as tending to show undue influence and coercion practiced by the defendant and Mrs. Looker, in procuring the deed from the plaintiff for the farm here in question.

Courts of equity will not vacate a deed obtained by means of influence and importunity, unless it has been unduly or improperly exercised. Fair argument and persuasion or appeals to the conscience or sense of duty of the grantor, especially by those having claims upon his *justice* or his bounty, if fairly made, lay no foundation for vacating a deed, although the grantor would not have made the deed but for such appeal, argument, or persuasion. *Truman* v. *Lore*, 14 O. S., 144-145.

The record shows that the grantor, John Boyer, made the deed in question, to the defendant, voluntarily and for reasons satisfactory to himself, and there is no evidence in the case that there was influence or persuasion used, either by the defendant or Mrs. Looker, to induce the making of the deed, other than what has been hereinbefore stated, and after the deed was executed and delivered, the plaintiff then stated that he had done what he had wanted to do for some time, that one reason he had for

making the deed to the defendant was that he desired the farm in question to remain in the "Boyer" name, it having been in the Boyer name for nearly a hundred years.

We find, as a fact, that there was no undue influence used by the defendant or any other person, to induce the plaintiff to execute the deed in question in this case, and there is no evidence tending to prove fraud or undue influence, at the time of its execution and delivery, April 13, 1909, but that the act was the free and voluntary act of the grantor, John Boyer.

This eliminates from the case the charge of fraud and undue influence, and leaves the question that the grantor, John Boyer, at the time he executed the deed, was mentally incapacited for the transaction of ordinary business. There is nothing better settled in law than that, in the absence of fraud or undue influence, mere weakness of intellect, resulting from sickness or old age, is no ground for setting aside an executed contract, providing the contracting party was capable of understanding, in a reasonable manner, the nature of the particular affair in which he participated. The rule of the measure of the grantor's capacity in such a case is simply that he understand, in a reasonable manner, the nature and effect of what he was doing. The burden of proof is upon the party assailing the act, to show the incapacity at the time the act was done.

The evidence of incapacity proffered must relate to the time of the *factum* or act done, either directly or when taken in connection with other evidence in the case. In other words, when the act is reasonable and proper in itself, the burden is on the party assailing the contract to show the incapacity at the time the act was executed. Tested by this rule, the evidence in this case is conspicuously feeble. There is nothing in the evidence tending to prove insanity in the ordinary and popular sense. Taken at its strongest, the most that could be claimed for the evidence for the plaintiff is that it proved some mental and physical weakness resulting from old age and sickness.

At the time the deed in question was executed, the grantor selected the notary public to transact the business for him and to write the deed in question, giving instructions as to what he wanted, and after the deed had been written and either read to him or submitted for his inspection, he discovered that it was not

in accordance with his instructions, in this: that he desired and intended to reserve a life estate in the farm, but, either inadvertently or otherwise, when it was written by Mr. Lane that condition was omitted, and the old gentleman called attention to the fact, and had the reservation of his life estate incorporated into the deed, and after that was done, the deed was executed and delivered to the grantee, the defendant, John J. Boyer. The old gentleman suggested and instructed the defendant, as well as Mrs. Looker, to whom he had made a deed on the same day, to have them recorded. This, in connection with other business matters that he had directed and planned for on the day the deeds were made, conclusively shows to the minds of the court that, at the time this deed was made, the grantor had mental capacity to transact ordinary business. We think, in this case, the deed is in the nature of a testamentary disposition of property, and it was carrying out what he had intended and had in contemplation for some time before the deed was executed.

Coming more directly to the question of his mental capacity, and believing the rule does not require that high degree of capacity, that a man's memory must be just as perfect as it ever was, or his physical ability as good as it was in former years; he may be feeble in mind and body, so that he will not be able fully, at all times, to comprehend his situation or surroundings. nevertheless, when it comes to the question of capacity and to the disposition of his property, a subject upon which he may have reflected much when in full vigor of mind and body, these failures of memory and infirmities of age are not sufficient to overcome the principle that he has the right to dispose of his property in any way he may wish or deem best.

If this is the correct test of capacity, we think there is no evidence whatever in this case to show that Mr. John Boyer, when this deed was made, had reached a condition of mental weakness that incapacitated him from making the disposition of his property that he did make to his nephew, the defendant herein.

If the old gentleman had mental capacity sufficient to transact ordinary business, and we find as a fact that he had, and was free from restraint and undue influence, which we also find as a fact, then he had the right to make such disposition of his

property as he thought proper. He is not required to make an equitable disposition of his estate among even the objects of his bounty. He may, if he chooses, exclude his children, or divide his estate among them unequally. The question in all cases is, was the act the free act of a competent party?

There is one further circumstance in this case that is deserving of notice. It is contended by the plaintiff that the grantor was laboring under a delusion of some kind, evidenced by his claiming that he had been in communication with his dead relatives at night, and, therefore, this delusion tended to show his unfitness to transact ordinary business. It will be observed that it was not claimed that these supposed communciations with the spirit world had any influence on him in making the disposition of his property that he did make. That is, it is not claimed that the spirits had directed him or had influenced him in making the deed or deeds that he made on the 13th day of April, 1909, or that, by reason of the delusion, he did what he otherwise would not have done, excepting for such delusion.

"Delusions can scarcely be regarded as evidence of general insanity, and when the evidence of them is opposed by other evidence tending to prove the general competency of the person whose mind is in question, to tend to his own affairs, and to dispose of them with sagacity or at least in obedience to the free impulses and motives of his own mind, his contracts and his dispositions of his property, testamentary or otherwise, must be treated as valid, unless connected in some way with his insane delusions." *Hemmingway Est.*, 195 Pa., 291 (78 A. S. Rep., 815); *Lucas* v. *Parsons*, 71 Am. Dec., 147; *Maynard* v. *Tylar*, 168 Mass., 107; *Rice* v. *Rice*, 50 Mich., 448; *Hollinger* v. *Syma*, 47 N. J. Equity, 22.

Without pursuing the discussion further, the court is of the opinion that, at the time the deed to the defendant was executed and delivered, John Boyer was mentally and physically competent to transact ordinary business, including the act of making and delivering a deed for any portion of his estate, and that he, at the time he made such deed, was not under undue influence or restraint, nor was there any fraud practiced upon him by the defendant in securing said deed.

Therefore, the judgment of the court is in favor of the defendant, with costs, and that the petition be, and it is hereby, dismissed.

STREET IMPROVEMENT ASSESSMENTS.

Circuit Court of Franklin County.

CITY OF COLUMBUS v. SARAH SCHNEIDER ET AL.*

Decided, January 21, 1895.

Assessments—Adjudications as to Validity of Street Improvement Assessments Are Res Adjudicata, When—Former Action No Bar, When—Questions as to Validity of Act under which Improvement Was Made, and of Applicability of Statute of Limitations—Sections 2286 and 2287, Revised Statutes.

1. Actions brought by the proper parties against a municipality to enjoin the collection of a street improvement assessment, where submitted on the issues and decided against the plaintiffs by the upholding of the assessment, amount to a conclusive adjudication of the validity of the assessment, in an action brought by the city against other parties to enforce the collection of assessments against other property for said improvement.
2. An action brought by one person against others on promissory notes and to foreclose a mortgage, in which the city was made a party defendant and in which there was a determination of the question of the right of the city to enforce a portion of such assessment assessed against that part of the frontage which after the improvement had been made was devoted to streets, when decided in favor of the city on demurrer can not be interposed as a bar to an action by the city against other parties to enforce collection of assessments for said improvement.
3. Under a petition to enforce the collection of assessments for a street improvement setting up that theretofore in a proper proceeding, before a proper tribunal and between the proper parties, the claim set forth was adjudged to be a lien upon the premises described in the petition and that it is unpaid, no question can arise on demurrer as to the validity of the act under which the improvement was made or as to the application of the statute of limitations.

Appeal from the Court of Common Pleas of Franklin County.

This action was brought by the city of Columbus against the plaintiffs in error, the owners of real estate described in the petition, to enforce the collection of an assessment for the improvement of North High street in said city, and to foreclose an as-

*Affirmed by the Supreme Court, without opinion, *Schneider* v. *Columbus*, 54 Ohio St., 644.

sessment lien as authorized by Sections 2286, 2287, Revised Statutes, and other sections. The street was improved under provisions of law, commonly known as the "Penn Act." 72 O. L., 153; Section 2336 *et seq.*, Revised Statutes.

The agreed statement of facts shows the following:

The city of Columbus is a municipal corporation of the first grade, second class, duly organized under the laws of Ohio. On March 30, 1875, the General Assembly passed a law known as the "Penn Act" (72 O. L., 153; Section 2336, *et seq.*, Revised Statutes), providing for the improvement of streets and avenues in cities of the second class, and the act had application to the city of Columbus. On June 7, 1875, owners of real estate abutting on North High street petitioned the city council of Columbus for the benefits of the act of March 30, 1875, and that North High street might be improved in accordance with the provisions thereof. On June 21, 1875, the city council did grant the prayer of the petition of the property owners, and did pass an ordinance providing that the roadway should be graded, paved and curbed, under the provisions of the act of March 30, 1875, and provided for the election of five commissioners to control and superintend the improvement under the provisions of that act, and did designate certain owners of property to fix the time and place of holding an election for commissioners, and to act as officers of such election. On July 27, 1875, the persons designated by the ordinance were duly qualified as judges and officers to conduct the election, and fixed the time of holding such election as July 29, 1875. In pursuance of that notice, an election was duly held as required by law, and within ten days thereafter, the officers of said election returned to the city clerk a list of the voters at the election, the ballots cast and the number of votes cast for the persons voted for and their certificate, duly certifying to the election of five commissioners therein named. Sections 3 and 4, 72 O. L., 153, 154; Sections 2338-2342, Revised Statutes.

Each of the commissioners so elected, within ten days after their election, met as required by law and elected one of their number as president and a secretary, and duly organized and accepted said office as commissioners, and did determine the kind

and description of pavement to be used, and did make and enter into contracts, in the name of the city of Columbus, for furnishing the material, grading, curbing and improving the roadway of said street, and did superintend and control the work during its progress. Section 6, 72 O. L., 154; Section 2346, Revised Statutes.

When the improvement was completed the commissioners ascertained the cost of the improvement, and caused a plat of the street to be prepared, showing the separate lots of ground fronting or abutting thereon and the names of the several owners and estimated the cost of the improvement, but refused to assess the cost upon the abutting real estate. Thereupon the city of Columbus caused mandamus proceedings to be instituted in the Supreme Court of Ohio against the said commissioners to require and compel them to complete the apportionment and assessment in accordance with the terms of said act, and on the hearing of that cause, mandamus was duly awarded, requiring the commissioners to complete their apportionment and assessment as prayed for, as appears from said cause as reported in the case of *State, ex rel,* v. *Mitchell,* 31 Ohio St., 592.

In compliance with the commands of the decree in the Mitchell case and of the said act of the General Assembly, the commissioners did complete said apportionment and assessment and filed the same with the city clerk, and did deliver a copy of said plat and schedule to the auditor of the county in which said city is situated, as required by law (Section 17, 72 O. L., 156; Section 2357, Revised Statutes). The cost and apportionment of said assessment, when made, was the sum of $7.17 2-10 per foot front on each side of the street so improved.

The assessment was duly placed upon the duplicate of the county, and became payable at the office of the county treasurer in seven equal installments, with interest at seven per cent., upon the unpaid portion thereof. The first installment, with interest on the whole amount at seven per cent., became due and payable at the semi-annual payment of taxes, falling due after August 1, 1876. The others fell due annually thereafter, with interest on the installments not due at the time, until all fell due and became payable. Section 18, 72 O. L., 156; Section 2358. Revised Statutes.

At the time North High street was improved and the assessment made, Margaret E. Patterson was the owner in fee simple of a parcel of land described in the petition in this case, with a frontage of 265 feet. At the time the street was improved Anna M. Woodruff was the owner in fee simple of a parcel of land, fully described in the petition in this case, abutting on the street so improved, and with a frontage of 363.83 feet. Prior to October 16, 1883, George Williams became the owner in fee simple of the two parcels of land owned by Margaret E. Patterson and Anna M. Woodruff aforesaid as their grantee, and subdivided the same into city lots and designated the addition as "Mt. Auburn addition to the city of Columbus, Ohio." At the time Williams became the owner of the Patterson land he made, executed and delivered to Patterson a mortgage securing part of the purchase money, that appears of record prior to the plat of subdivision. Afterward Williams conveyed to William H. Innis lots Nos. 56, 57, 58, 59, 60, 61, 62, 104 and 105 of Mt. Auburn addition, all of which lots front and abut on North High street, and have a depth of 187½ feet. Lots Nos. 56, 57 and the back corner of 58 fronting on High street for a distance of 117.88 feet, were platted from the lands belonging to Margaret E. Patterson, and lot No. 58, excepting the corner off the back part thereof, and lots Nos. 59, 60, 61, 104 and 105, fronting on High street for a distance of 383.40 feet, were platted from the lands belonging to Anna M. Woodruff.

On February 16, 1890, William H. Innis died testate and his last will and testament was duly admitted to probate, and Adam G. Innis was duly appointed and qualified as his executor and entered upon the discharge of the trust. By the terms and provisions of that last will and testament, the plaintiffs in error became the owners in fee simple of the lots so owned by their father.

On July 15, 1875, Anna M. Woodruff commenced an action in the Court of Common Pleas of Franklin County, Ohio, against the city of Columbus et al, and on December 16, 1878, Margaret E. Patterson commenced an action in the same court against the city of Columbus et al.

In *Woodruff* v. *Columbus et al,* the petition shows the passage of the ordinance under which North High street was improved;

that the improvement was made under the "Penn Act" (72 O. L., 153), the rate of the assessment per foot front and the aggregate amount of the assessment; that she was the owner of the real estate against which the assessment in controversy rests, and asserted that the assessment was wholly invalid, for reasons in her petition stated. After the decree was entered in that case, it was appealed to the district court, and on March 3, 1884, the case with others was referred to a master commissioner who was directed, among other things, to ascertain "which one or more of said plaintiffs in the several actions signed the petition to the city council of Columbus for the said improvement of said High street under the act aforesaid." Upon hearing of that case before the master he made findings, in substance, as follows:

"The following plaintiffs signed the petition to the council for the improvement of said street: Anna M. Woodruff, Z. F. Guerin. * * * Said several plaintiffs are liable for the assessment upon the said lots of land owned by them respectively."

Upon the consideration of that report, the court made entry as follows:

"And it is by the court ordered that said report of the master, as hereinbefore modified, and all the matters and things therein contained be and they are hereby approved and confirmed and that the findings of said master, as hereinbefore modified, do stand as the findings of this court, to each and all of which orders the plaintiff excepted.

"And the court find upon the same issues joined, that the equities are with the defendants, to which finding the plaintiff excepted. It is, therefore, ordered, adjudged and decreed, that the petition of the plaintiff herein be and is hereby dismissed."

In *Patterson* v. *Columbus et al,* the petition shows the passage of the ordinance under which North High street was improved, and that the improvement was made under the "Penn Act" (72 O. L., 153, Section 2336, *et seq.,* Revised Statutes), the rate of the assessment per foot front, the aggregate amount of the assessment, and that she was the owner of the parcel of land on which the assessment rests, that is in controversy in this case, and asserted that the assessment was wholly invalid for reasons in her petition stated.

At the April term, 1884, the case was referred, with other cases, to a master commissioner for the purpose, among others,

of finding which one or more of the plaintiffs petitioned the city council for the improvement of High street under the act of March 30, 1875. Upon a hearing of the case before the master he did find and report, among other things, as follows:

"The following named plaintiffs signed the petition to the council: * * * Margaret E. Patterson. * * * The undersigned finds that the said several plaintiffs who signed the petition to the council for the improvement, or whose grantors signed said petition, are liable for said several assessments upon the land owned by them respectively. Also that said several plaintiffs voted at the election for commissioners, or whose grantors voted, are liable for said assessments upon the land owned by them, respectively."

Upon the consideration of that report, the court made entry as follows:

"It is by the court ordered, that said report as hereinbefore modified, and all the matters and things therein contained be, and they are hereby approved and confirmed and that the findings of the said master, as hereinbefore modified, do stand as the findings of the court. * * *

"It is considered, adjudged and decreed by the court that the assessment mentioned in the petition, on the property described in the petition for the improvement of North High street, is a valid and subsisting lien on said premises, and that the petition of said plaintiff herein be and is hereby dismissed at the costs of said plaintiff."

On May 7, 1885, Margaret E. Patterson commenced an action against George Williams, Jr., William H. Innis et al, in the Court of Common Pleas of Franklin County, Ohio, to recover judgment on two certain promissory notes made by George Williams, Jr., and to foreclose a mortgage securing the same.

On September 25, 1885, Patterson filed an amended petition herein, in which she asked judgment against Williams, and for a decree and order of sale, foreclosing the purchase money mortgage from Williams to her, that is hereinbefore referred to.

On June 6, 1885, William H. Innis filed his answer and cross-petition in the case last mentioned, in which he sets forth a certain indemnity mortgage that was executed and delivered to him by George Williams, Jr., indemnifying him against loss on account of the North High street assessment resting upon lots then

owned by Williams, and then conveyed by him to William H. Innis, asking for a foreclosure of the same and for other relief.

On April 9, 1886, George Williams, Jr., filed his answer and cross-petition, joining issue with William H. Innis, on his answer and cross-petition.

After the death of William H. Innis the case was revived in the name of Adam G. Innis, as executor, and on October 16, 1891, the cause was submitted to the court upon the issues joined between the defendants, William H. Innis and George Williams, Jr., and the court did find that on February 26, 1884, Williams, then being the owner, conveyed to William H. Innis lots 56-61, 104 and 105 of Mt. Auburn addition and that said deed of conveyance contained covenants of general warranty, and that the premises were clear and free from all incumbrances whatsoever. Prior to the date of said conveyance North High street, on which said lots abut, had been improved and the costs and expenses thereof assessed upon the abutting property, attaching as a lien on August 1, 1876, and among other parcels, the assessment attached upon lot No. 10 of Chaffee's subdivision, being the same parcel theretofore owned by Margaret E. Patterson, and also a certain other tract of land abutting on High street with a frontage of 383.46 feet, theretofore owned by Anna M. Woodruff. Both of the parcels enter into and make a part of lots Nos. 56-61, 104 and 105 of Mt. Auburn addition. And in order to indemnify the said Innis against loss, Williams had executed and delivered to Innis a mortgage deed alluded to in the answer and cross-petition of Innis, and then proceeded with a finding in the following language:

"The court now finds that said assessment, commonly known as the 'North High Street Paving Assessment,' did attach as a lien on said lots so conveyed by the defendant, George Williams, Jr., to William H. Innis, and that no part of said assessment has been paid, and there now stands on the tax duplicate of Franklin county, Ohio, charged as an assessment against a portion of said lot 10 in Chaffee's subdivision, of which lots 56-57 of George Williams, Jr.'s, said subdivision form a part, the sum of $1,263.68, with seven per cent. interest thereon from August 1st, 1876, to October 16th, 1891, amounting to $1,345.07, making a total of $2,608.75. And on said parcel taxed in the name of Anna W. Woodruff aforesaid, of which parcel said lots

Nos. 58, 59, 60, 61, 104 and 105 of George Williams, Jr.'s, subdivision aforementioned form a part, the sum of $2,752.60, with 7 per cent. interest thereon from August 1st, 1876, to October 16th, 1891, amounting to $2,930.37.

"The total amount of said assessment, with interest, now standing on the tax duplicate, amounts to the sum of $8,291.72. no part of which has been paid."

To pay for said improvement the city of Columbus, on the 1st day of August, 1876, issued bonds and converted the same into money, and from the proceeds thereof paid the costs and expense of the improvement the city to be reimbursed out of the assessment.

No part of said assessment on the lands in controversy has been paid.

STEWART, J.; SHAUCK, J., and SHEARER, J., concur.

This case has been submitted to us upon an agreed statement of facts and the pleadings, and the only questions remaining to be determined are:

First. Were the decisions made in the case of *Woodruff* v. *Columbus* and *Patterson* v. *same*, adjudications upon the issues presented, and

Second. Was the decision in the case of *Patterson* v. *Williams* an adjudication against the city, which precludes its obtaining a judgment here.

The question as to the statute of limitations set out in the answer and the rights and privileges of the parties under the "Penn Act," as that act has been construed by the Supreme Court, were examined by us and decided upon the demurrer to the petition and we are still of the opinion that they do not constitute any defense to plaintiff's claim.

As to the first question: Both these cases were brought to restrain the treasurer from collecting these assessments and the final entries show, not a dismissal of the action, but a submission upon the issues, a finding against the plaintiffs and a dismissal of their petitions. This was an adjudication and being unreversed, is conclusive.

As to the second question: Nowhere in the suit of *Patterson* v. *Williams* was the validity of this assessment challenged except

in the supplement and amendment of George Williams, Jr., to his answer and cross-petition, filed November 28, 1887, and in that only as to the right of the city to enforce that portion of the same, assessed against the portion of the frontage, which after the improvement had been devoted to streets. For the purpose of testing this question and this question only, the city was made a party and its demurrer to this question was sustained. On the other hand, Williams, the grantor of Wm. H. Innis, and Wm. H. Innis, the immediate ancestor of these defendants, averred its validity and called upon the court to order the same paid. though contending as to who was responsible for its non-payment; and in its finding made on the cross-petition of said Innis. the court expressly held it to be a valid and subsisting lien on these lots, stated the amount of the same, and granted to said Innis an order of sale upon the mortgage given by Williams to him to indemnify him against this very assessment, and property to the amount of over $1,400 was sold under that order.

This was an adjudication in favor of the lien rather than against it.

As it is nowhere claimed in the record that any part of this assessment has been paid it follows that the plaintiff is entitled to a decree for the amount of the same and an order to sell the premises in case of non-payment.

The tax duplicate shows the following amounts as due: lot 56. $1,312.35; lot 57. $823.54; lot 58, $823.54; lot 59, $823.54; lot 60. $823.54; lot 61, $533.43; lot 105, $823.54, and lot 104, $1,349.75: total, $7,313.23.

As these figures are different from those set out in the petition they may be subject to correction.

The petition also claims that five per cent. penalty should be added, but as no authority has been cited for making this addition, we will not decide whether it should attach or not, until counsel have an opportunity to express their views. The decree will be for the plaintiff in conformity to the foregoing decision.

APPLICATION OF THE GRADE CROSSING ACT.

Circuit Court of Lucas County.

THE WHEELING & LAKE ERIE RAILROAD COMPANY v. THE TOLEDO RAILWAY & TERMINAL COMPANY.*

Decided, November 9, 1907.

Grade Crossings—Construction of the Act Relating Thereto—Meaning to be Given to the Words "Reasonable" and "Practicable"—Continuation of Grade Crossings Will Be Permitted, When—Policy of the Law to Protect Persons and Property from Injury and the Rights of the Railway Companies Alike.

1. While one of the purposes of the grade crossings act is to conserve the public safety, railway companies will not be required to avoid such crossings unless it is reasonable and practicable so to do.
2. Where an interlocking device has been in use at a grade crossing for a considerable period, with favorable results from its operation and comparatively little interruption to the trains of either road, and to avoid the grade crossing would involve heavy expenses and other hardships to the railway companies, a case is not presented requiring the preventive application of the statute.

Seiders & Duncan, for plaintiff.
King & Tracy, contra.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

For an understanding of the issues before us on the present hearing and the facts involved, recourse may be had to the recitals in the hearing of the same case before the Supreme Court of Ohio as reported in 72 O. S., 369, on a proceeding in error to reverse the former judgment in this court. The case was treated by the Supreme Court as involving an application for the ascertainment of a mode of crossing of the Wheeling & Lake Erie Railroad Company track by the Terminal Company, and was remanded to this court for the purpose of such ascertainment. The crossing of the plaintiff's tracks not having been enjoined, the Terminal Company proceeded with its construction across

* Affirmed, without opinion, *Wheeling & Lake Erie Ry. Co.* v. *Toledo Ry. & Terminal Co.*, 80 Ohio St., 540.

the plaintiff's roadway and has been in continuous operation of its line at that point for about four years. The issues, so far as concern our present inquiry, are based upon the original act as to grade crossings (95 O. L., 530), which was passed and took effect May 10th, 1902.

The amendatory act of May 3d, 1904 (97 O. L., 548), is prevented by Revised Statutes, 79, from affecting a pending proceeding, but it may have use as indicative of the tendency of the Legislature to protect the future interests of any younger company in two important respects; first, by providing that no grade is to be required to exceed the established maximum or ruling grade of such company; and, second, that the initial expense of construction and the expense of maintenance are to be equitably apportioned between the companies.

It is doubtful whether under the original act which governs the present case, the court would have power to impose any part of such expense on the elder company. Such was the view of the Supreme Court of Pennsylvania in *Pennsylvania R. R. Co.* v. *Warren Street Ry. Co.*, 188 Penn. St., 105, in which it was said: "The courts have no power * * * equitably to apportion the expenses among those interested." The provision as to not exceeding the ruling grade, however, indicates that in 1904 the Legislature deemed it not so imperatively necessary to avoid a grade crossing as to justify imposing a burden on the crossing company which would destroy the effectual operation of its road; in other words, that so to require would not be reasonably within the contemplation of the law when applied to the junior road. Both the original and amendatory statutes provide that: "If in the judgment of such court or the judge thereof it is reasonable and practicable to avoid a grade crossing, it shall by its process prevent a crossing at grade." It is argued by counsel for the plaintiff that the term "reasonable and practicable" as embodied in our Ohio statutes, is synonymous with the term "reasonably practicable," as found in the Pennsylvania statute. It is said that the Ohio legislators have adopted the legislation of the older state and that the phraseology of the Pennsylvania statute had received interpretation by the courts of that state which was presumably adopted with the enactment of our statute.

Before considering this contention, but assuming the general correctness of the principle claimed; which is recognized by the courts of Ohio in numerous cases, let us examine the phrase as used in the Ohio statute, comparing it with the one of Pennsylvania, in an effort to ascertain whether or not they are equivalent. The word "practicable" in either state may properly be defined as "feasible" or, in other words, "possible of accomplishment." The word "reasonable" as we find it in the Ohio statute, has been treated as substantially synonymous with the word "fair" in *Jones* v. *Angell,* 95 Ill., 376-382; with "impartial," in *Thompson* v. *Beacon Valley Rubber Co.,* 56 Conn., 493-498; with "just," opinion of the Justice, 4 New Hampshire, 565; and by Webster with the words "just," "honest," "equitable" and "fair." Substitute any one of these alternative words for "reasonable" in our statute, and we have a phrase signifying that a grade crossing will not be prevented unless it can be justly, honestly, equitably or fairly done, having due regard to the rights and interests of both parties.

To the extent that the senior company has improved its right-of-way by its structures and expended its money, the companies do not stand on an equal footing; and the statute, both in its original form and as amended, wisely attempts to protect as far as possible the rights acquired by such use. It might be unavoidable for a crossing company to injure or destroy property in crossing, and under the principle enunciated in *Railway* v. *Railway,* 30 O. S., 605, even this would be permissible if demanded by the public welfare. The statute under which we are proceeding does not prohibit injury to property rights of the occupying company, but requires that in crossing the least practical (that is substantial) injury shall be inflicted. The implication is irresistible that some injury may be unavoidable if the junior company is permitted to cross at all. Therefore, if none other than a grade crossing is reasonable, that is to say, just, fair and equitable to both parties, the court will permit such mode of crossing, although it might be practicable, so far as mechanical conditions are concerned, to cross in some other way. For whatever injury to property is sustained by the older company, just compensation should be awarded in any proceeding to appropri-

ate a right-of-way across its line. But it is not the policy of the law, while seeking to protect the just rights of the companies and protect property and persons from unnecessary injury, to place insurmountable obstacles in the way of improved means of conveyance or transportation. It is the benefit which flows to the public from such better transportation which justifies the exercise of the right of eminent domain in behalf of private corporations.

It is unquestionably the policy of our state, as indicated by the legislation of which the acts already referred to form a part, to protect lives and property as far as it can practically and reasonably be done, and without prohibitive interference with lawful and beneficent enterprises, by preventing crossings at grade. With the qualifications stated, the requirement of the statute is mandatory. It is urged in behalf of the plaintiff company that, in view of the construction placed upon the prior enactment of the state of Pennsylvania by the courts of that state, the phrase "reasonable and practicable" embodied in the Ohio law will not bear the interpretation which I have given to it. We are not informed, other than by the general similarity of phraseology and the fact that the Pennsylvania statute was enacted many years before that of Ohio, that the one is a copy of the other; but, assuming it to be so—and it is highly probable that the claim of counsel in that respect is correct—we think that the very fact that the copy departs from the original in the respect to which reference has been made, is a fact of importance as suggesting the intention of our Legislature. If the framers of our statute had before them that of Pennsylvania, it is manifest that either by inadvertence or designedly, the term "reasonably practicable" was not adopted. In the Pennsylvania statute the word "practicable" is qualified by the adverb "reasonably"; not so in the Ohio enactment, but two qualifications are made to the direction to the court to prevent a grade crossing by its process: the one is, when it is not practicable to avoid such crossing, and the other, when it is not reasonable.

It is not an unfamiliar principle of statutory construction, and one which appeals to our common intelligence, that where one act is copied or amended with any material change of phrase-

ology, the inference is to be drawn that the change was intended. The case of *Bloom* v. *Richards,* 2 O. S., 388-402, is an instance. Judge Thurman in that case used these words, "It is a general presumption that every word in a statute was inserted for some purpose"; and again, "When a considerable change is made in the phraseology of a former law, the inference is reasonable that a change of meaning was also intended."

Referring again to this argument of counsel for plaintiff, that the adoption of the Pennsylvania statute carries with it the construction placed upon that statute by the Pennsylvania court, we are cited to a long line of cases, beginning with the 77 Pa. St., 172-184, *Pittsburgh & C. R. R. Co.* v. *S. W. Pa. Ry. Co.,* and including 207 Pa. St., 406, *B. & O. R. R. Co.* v. *Butler Ry. Co.* Two of the cases cited, *R. R. Co.* v. *R. R. Co.,* 203 Pa. St., 176, and 207 Pa. St., 406, *supra,* were decided by the Supreme Court of Pennsylvania after the enactment of our statute, and, manifestly, can not have been adopted by our Legislature. It is, however, clear that the tendency of the Pennsylvania court from its first expression in application of the statute of that state to the present time, has been to enforce more and more strictly the mandatory requirements of the statute. In the earliest of the cases cited it was said, in substance, that it was the policy of the law to discourage grade crossings; in the 150 Pa. St., 193, 194, *Perry Co. R. R. Co.* v. *R. R. Co.,* that courts should prevent such crossings, except in case of manifest imperative necessity; in the 198 Pa. St., 1, *R. R. Co.* v. *Lawrence County,* that they should do so except in cases of "unavoidable necessity"; but whatever may have been the construction placed upon the act from time to time, it was always based upon the phraseology peculiar to the Pennsylvania statute and adopted only in part by our own.

Another use has been made of this argument by counsel for the plaintiff, to-wit, that by following the Pennsylvania legislation in our statute under consideration, the principles enunciated in *Railway* v. *Railway,* 30 O. S., *supra,* have been abandoned. It is said, and correctly, that the act as to crossings does not leave the two companies on an equality as to rights; that the senior road is preferred to the junior; but we think that this is so only in the manner and to the extent already stated. The

easement first acquired by the plaintiff is as much a qualified title as it was before the act of 1902.

The importance of this fact is apparent when we consider the emphasis placed by counsel for plaintiff in error upon their claim that at the time when the Terminal Company instituted its proceedings for the appropriation of a right to cross, the plaintiff had in contemplation certain plans of development and use of its property which will be substantially destroyed by permitting a grade crossing. It is claimed that this may not legally be done, and some reliance is placed upon the Pennsylvania decisions, including *Railroad Co.* v. *Railroad Co.*, 203 Pa. St., 176. A reference to that decision discloses the fact that it was argued in the Supreme Court on May 5, 1902, five days before the enactment of the Ohio law, but the decision of the court as announced in the opinion of one of its judges on page 182, bears date May 19, 1902, nine days after the passage of the Ohio statute. The case may be useful as a precedent, but it is not authoritative and would not be followed in any conflict with the principles established in our own court. We are not clear that it is necessarily so in conflict. It is to be read in connection with the other cases decided by that court and in construction of the Pennsylvania statute.

The evidence submitted to us on the trial of this case has impressed us with the view that inquiries of this character might more wisely be left to the determination of a body of expert engineers, as has been done in some of the states. The case is one of great importance and of great difficulty. It has become manifest that either to permit or to prevent a crossing at grade will be attended with much inconvenience and financial loss to one or the other of these companies. We may, however, form some idea as to the extent of such inconvenience and loss to the plaintiff company by a crossing at grade from the fact that such a crossing has now been maintained for a period of about four years. In obedience to another Ohio statute, an interlocking device has been established and maintained, with the result that up to the present time no collisions have occurred between trains of the two companies. A witness whose duty calls him to continuous observation of the passage of engines and trains at the point

of crossing, testifies that there has been but very slight interference with the movements of such engines and trains of the plaintiff company; that ordinarily in the operation of the interlocker, tracks of the plaintiff company are kept free for the passage of its trains. That there has been some inconvenience and delay, there can be no doubt, but has it been of such a character and extent as to justify the imposing upon the defendant company the burden of an overhead crossing? It is conceded that the crossing must be either at grade or above. The ruling or maximum grade of the defendant company is sixty-five hundreths of one per cent., and while the amendatory statute of 1904 can not be applicable to the present proceedings as a governing factor, they may suggest what in the judgment of the Legislature might be a reasonable requirement in a crossing company under the original law. To construct an overhead crossing at the grade mentioned would entail an expense, as claimed by the defendant company, of upwards of $240,000. The estimate of experts called by the plaintiff is considerably lower, but the precise amount is not important; it suffices that, upon either estimate, the expense would be very great. The defendant contends that a crossing at any higher grade would not only be unreasonable, in view of other difficulties to be encountered, but would be impracticable. Experts for the plaintiff have suggested a construction of a one and one-half per cent. grade at an estimated cost of $76,000 and no cheaper plan has been proposed by either side. Several substantial objections are made to a 1½ per cent. grade by counsel for the defendant. They are in part as follows:

That it is a grade known as a "momentum grade," requiring for the passage of heavy trains over it a speed of at least twenty-six miles an hour, while the engines used by the Terminal Company have a maximum speed of only twenty miles an hour. These engines can not go faster, with safety, and engines of a different character would be unsuitable to the requirements of the defendant's business. The terminal is a belt line, engaged in the work of transferring trains to and from various railroads entering the city of Toledo, and taking and delivering freight at various industrial plants along its line. To require an

entire change of its motive power would, it is claimed, interfere with the purposes of the company to a far greater extent than interference would be or has been caused to the plaintiff company by the crossing at grade. In response to a suggestion that the necessity for high speed to overcome such grade might be obviated by the use of a pusher-engine, evidence is offered that the maintenance of one such engine at the crossing would involve an expense of $60 for every twenty-four hours, an aggregate of more than $20,000 a year.

Various other difficulties are suggested, which I will not enumerate, in the way of the adoption of this suggested grade of 1½ per cent. We have concluded, in view of all the circumstances before us, that while the consummation of the plan might be within the bounds of feasibility, the expense of its construction and maintenance and the hazard and inconvenience attendant upon its use, coupled with the dangers which might arise from the suggested speed at street crossings, and possible municipal regulations as to such speed, all render the adoption of the plan one that it would be unreasonable to require.

As to the other plan—or a 65 per cent. grade—we think that the great cost may fairly be taken into account. In nearly all of the Pennsylvania cases cited the element of expense received consideration from the court, and wherever a crossing at grade was prevented the action of the court seems to have been based partly upon the fact that the expense was moderate. In this connection it should not be overlooked that our original statute contains no provision for an equitable apportionment of the expense between the two companies. If the crossing should involve a cost of from $200,000 to $240,000, the plaintiff would, unquestionably, insist that it should be entirely borne by the defendant. I have already quoted language from the case in 188 Pa. St., *supra,* which might be used to sustain such contention. The adoption of a 65 per cent. grade—which is the highest grade conceded by defendant to be feasible—would necessitate a change of the established grade of certain streets of the city of Toledo and would, it is claimed, cut off convenient access to industrial plants, to the great injury of defendant's business. Upon this point, as upon the other, it would not be profitable to go into a review of the evidence.

We are of the opinion that although this statute can by its terms be invoked only by one of the corporations interested, one of the purposes of the statute was to conserve and protect the interests of the public. Grade crossings, in the interest of safety, are to be avoided if it is reasonable and practicable so to do, but considering the uses made of these tracks by both companies, the results of their long experience with the interlocking device, the comparatively slight interruption of the trains of either, the expense and other difficulties attendant upon the construction of any suggested overhead crossing, we are unanimously of the opinion that the case is not one requiring the preventive application of the statute. We feel that to require an overhead crossing is not so imperatively demanded in the interest of public safety as to justify the placing of this heavy burden on the defendant. The public has an interest in the continued prosperity and development of the enterprises inaugurated by both companies, and the court should not adopt a harsh construction of the law and application of the evidence resulting in seriously affecting such prosperity and development. Any operation of a railroad is attended with some danger to persons engaged in such operation and others, but in spite of such danger, in view of the great benefits derived by the public, the enterprises are fostered and encouraged. It is our judgment that the petition of the plaintiff be dismissed.

EXEMPTION FROM JURY SERVICE.

Circuit Court of Hamilton County.

IN RE JAMES J. HEEKIN; HABEAS CORPUS.

Decided, September 23, 1911.

Constitutional Law—Validity of Statute Exempting from Jury Service Contributing Members of the State Militia.

It is within the province of the Legislature to exempt from jury service such classes of persons as it deems best, and Section 5211 exempting contributing members of the Ohio Militia from such service is a valid enactment.

Walter W. Schwaab, for the petitioner.
Stanley W. Merrell, for the state.

SMITH, P. J.; SWING, J., and JONES, J., concur.

In the above case the court is of the opinion that the judgment of the Court of Insolvency of Hamilton County, discharging the relator, James J. Heekin, from the custody of the sheriff of this county for alleged contempt of court is correct.

It appears that said Heekin is a contributing member of the Ohio National Guard and when summoned as a juror in the common pleas court he declined to serve as such by virtue of the provisions of Sections 3039 and 3055, Revised Statutes (General Code Nos. 5210 and 5211).

It seems to us that it is within the province of the Legislature to exempt from service upon juries such classes of persons as it may deem best, and indeed this seems to be the great weight of authority.

Under Section 11444 of the General Code, public officers, clergymen, priests, physicians, attorneys at law, members of the police force, firemen employed by a municipal authority, acting volunteer members of companies to extinguish fires, organized in and under the control of a municipality, and all persons serving as active members thereof for five consecutive years and every person over 70 years old are exempt from jury service.

We have never had it seriously contended that individuals in any of the above classes could be compelled to serve as jurors, if they desired to avail themselves of their exemption, and we see no good reason why the Legislature could not make an additional class exempt so long as the right of trial by jury is maintained. *Hall* v. *Burlingame,* 88 Mich., 438; *Rawlins* v. *State,* 201 U. S., 638.

As there is no error in the record the judgment of the court below is affirmed.

AS TO WHETHER AN INTENDED GIFT WAS MADE COMPLETE.

Circuit Court of Mahoning County.

GERTRUDE MCKELVEY'S ADMINISTRATOR v. WM. H. MCKELVEY.

Decided, October Term, 1911.

Gifts—Evident Intention of a Decedent to Make a Gift but Lacking Delivery—Conversations with Attorney—Declarations Not Sufficient to Create a Trust—Failure to Pass Title—Sections 10857 and 11494.

Where one intending to make a gift to another purchased United States money orders in the name of the prospective donee, but died before delivering them and with the orders in her possession, the gift was incomplete and the administrator is entitled to the money.

Wirt & Gunelfinger, for plaintiff.
M. C. McNabb, contra.

METCALFE, J.; NORRIS, J., and POLLOCK, J., concur.

This action was brought by the administrator of the estate of Gertrude McKelvey, under favor of Section 10857, General Code, to obtain the judgment of the court as to certain matters about which controversy had arisen in the settlement of the estate.

The plaintiff's decedent, Gertrude McKelvey, was an actress. While in the city of Manila, in the Philippine Islands, she sustained a loss by fire on some property which she owned, and upon which she held a policy of insurance. The amount due on the policy of insurance was collected for Miss McKelvey by O'Brien & Peoples, a firm of attorneys in Manila, and Mr. O'Brien was directed by her to purchase therewith a number of United States money orders payable to her sister, Mrs. Hupfer. Soon after the purchase of the money orders Miss McKelvey went to Hong Kong, China, and while in that city she was murdered, and upon the person of the man arrested for her murder was found the money orders. It is now claimed that Miss McKelvey made a

valid gift of the money orders to Mrs. Hupfer, or that by her, actions and declarations with reference to them she created a trust which the court should enforce in Mrs. Hupfer's favor.

The only testimony we have as to how the orders came to be in the name of Mrs. Hupfer is that of the attorneys in Manila, O'Brien & Peoples. In their depositions are related conversations between Mr. O'Brien and Miss McKelvey with reference to what she wanted done with the money, and his advice to her. These conversations we think are clearly incompetent under Section 11494, General Code, which prohibits an attorney from testifying to a communication made to him by his client in that relation, and his advice to the client. Some facts are related, however, which we think are competent. Mr. O'Brien says that he took the money which was collected on the insurance policy, and that he went to the post office, purchased the money orders in question, took them to his office and delivered them to Miss McKelvey.

The purchase of the order in the name of Mrs. Hupfer was no doubt done under the direction of Miss McKelvey and we think that it evinced an intention on her part to give the money to her sister. But the question is did she carry out that intention so as to make it effective and pass the title to the property? Several things must concur to make a valid gift. First, there must be an intention on the part of the giver to part with his property. Such intention, we are inclined to think, appears. But there must be something more than an intntion. The intention to give, to be made effective, must be carried out by the donor relinquishing dominion over the property and delivering it to the donee either actually or constructively. Whatever Miss McKelvey may have intended to do, there is no evidence tending to show a delivery of the property to her sister, and she certainly did not relinquish her dominion and control over it. Taking out the orders in the name of Mrs. Hupfer did not prevent her from returning them to the post office and having them canceled and receiving back the money which she had paid for them. She could have done this any time she wished (Revised Statutes, U. S., Sections 4035-4039). The fact that the orders did not come to Mrs. Hupfer, and that Miss McKelvey retained possession of

them make the transaction lack all the essential elements of a gift, save the intention alone.

It is urged, however, that the facts in this case constitute a trust in the money represented by the several orders in favor of Mrs. Hupfer, but we think the transaction will not bear that construction. The cases cited do not, in our judgment, support it. In *Martin* v. *Funk*, 75 N. Y., 134, money was deposited in a savings bank, the depositor declaring at the time that it was in trust for the plaintiff and the account was so entered, and a pass book made out, which the donor held in her possession until her death. The court held that a trust was created. Here there was an express declaration of a trust and so it is with the other cases cited. Either there was an express declaration of a trust, or there were facts present which showed an intention to create one. Such intention, however, we do not think appears here.

The unfortunate circumstances of this case prevent us from carrying out what we think was the probable intention of Miss McKelvey, and prevent us from finding in Mrs. Hupfer's favor, but we can not disregard the law as we see it and therefore the judgment is for the plaintiff.

REDEMPTION OF PROPERTY SOLD FOR TAXES.

Circuit Court of Hamilton County.

HIRAM FRIEDMAN ET AL v. MARIA F. VAN ANTWERP ET AL.

Decided, August 1, 1911.

Taxation—Enforcement of Lien for Unpaid Taxes—Redemption—Sections 2667, 2669 and 2670.

The owner of real estate, ordered sold in satisfaction of a lien for unpaid taxes or assessments, may redeem the property at any time before confirmation by payment of such taxes or assessments with penalties.

H. H. Friedman, for plaintiffs in error.

Thomas B. Paxton, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

Under Sections 2667, 2669, 2670 and 2671 of the General Code relating to actions by treasurers of counties for recovery of unpaid taxes or assessments, the court is of the opinion that the owner or owners of the real estate ordered sold to enforce the lien of such taxes or assessments may redeem the same at any time before the confirmation of the sale thereof.

The record in the above case discloses that before confirmation of the sale to plaintiffs in error of the real estate described in the petition, the court allowed the owners to redeem the same upon the payment of all liens for taxes, assessments, penalties. etc., due.

We find no error in the court overruling the motion of the purchasers to confirm the sale to them, and the judgment therefore will be affirmed.

PROSECUTION FOR SALE OF LIQUOR IN "DRY" TERRITORY.

Circuit Court of Tuscarawas County.

GERSHOM K. WHEELAND v. STATE OF OHIO.

Decided, December 9, 1910.

Intoxicating Liquors—Sale of, to Detectives in Dry Territory—Serving Liquor to Two Persons at the Same Time Not a Single Offense.

Where two persons enter a place within the limits of "dry" territory, and one of them calls for the drinks, and intoxicating liquor is served to both and is paid for, the offense is complete and prosecution will lie therefor.

BY THE COURT.

In these cases motions are filed by leave to file petitions in error.

The charge was made in the court below that at the times mentioned in the affidavit one Gershom K. Wheeland did unlawfully sell intoxicating liquors contrary to the statute in such case made and provided. The affidavits were filed before the judge of the

court of common pleas and by him heard, and upon the hearing a judgment of conviction and sentence was entered. Exceptions were taken to the action of the court and now leave is asked to file petitions in error in this court. We are of the opinion that there is good cause shown and leave is hereby given in each case to file a petition in error.

The cases were submitted then upon the record, the arguments of counsel and briefs filed in the case. The only error alleged is, that the records show that the alleged sales were made to two persons who were seeking evidence of violations of the law for the purpose of having the alleged violators of the law placed upon the tax duplicate by the dairy and food commissioner of the state of Ohio. Each of the records discloses that these two so-called detectives entered the place kept by the plaintiff in error, whereupon one asked for the drinks for the two, which was supplied and paid for by the one. That after an intermission of some ten or fifteen minutes the other detective asked for the drinks for the two, which was supplied and paid for by the second person. Each of these transactions are now made the basis and foundation of a charge for violation of the law.

It is the contention of the counsel for plaintiff in error that as these detectives were engaged in securing evidence for the purposes of a conviction of the plaintiff in error and charging him with the tax incident to a dealer in intoxicating liquors, these two sales, if we may so term them, constituted but one single transaction and but a single violation of the law. And in support of this contention the counsel called to our attention an opinion delivered by one of the judges of the third circuit of the state and concurred in by one of his associates. It is also claimed that this holding and judgment was subsequently affirmed by the Supreme Court. But an examination of that case will show that the question now sought to be made was not involved in the case that went to the Supreme Court, nor was the same necessarily involved therein; that this question was only involved in certain of the cases that were decided at the same time that the case of *State* v. *Hinkleman*, 13 C.C.(N.S.), 321, was decided, and therefore we do not think that this case has the support or approval of the Supreme Court of the state.

We are of the opinion that when these two men entered the place of the plaintiff in error and one called for the drinks of liquor and it was supplied to the two and the price thereof was paid, that if the sale so made was a sale of intoxicating liquors and the place was within the limits or territory wherein the sale of intoxicating liquors was prohibited, it constituted an offense against the laws of the state and the offense was complete; that being simultaneous in time would not unite the transaction so as to make it but a single offense. To illustrate, suppose each of these detectives had entered the place and each had simultaneously proposed to buy intoxicating liquors and each was simultaneously supplied and each simultaneously paid, we do not think it can reasonably be contended that this constituted but one transaction, but that it would be two distinct sales, furnishing or giving away under the statute.

That there may be an adjudication of these causes is an additional reason why we think we are right in allowing these petitions in error to be filed. If the holding of the third circuit is correct and our holding is contrary, this question ought to be determined by the Supreme Court of the state. But as we view these records we find no error in the records to the prejudice of the plaintiff in error, and the judgments of the court of common pleas are affirmed with costs and remanded for execution, with exceptions.

CONSTRUCTION OF AGREEMENT AS TO ATTORNEY'S FEES.

Circuit Court of Hamilton County.

LOUIS J. DOLLE, AS TRUSTEE FOR ANNA ROBERTS ET AL, v. THOMAS R. ROBERTS ET AL.

Decided, November 25, 1911.

Attorney and Client—Agreement as to Fees for Recovering Alimony—Attorney to be Given a Percentage of the Amount Recovered— Husband Subsequently Creates a Trust for Benefit of Wife and Children —Agreement of Attorney with Wife Not Enforcible and He is Allowed a Quantum Meruit.

The word "fees" in a trust instrument will not be regarded as referring in any way to an agreement as to fees, entered into between the *cestui que trust* and her attorney prior to the creation of the trust and without the knowledge of the grantor, but in such a case the attorney for the *cestui que trust* will be allowed to recover as fees out of the trust funds only the fair value of the services rendered.

Dolle, Taylor & O'Donnell, for plaintiff.

C. D. Robertson and *E. C. Pyle,* contra.

JONES, J.; SMITH, P. J., AND SWING, J., concur.

On June 29th, 1909, the defendant, Thomas R. Roberts, conveyed to plaintiff, as trustee, property valued at about forty thousand dollars to be held in trust for the wife and children of said Thomas R. Roberts, the wife, Anna R. Roberts, to have the net income from same during her life, or until her re-marriage, in which latter event the income will go to a minor son, Thomas W., until he becomes of age. Upon her death, or (in case of her re-marriage) upon the son's becoming of age, said property will go, absolutely, to the four children.

This arrangement and settlement was reached after the filing of an action for alimony in the Insolvency Court of Hamilton County by Mrs. Roberts on or about May 31, 1909, in which cause Mr. Dolle represented the plaintiff as attorney.

At the time said action was brought, Mrs. Roberts agreed in writing to pay Mr. Dolle twenty per cent. of such sum as might

be ordered paid to her as alimony in said cause, the parties to said agreement evidently contemplating that whatever sum should be received by her would be in gross or as commonly called a "lump sum." This, Dolle, as her attorney, insisted upon in the early negotiation for a settlement and Mr. Roberts, by his attorney, Mr. Pyle, was equally or more insistent that a trust fund should be set aside for her and the minor son, they to use and enjoy the income therefrom.

This latter plan was ultimately agreed upon and thereupon at the instance of Mr. Dolle a new agreement was entered into as to attorney fees, which provided that the former agreement should be canceled and that Dolle should receive for his services fifteen per cent. "of the market value of any and all real estate, money, securities or other personal property which he may succeed in having conveyed or transferred by the said Thomas R. Roberts, in trust for the benefit of said Anna Roberts or Thomas R. Roberts, or either or both of them during their life or lives, and thereafter the principal sum to be paid or delivered to their children, the said commission to be paid out of the principal fund so conveyed or transferred immediately upon the delivery thereof to the said trustee or trustees; and the said trustee or trustees of said fund, or either of them, is hereby authorized to pay to the said Louis J. Dolle upon demand a sum equal to fifteen per cent. of the total value of all property which the said Thomas R. Roberts may hereafter convey to him or them or either of them in trust as aforesaid."

This agreement bears date of June 16, 1909, and is signed by Louis J. Dolle, Anna Roberts, Stella Roberts, Mae Browning, Florence Roberts and by Thomas W. Roberts, a minor, by Anna Roberts, his natural guardian.

The instrument of June 29th, creating the trust and setting forth its terms and conditions and signed by the husband, Thomas R. Roberts, contains in Article 7, the following direction to the trustee:

"The said trustee shall * * * pay and discharge the court costs and the fees due Louis J. Dolle for services rendered and expenses incurred by him in the action of the said Anna Roberts

against Thomas R. Roberts for alimony * * * and for this purpose he is authorized to sell a sufficient amount of said securities and other personal property to pay the same."

It is for a construction of the above paragraph that this petition is filed by the trustee he claiming out of the trust fund fifteen per cent. of the market value of all property held by him as trustee, being as he contends, the "fees due" him under his contract of June 16th with Mrs. Roberts and the children and amounting to $5,964.15.

Objection to this charge is made by Mr. Roberts and other beneficiaries of the trust, it being urged that Dolle is only entitled to charge the reasonable value of his services without reference to any agreement he may have had with his clients.

It is conceded that at the time he signed the trust instrument Thos. R. Roberts had no knowledge of the contract for fees existing between Mrs. Roberts and her attorney by which the latter was to receive a contingent fee of fifteen per cent.

Such being the case, we do not see how the trustee can recognize said contract, as he only has such powers as are conferred upon him expressly by the trust instrument and such as are necessarily implied. The creator of the trust having had no information as to any special contract for fees, it is not reasonable to suppose that he contemplated such an agreement when providing for the payment of fees. On the contrary, the presumption is that he had in mind only such fees as would fairly compensate the attorney for services rendered, fixed under the conditions then surrounding the parties at a time when he was making provision to safely secure and pay same, rather than a fee fixed at an earlier date when its ultimate receipt depended and was contingent upon the success of a proceeding in court, and the recovery and satisfaction of judgment.

We are of the opinion, therefore, that the word "fees" in Article 7 of the trust instrument relates in no way to the contract of June 16th; that under the terms of Article 7, Mr. Dolle is entitled to be paid out of the trust fund the value of his services; that all the services on the part of Dolle and his associate counsel, including the negotiations for and preparation of the trust

instrument, were rendered in the alimony proceeding and in effecting a settlement thereof.

All parties to this cause have united in a request that the court proceed to fix the fees due Mr. Dolle in the event of the above finding. After careful consideration of the question we are of the opinion that there should be paid to him the sum of twenty-five hundred ($2,500) dollars for legal services, provided that upon payment to him of said amount he relinquish all claims for attorney fees against Mr. and Mrs. Roberts and their children.

The trustee, in his account, a copy of which is attached to the petition herein, credits himself with $828.24 paid out of for the benefit of Mrs. Roberts and children prior to June 29th, 1909, or paid upon obligations incurred prior to that date. It is claimed that the items making up this amount are properly chargeable to the trust fund under "expenses" as provided in Article 7 of the agreement above quoted.

The following items should be elminated from said account as not being embraced within said provision: 1909, June 2, $185.85; June 10, $8; June 14, $2.25; June 15, $14.95; June 15, $1.65; June 30 $1.50; June 30, $1.90; total $216.10.

No question is raised but that all the items were paid by Dolle and the payments appear to have been made in good faith. Hence, we have resolved doubt as to several in his favor and allow the remainder of the account, to-wit, $612.33.

These amounts have been fixed with the idea and upon the theory that they should be accepted in full satisfaction of the respective claims upon which they are based.

We find no evidence in the entire transaction of any fraud on the part of Mr. Dolle, as attorney, or in his capacity as trustee.

OFFER TO PURCHASE.

Circuit Court of Ashland County.

THE DURANT-DORT CARRIAGE CO. v. S. L. KARTH & BRO.

Decided, October 21, 1910.

Sales—Offer to Purchase Distinguished from Contract to Purchase—Action on Alleged Breach of Contract of Purchase—Objection Sustained to Introduction of any Evidence.

An offer to purchase goods in accordance with a proposition theretofore submitted, does not constitute an enforcible contract of purchase, until the offer has been submitted to the seller and approved by him.

J. W. Mykrantz, for plaintiff in error.
Chapman & Taggart, contra.

TAGGART, J.; DONNELLY, J., and VOORHEES, J., concur.

The question in this proceeding in error is as to the action of the trial court in sustaining an objection to the introduction of any testimony, after a jury was impanneled to try the cause, which objection was sustained by the court, and a verdict directed, and the petition dismissed.

If the amended petition, upon which this case was put to trial, contains facts constituting a cause of action, then the action of the court was erroneous and prejudicial. If, however, the amended petition does not state facts constituting a cause of action, then the action of the court in sustaining the objection to the introduction of any testimony was proper.

The action in the court below was based upon an alleged written contract, and the amended petition refers to a copy which is attached thereto and made a part thereof, marked Exhibit "A," and then refers to the terms of the alleged contract, and from the terms so referred to the right is claimed to recover for the damages stipulated therein.

The court has the right, in construing the petition, to look to the exhibit that is made a part thereof, not to help out the petition to make a good cause of action, but may look to it for the purpose of determining whether the averments of the peti-

tion are supported by the exhibit and if there is a variance between the terms of the exhibit and the allegations of the petition, the exhibit must control and the court may declare the petition insufficient.

The examination of the exhibit attached to the amended petition does not sustain the averment that the cause of action is founded upon a written contract. The exhibit, by its terms, is simply an order or an offer to purchase certain goods of the plaintiff, according to the terms of the order or offer, so made by the defendants. One of the terms and conditions of this order or offer to purchase is as follows, "Subject to approval of the Durant-Dort Carriage Co."

Now, it is averred in the amended petition that the plaintiff accepted said order and approved the same, and fully performed its entire part of said contract. But the exhibit itself contains no approval, nor evidence of approval by the plaintiff, neither is it averred that such an approval was ever communicated to the defendants, and the averment that it fully performed its entire part of said contract, we think, is clearly referable to the fact that it constructed the buggies named therein.

But, it is a clear rule of law, sustained by abundant authorities, that an order or offer to purchase goods, under a written or printed order, similar to the exhibit attached to the amended petition, is a mere offer, and before notice of acceptance may be revoked by the party making the offer or signing the order. This amended petition avers that the defendants refused to accept the goods or refused to give any orders for shipment. It is not shown that they had in any wise accepted, or had any knowledge of the approval of said order by the plaintiffs, and such refusal was the equivalent of revocation of the order so made by them.

We think there was no error in the action of the court in sustaining the objection to the introduction of any testimony, as in our judgment this amended petition did not state a cause of action.

The judgment of the court of common pleas is affirmed with costs, and remanded for execution. Exceptions will be noted.

LIABILITY FOR COLLAPSE OF A BRIDGE.

Circuit Court of Hamilton County.

CITY OF CINCINNATI v. EDWARD ARMSTRONG.*

Decided, July 29, 1911.

Bridges—Collapse of Wooden Structure from Decay—Constructive Notice to Municipality of Its Unsafe Condition.

1. In an action for damages on account of injuries to a team and driver from the collapse of an old wooden bridge, a verdict against the municipality must be sustained, where it appears from the testimony that the bridge had been in use for a great number of years and the timbers supporting it were rotten, and there was no contributory negligence on the part of the driver.
2. Where it appears that the board of public service had been notified of the unsafe condition of the bridges in that particular locality six weeks before the accident, constructive notice of the condition of this particular bridge, which would have been revealed by a reasonably careful inspection, is sufficiently shown.

Constant Southworth, for plaintiff in error.
Harry J. Wernke, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

We do not think the evidence in the above case discloses any contributory negligence on the part of the defendant in error, but on the contrary the evidence is such as that but one conclusion can be drawn, which is, that the bridge in question was out of repair. The evidence upon this point being that "the timbers supporting it were rotten; that there was no live current in the wood and that it had been built and in use for a long time prior to its taking over by the city from the county."

The jury unequivocally answered three special interrogatories entirely consistent with the general verdict to the effect that the defect in question was of such a character that it could have been discovered by a reasonably careful inspection; that such an inspection was not made before the accident, and that the

* Affirming *Armstrong* v. *Cincinnati*, 8 O. L. R., 224.

city had notice of the unsafe condition of the bridge about six weeks before.

Upon the latter question of notice the court is of the opinion that there is sufficient evidence to justify the finding of the jury upon this point. The attention of the board of public service was called to the unsafe condition of the bridges in that locality, and a written communication was sent to it specifying streets that needed repair, and we think that under all the evidence the constructive notice of the unsafe condition of this particular bridge was sufficiently proven.

We see no error in giving to the jury the special charge on behalf of defendant in error, No. 5, as the same is fully sustained by the case of *Commissioners* v. *Coffman, Admx.*, 60 O. S., 538.

The general charge correctly stated the law of the case, and finding no errors in the record, the judgment will be affirmed.

LIABILITY FOR COST OF RAILWAY BRIDGES OVER ARTIFICIAL WATER COURSES.

Circuit Court of Wayne County.

THE ASHLAND & WESTERN RAILWAY COMPANY v. THE BOARD OF COMMISSIONERS OF WAYNE COUNTY, OHIO, ET AL.

Decided, October 18, 1911.

Ditches—Construction of, Underneath Railway Tracks—Company Can Not be Required to Meet the Expense of, When—Invalidity of Assessments Imposed on Property for the Sole Benefit of Others Than the Owner—Section 6518.

A railway company can not be made liable for the expense of constructing a bridge or culvert over an artificial water-course, established after the company acquired its right-of-way at its own expense, and constructed a railroad thereon.

Semple & Sherrick and *Eugene Carlin*, for plaintiff in error.
L. R. Critchfield, Jr., and *S. B. Eason*, contra.

POWELL, J.; SHIELDS, J., and VOORHEES, J., concur.

This action comes into this court on a petition in error, filed by the Ashland & Western Railway Company, against the commissioners of Wayne county, Ohio, and Harry L. Henderson,

alleging error in the orders of said commissioners establishing a county ditch upon the lands of the defendant, Harry L. Henderson, and in which order the commissioners required the plaintiff in error to construct a bridge over said ditch at its own expense.

The original action was commenced by Harry L. Anderson filing his petition for said ditch with the county commissioners of this county, and after the same was allowed an appeal was taken by the plaintiff in error to the probate court of this county, upon all the grounds upon which such appeal may be taken, and we are asked by the petition in error to review the action and judgment of the probate court upon such appeal.

We have examined this record upon all the assignments of error set forth in the petition in error, and find that there is error in the charge of the court for which the judgment below should be reversed. There may be other errors in the record, but they are not of sufficient importance to justify a reversal of the judgment, but we find that the probate court in construing Section 4495 of the Revised Statutes, or 6518 of the General Code, instructed the jury—

"If you find that the location and construction of the bridge on the railway at the crossing of the proposed ditch, No. 187, is necessary to the public health, convenience or welfare, it is the duty of the Ashland & Western Railway Company to locate and construct said bridge at its own expense, and it can not recover damages for the expense."

This court is of the opinion that the section above quoted ought not to be so construed, because such construction would make the plaintiff in error liable at its own expense to construct a bridge or culvert over an artificial water course, that was established after it had acquired its property and constructed a railroad thereon at its own expense and such construction would render the statute unconstitutional. The 79 O. S., page 348, supports this view.

The syllabus of this case is:

"1. The provisions of the Constitution forbid not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another.

"2. The Act of April 18, 1904 (97 O. L., 138), may not be so construed and administered as to charge an owner of lands

which are, and are to remain unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor."

It is not contended here by any one that the establishment and construction of this bridge is for the benefit of the plaintiff in error, but it is admitted that it will be solely for the benefit of others than itself, and if such construction would be allowed to prevail, the plaintiff in error would be suffering the imposition of an assessment for the benefit of other parties, and which, in effect, would be the taking of its property for the benefit of others without compensation.

This instruction to the jury naturally would influence their decision upon the question of compensation and damages, and we think that there is such prejudicial error in such instruction that the judgment of the probate court should have been reversed. For these reasons, the judgment of the court of common pleas, affirming the judgment of the probate court, and the judgment of the probate court, will be reversed, and the cause remanded to the probate court for further proceedings according to law.

SALE OF CORPORATE STOCK BY AN ADMINISTRATOR.

Circuit Court of Hamilton County.

WALLACE BURCH v. THE CINCINNATI TRUST COMPANY AND THE CINCINNATI GAS & ELECTRIC COMPANY.*

Decided, November 11, 1911.

Estate of Decedents—Private Sale of Stock Certificates—Failure to Conform in All Respects with the Statute—Section 10704.

Omission by the probate court to fix the lowest price at which corporate stock belonging to the estate of a decedent may be sold at private sale, does not invalidate a sale made in all other respects in conformity with the statute, without collusion or fraud and at the market price.

Robert B. Burch, for plaintiff in error.
Louis A. Ireton, contra.

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* Affirming *Burch v. Cincinnati Trust Co.*, 12 N.P.(N.S.), —.

JONES, J.; SMITH, P. J., and SWING, J., concur.

The order of the probate court, in that it does not fix a sum below which the shares of stock could not be sold at private sale, is defective and not in compliance with Section 10704, General Code.

Such defect however, does not impair the title to the stock in the plaintiff where it appears that the proceedings in all other respects conformed to the statutes and that the sale was made in good faith, at the market value, and in the absence of fraud or collusion.

The petition states a cause of action and the demurrer must be overruled. *Sutherland* v. *Brush*, 11 Am. Dec., 282 (notes); *Edney* v. *Baum*, 97 N. W. Rep., 252 255; *Rockel's Probate Practice*, Vol. 1, p. 420; *Jelke* v. *Goldsmith, Administrator*, 52 O. S., 499.

ACTIONS FOR SERVICES.

Circuit Court of Hamilton County.

GEORGE F. WILLIAMS v. W. T. CROCKETT.*

Decided, July 9, 1910.

Services—Averment of Wrongful Termination of—Denial of Special Contract—Action on Implied Quantum Meruit.

Burch & Johnson, for plaintiff in error.

Chas. A. J. Walker, contra.

GIFFEN, P. J.; SMITH, J., and SWING, J., concur.

The plaintiff in error not only denied the existence of any special contract with the defendant in error, but made such denial in writing before suit was commenced.

The defendant in error thereupon elected to sue as upon an implied *quantum meruit* for the value of the services rendered, and recovered a verdict. The judgment should be affirmed. *Ralston* v. *Cole's Administrator*, 30 Ohio St., 92.

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* Affirmed by the Supreme Court without opinion, *Williams* v. *Crockett*, 84 Ohio St., p. —.

REVIVOR OF A DORMANT JUDGMENT.

Circuit Court of Wayne County.

JAMES VAN NOVER v. DAVID ESHLEMAN.

Decided, October 14, 1911.

Judgment—Conditional Order of Revivor—How Made—Effect of—Will Sustain an Execution—Is in the Nature of a Summary Process—Protection to the Debtor.

When a conditional order of revivor of a dormant judgment is made, the judgment is revived for all purposes for which a judgment may be revived and will sustain an order of execution issued thereon, subject to the condition that if the judgment debtor, within a time fixed in the order of revivor, can show cause why said judgment ought not to have been revived, the order of revivor will be set aside.

M. L. Spooner and *John McSweeny,* for plaintiff in error.
A. D. Metz, contra.

POWELL, J.; VOORHEES, J., concurs; SHIELDS, J., dissents.

This is an action by the plaintiff in error to reverse the judgment of the court of common pleas setting aside an execution issued out of that court on the 27th day of January, 1908, in favor of plaintiff in error and against the defendant in error.

The record discloses that the plaintiff in error is the owner of a judgment which stands upon the records of this county in his favor against the defendant in error, David Eshleman; that prior to the 25th day of January, 1908, the said judgment had become dormant, and on that date the plaintiff in error filed his application for a conditional order of revivor of the said judgment, which order was that day allowed and entered on the journal; that notice thereof was served upon the defendant in error, and an execution was issued on said judgment on the 27th day of January, 1908, which execution was levied on certain real estate of the defendant in error situated in Cuyahoga county, Ohio.

The record also shows that an issue was made up on the application for revivor of the judgment, which was tried and decided

in favor of the plaintiff in error and final order entered on March 11, 1908. The defendant in error in June, 1910, filed a motion to set aside the execution which had been issued on said judgment on the 27th day of January, 1908, which was sustained.

It is the action of the court in sustaining the said motion and setting aside said execution that is before us for review. A majority of the court are of the opinion that when a conditional order of revivor of a dormant judgment is made, such order revives the judgment for all purposes for which a judgment may be revived—subject, however, to the terms and conditions made a part of such order. That is, a conditional order of revivor is a revivor of the judgment subject to the condition that if the judgment debtor, within a time to be fixed in said conditional order, can show cause why such judgment ought not to have been revived, the order of revivor will be set aside.

It is contended strongly that this execution was issued upon a dormant judgment. A majority of the court think it was issued upon a judgment that had been revived by the conditional order, and was no longer dormant. It is also contended that the case of *Smith* v. *Hogg*, 52 O. S., 527, settles the question in controversy here. We do not think this case decides the question presented. It holds and decides that when a dormant judgment is revived, all the liens that were valid under said judgment before it became dormant are re-instated and again become valid liens by such revivor. It does not decide when a conditional order of revivor takes effect so that an execution may issue thereon. We think that a dormant judgment can only be revived by an order of the court in which proceedings for revivor are pending, whether such order be conditional or absolute. A conditional order of revivor is a revivor of the judgment subject to be defeated by the judgment debtor showing that the judgment has been paid, settled or barred by the statute of limitations, as these are practically the only defenses that can be made to the revivor of a dormant judgment.

We think that when this conditional order was entered on the 25th day of January, 1908, the judgment was no longer dormant, but revived, and as such revived judgment would sustain the execution issued thereon January 27, 1908.

This conclusion is supported by the practice in other states, and by the former practice in Ohio, where judgments were revived upon a writ of *scire facias*, and which practice still prevails in many of the other states. It is the practice in Indiana that when a judgment becomes dormant, a motion may be filed for leave to issue execution thereon, and the action of the court sustaining such motion has the same effect that the order of revivor does in Ohio.

We think that revivor by conditional order is a summary proceeding, and intended by the Legislature so to be, in order to reach the property of the judgment debtor, that otherwise might be encumbered or conveyed before an absolute order of revivor could be obtained upon a petition for that purpose.

We further think that the second order entered upon an application for a conditional order of revivor has no other legal effect than to be cut off, or foreclose, the right of the judgment debtor to set up a defense to the revivor of the judgment in that proceeding. The statute is, that unless the judgment debtor shows sufficient cause to the contrary the judgment shall "*stand revived,*" or as we construe it, *continue revived,* having already been revived by the conditional order entered on the filing of the application.

We do not see any inherent difficulty in this construction of the statute, such as that the property of the judgment debtor might be seized upon execution and held before a final determination of any question he might make as to the validity of such judgment could be had. The statute requires notice to be given such debtor, and allows him to make any claim or defense he may have against the order of revivor of such judgment, and if his property has been wrongfully seized the court can in the same proceeding issue a restraining order to prevent a sale of the same until a final hearing can be had.

With this view of the question involved, a majority of the court think that the judgment of the court of common pleas should be reversed at the costs of the defendant in error.

EFFECT OF FAILURE TO ARRAIGN AN ACCUSED PERSON.

Circuit Court of Hamilton County.

ANNA EMMONS v. STATE OF OHIO.

Decided, June 24, 1911.

Criminal Law—Error in Placing an Accused Person on Trial Without His Having Been Arraigned—Section 13581.

The provision of Section 13581, as to defects in an indictment which shall not be regarded as fatal, does not apply to the case of one who has been convicted of an infamous crime without having been arraigned on the indictment or having entered a plea thereto, and such an omission constitutes reversible error.

A. Lee Beaty, for plaintiff in error.
Arthur C. Fricke, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

The plaintiff in error was indicted, tried and convicted in the court of common pleas of this county of murder in the second degree.

The error principally relied upon by counsel for plaintiff in error is, that the record of the conviction does not show that the defendant was arraigned on the indictment, that is, there was no plea of "not guilty" to the crime charged.

Section 13629, General Code, provides that the accused shall be arraigned by the clerk of the court or his deputy reading the indictment to him, unless the accused or his attorney waive the reading thereof, and he shall then be asked by the court whether he is guilty or not guilty of the offense charged; and Section 13634 provides that if the accused plead not guilty such plea shall be entered on the indictment.

In the case of *Hanson* v. *State,* 43 O. S., 376, our Supreme Court holds that "the record of a conviction for crime must show that the defendant was arraigned on the indictment"; and in the case of *Crain* v. *U. S.,* 162 U. S., 625, the Supreme Court of the United States, says that where the record does not show that the accused was ever arraigned, or that he pleaded to the

indictment, the conviction must be set aside, as it is better that a prisoner should escape altogether than that a judgment of conviction of an infamous crime should be sustained where the record does not clearly show that there was a valid trial; in this same case the Supreme Court says, that in its opinion it is the prevailing rule in this country in cases of felony that a plea to the indictment is necessary before the trial can be properly commenced, and unless this fact appears from the records the judgment can not be sustained. Until the accused pleads to the indictment and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred from a general recital in some order that the jury were sworn to try the issue joined. The court further says that the rule requiring the record of a trial for an infamous crime to show affirmatively that it was demanded of the accused to plead to the indictment, or that he did so plead, is not a matter of form only, but of substance in the administration of the criminal law, and that due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed.

We do not think that Section 13581, General Code, relating to defects in an indictment that are not fatal, can apply in the case at bar, as the right to plead to the indictment is a substantial one which can not be taken away from the accused.

Finding no other errors in the record, the judgment of the court below will be reversed on the above grounds and a new trial granted.

Judgment reversed.

ARRESTS FOR VIOLATION OF FISH AND GAME LAWS.

Circuit Court of Franklin County.

GEORGE M. WILLIAMS ET AL v. V. G. MORRIS.

Decided, January 17, 1911.

Fish and Game Laws—Deputy Sheriff May Arrest on View Persons Found Violating—Whether Officer's Action was Reasonable is a Question for the Jury in an Action for Damages for False Arrest—Officer Not Liable for an Arrest Made Under a Warrant Declared Defective on Proceedings in Error—Arrest Under Unconstitutional Statute—Counsel Fees in a False Imprisonment Case Allowable, When—Section 12525.

1. A deputy sheriff or other person authorized by law to make arrests may, on view, arrest persons found violating Section 12525 of the fish and game act and not be liable for false arrest, notwithstanding the provision that prosecutions may be instituted only upon complaint of the owner or agent of the owner of the lands, or rights in lands or waters, where the trespass was committed.
2. Where an arrest is made without a warrant, the arresting officer should within a reasonable time secure a warrant, and during the interval should use only such means and methods for detaining the party under arrest as are reasonable and necessary under the circumstances; and in an action for damages for false arrest and imprisonment, the question whether the arresting officer so acted is one of fact for determination by the jury.
3. In the event the party under arrest is bound over to the grand jury under a warrant which upon proceedings in error was declared to be defective, the arresting officer is not liable for false imprisonment, unless he detained his prisoner an unreasonable length of time and in an improper manner.
4. Inasmuch as the Legislature is presumed to have passed only constitutional laws, an arresting officer is not liable for false arrest or imprisonment where he acted, properly and within prescribed limits, under an act which was subsequently declared unconstitutional.
5. Counsel fees can not be allowed to a plaintiff in an action for damages for false arrest and imprisonment, unless the evidence is such as would justify an allowance of exemplary or punitive damages.
6. Where the arrest was not illegal and there was no false imprisonment, it is error to instruct a jury that they may allow as com-

pensatory damages an attorney's fee for services incurred in setting aside the proceedings of a justice of the peace had on a defective warrant.

G. M. Carpenter, for plaintiff in error.
J. C. Nicholson, contra.

ROCKEL, J.; JONES, J., and ALLREAD, J., concur.

Error to common pleas court.

The action in this case, according to the plaintiff's petition, is one of false arrest and imprisonment. The petition alleged, among other things, that the defendants maliciously assaulted plaintiff, shot at him, threatened to kill him and by force unlawfully compelled him to go with them and imprisoned him in a corn crib and there detained him against his will, depriving him of his liberty from about 8:30 o'clock P. M. on June 12, 1908, until about 5 A. M., June 13, and refusing him food and water during said time, and that on June 13 said defendants maliciously, unlawfully, and with force compelled the plaintiff to go with them to a magistrate and there to answer to a pretended charge of trespassing, all without warrant and without authority of law.

That the plaintiff was afterward, according to an order of the court of common pleas, dismissed, or at least discharged from the action, and that the plaintiff was compelled to expend the sum of $25 in counsel fees in attaining his release and discharge.

The defendants for answer admit in substance that the defendants did detain plaintiff a certain length of time, but that the plaintiff was then trespassing upon defendants' land and that the alleged arrest was made by a duly authorized deputy sheriff and that the arrest was made on view and that the plaintiff was taken, as early as convenient on the following morning, to a justice of the peace, where an affidavit was filed and a warrant was duly issued by the justice, and the plaintiff pleaded guilty, and the justice imposed a fine, and that it was this action of the justice of the peace in imposing such fine that was set aside by proceedings in error, and denies the other allegations.

The case was tried to a jury and a verdict of $25 given for plaintiff. Motion was made for a new trial by both the plaintiff

and defendants below, which motions were overruled and each of the parties excepted thereto. The charge of the court was excepted to by both of the parties and error is principally predicated upon the law as laid down by the court.

The defendant in error, while not specifically pointing out in his brief the matters objected to, takes the position for his ground for setting aside the judgment below that the court below took the view throughout the trial and in its charge to the jury that the arrest in the first place was legal, and left the jury for determination from the evidence the questions as to whether or not the accused had been detained an unreasonable length of time before being taken to the magistrate, and whether or not he had been detained in an improper place, and whether or not he had suffered at the hands of his captors improper treatment and indignities.

And defendant in error admits that if the view taken by the court below was correct that there was no prejudicial error. The facts show that Mr. Williams, one of the plaintiffs in error, was the owner of a tract, I believe about 130 acres, of land several miles from Columbus; that the other plaintiff in error, Mr. Rutter, was a duly appointed and acting deputy sheriff. On Mr. Williams' farm there was an artificial lake less than ten miles in length, into which had been introduced some fish, and it was such a lake that a person trespassing thereon for the purpose of fishing would be guilty of an offense under the statutes of Ohio. (99 O. L., 380, Sec. 76.)

The defendant in error, with two others. came out to this lake about 8:30 o'clock for the purpose of fishing, and between that hour and 10:30 oclock they were caught in the act of fishing by Mr. Rutter and by him placed under arrest, and afterwards were taken up to the house of Mr. Williams, and there detained in a corn crib until the next morning, when they were taken before a justice of the peace, where Mr. Rutter made out an affidavit for the violation of this section, and the defendant in error and his two companions pleaded guilty and were fined $10 each, and given thirty days in which to pay the same, or give bond in the sum of $75.

Under Section 77, 99 O. L., 380 (General Code, 12526), it is provided:

"Prosecutions for a violation of the provisions of such section shall be instituted only upon complaint of the person or his agent upon whose land or rights in land or waters the trespass has been committed."

In making out the affidavit for the warrant before the justice of the peace, the deputy sheriff did not state therein that he was the authorized agent of Mr. Williams, but merely signed his name to the affidavit. These proceedings before the justice of the peace were taken up to the court of common pleas and reversed, for the reason that the affidavit did not show an offense; that is, as this prosecution could only be instituted by Mr. Williams or his authorized agent, and the affidavit did not show that fact, the proceedings before the justice of the peace were erroneous.

However, the warrant on its face was regular and the evidence shows that Mr. Rutter was in fact the authorized agent of Mr. Williams, when his affidavit was made, and that he was duly authorized to make a proper affidavit, and that he was also the duly authorized agent for Mr. Williams at the time that he made the arrest.

The defendant in error contends that because no valid complaint had been filed prior to the arrest, that all the proceedings were illegal.

The court, however, tried the case and took the opposite view that Mr. Rutter as deputy sheriff duly authorized by Mr. Williams might on view lawfully make the arrest, even though no complaint had before been filed, or the complaint thereafter filed was not valid in law. To hold that a person found violating this law could not be detained or arrested, without first having the owner file an affidavit, would in many instances defeat its enforcement entirely. Such persons are not likely to kindly wait for these preliminaries, nor are they particular about disclosing their identity, and the return on the officer's warrant would generally be "not found."

We think that the court was right in this view, that it is not necessary under this statute to have a complaint made before an arrest can legally be made, especially when the arresting officer makes the arrest on view. If an officer should arrest on view

and thereafter the owner of the land would refuse to institute proceedings, a different question would arise, but in this case the officer had authority from the owner at the time the arrest was made and had full authority to institute proceedings in this case. So the fact that the court of common pleas afterwards set these proceedings of the justice aside would not, in our view, make the arrest illegal.

In fact, the court charged the jury in this case that:

"The fact that the plaintiff was subsequently released and discharged from custody by order of the court of common pleas of this county, cuts little or no figure in this case."

In this we think the court was right.

If the arrest in the beginning was legal, the only question which was really in the case was whether or not the plaintiff below was unlawfully detained or illegally imprisoned from the time that the arrest was actually made until the affidavit was filed before the justice of the peace, and this question was submitted to the jury. Even if the length of time of the detention was not sufficient to make it unlawful, yet whether the detention itself was conducted in a proper or improper manner was certainly a question of fact for the jury to decide.

Defendant in error contends that the statute under which the arrest was made was unconstitutional and, therefore, all proceedings were void *ab initio,* and that no protection is afforded to these plaintiffs in error, even though they acted in a manner in which the law would have protected them were it constitutional.

We do not think it is necessary to pass upon the constitutionality of the law in this action, for we are satisfied that these plaintiffs in error were not bound to act or not act under the possibility that law thereafter might be declared unconstitutional. To otherwise hold would be to take away a safe-guard from persons acting under such a law which could not be otherwise than unwise and unjust. A law is presumed to be constitutional until the courts have declared it otherwise. The Legislature is presumed only to have passed constitutional laws.

Courts should protect officers and others in the administration of the law as it appears in the statutes, promulgated by proper

authority, and so long as they do not transcend the authority given by such statute, their acts should be upheld and they should not be mulcted in damage merely because the law is afterwards declared unconstitutional. The verdict of the jury was in favor of the defendant in error, and we can not say that even if the law were so construed, as defendant in error contends, that he could have received or have been entitled to a larger verdict.

We, therefore, find that there is no error prejudicial to the defendant in error in this case.

The plaintiff in error raises a question upon the refusal of the court to allow him to introduce certain testimony, and also questions of law arising in the charge of the court. On pages 86, 87, 88, 89 of the record, Mr. Brown was examined in chief by counsel for defendant and after it was shown where he lived, he was inquired of as to his having seen three persons going towards Mr. Williams' residence, and the following as appears from the record:

"Q. What time of night was that?

"Mr. Nicholson: I object to that unless they identify the parties.

"The Court: Do you expect to identify these people?

"Mr. Carpenter: Only by the circumstances is all. There is not much probability that there was two lots of three people going down there at that time of night.

"The Court: Before he answers that question, you may inquire with regard to any description of the men.

"Q. Are you able to give any description of the men? A. Oh, no—no way at all of knowing whether they were—I couldn't identify them by no means.

"The Court: Tell whether they were old or young men.

"Witness: They had the appearance of young men.

"Q. (By Mr. Carpenter.) Where had you been during that evening? A. We were sitting out on the porch. We had company and were sitting out on the front porch.

"Q. How long had you been sitting out there? A. Probably all evening,—sitting there in our shirt sleeves, talking. I can tell you that.

"Q. How early in the evening do you say you went out there? A. We probably went out there after supper; we generally eat our supper about seven or eight o'clock in the summer time.

"Q. Do you mean sun time? A. Yes. We go by sun time out there.

"Q. Now, then, what would you say as to whether you were out there from that time until the time you saw these parties? A. Oh; yes, sir. I was out there.

"Q. Had you seen anything else; that is, a group or three passing there, carrying fishing poles? A. I had not.

"Q. Did you see another group of three later than that passing there, carrying fishing poles,—I mean later than the time you saw,—? A. I only saw the one gang of three. That is all I remember of seeing.

"Q. (By the Court.) How long did you remain on your porch in view of the highway that night? A. Oh, it was probably, just after supper we went out there, I suppose probably eight o'clock, something like that. We stayed there until ten or probably later. We had company that afternoon and we were sitting out on the front porch.

"Mr. Nicholson: I can not see where even the time would be material, if the court please. These boys admit they went down that way and that they were there. They say about 8:30 and Rutter says about 10. I can not see the materiality of this testimony.

"Q. (By Mr. Carpenter.) What time was it that you saw these three parties passing along with fishing poles?

"Question objected to by the plaintiff; objection sustained; exception by the defendants.

"Mr. Carpenter: Let the record show that we expect the witness, if permitted to answer the question, to say that it was between nine and ten o'clock that night.

"And thereupon, the court sustained the above objection of the plaintiff, to which ruling of the court the defendants excepted.

"Q. Mr. Brown, what, if anything, did you do with reference to this matter after you saw them pass your home south?

"Question objected to by the plaintiff; objection sustained; exception by the defendants.

"Mr. Carpenter: Let the record show that if the witness were permitted to answer the question, he would testify that he called up Mr. Williams' residence and talked with Mr. Rutter.

"And thereupon, the court sustained the above objection of the plaintiff, to which ruling of the court the defendants excepted.

"Q. What time was it that you talked to Mr. Rutter?

"Question objected to by the plaintiff; objection sustained; exception by the defendants.

"Mr. Carpenter: Let the record show that if the witness were permitted to answer the question, he would say that it was after ten o'clock when he got them on the 'phone.

"And thereupon, the court sustained the above objection of the plaintiff, to which ruling of the court the defendants excepted."

Mr. Rutter, the man making the arrest, had testified that after he had retired the telephone began to ring, and it continued for some time. He then rose and a friend told him over the 'phone that some fellows had gone down his way with fish poles, or something of that kind, and that thereupon he got his gun and went down to the lake and made the arrest.

As the length of time which the defendant in error was confined in the corn crib, between the time of the arrest and the filing of the affidavit, was a material element in the determination by the jury whether or not the detention was unlawful, we think that it was prejudicial error to exclude the testimony of Mr. Brown as to when he called up Mr. Rutter.

Mr. Nicholson, counsel for plaintiff below, admits the identity of these boys, as will be seen from the record above quoted. Therefore, it seems to us that it was quite material, not only as showing the actual time that this arrest was made, but in corroboration of the testimony of the defendants below as to the time that the arrest actually was made, and in opposition to the testimony of plaintiff below and his companions upon the same matter. For, as before said, the real question of issue in this case, as viewed by the court below, was whether or not such detention was unlawful and the length of time of such detention was a material element in considering whether it was in fact unlawful.

In the instructions of the court to the jury upon the question of what damage should be allowed to the defendant, and the character of the same, the court charged as follows:

"If you find for the plaintiff, the question of damages then arises, and you should award such damages as will compensate the plaintiff for the injury which he sustained, unless you find that the acts of the defendants were malicious. Then you may add what is termed in law 'exemplary damages,' or 'smart money.' If you find for the plaintiff, as I have said, the plaintiff is entitled to compensatory damages, although the defendants may have acted in good faith and in the belief that they were discharging their duties in the premises. But if you find that the defendants arrested and imprisoned the plaintiff mali-

ciously, then the defendants are liable to the plaintiff for compensatory damages and you may, if you see proper, also assess further damages as smart money, that is, exemplary damages. By a malicious act is meant an act that is wanton and willful, without regard to the rights of others. That is an act that is malicious. You will determine whether the defendants acted maliciously. If they acted maliciously you may add smart money to the actual damages which you find this plaintiff to have sustained, smart money is given in the way of pecuniary punishment for malicious acts. In allowing for compensatory damages you should allow such damages as will fully and reasonably compensate him for the injuries which he has sustained. The elements for which compensatory damages may be allowed include pain and suffering, if any, mental and physical, the loss of time, if any, in consequence of such false imprisonment, and injury, if any, to the reputation or social position as well as for shame and mortification caused by false imprisonment, and also reasonable attorney's fees to the plaintiff for services of the attorney in prosecution. The plaintiff claims $25 in obtaining his release. You may consider that also. And if you find that the defendants not only falsely, but that they also maliciously imprisoned the plaintiff, then you may allow the plaintiff, in addition to the compensatory damages such further sum by way of exemplary damages as you in your judgment may think just and proper in view of all the facts and circumstances."

We think that there are two serious objections to this charge, as given by the court to the jury. The first is that part of it which refers to what constitutes or may be allowed under the head of compensatory damages.

The court correctly stated that if the detention was unlawful, that if it was unreasonable, the defendants are liable and they were so, even though they might have acted in good faith, and that if the jury found that the detention was unlawful, they should allow the plaintiff below compensatory damages, but the court erred when the jury was instructed that they might consider as a part of such compensatory damages, reasonable attorney fees to the plaintiff for services of the attorney in prosecution.

In the recent case of *United Power Co.* v. *Matheny,* 81 Ohio St., 204, 210, which was a case brought by a passenger to recover damages for an unlawful and forcible ejectment from a street

car, and in which a very much similar charge was given, the court says:

"Again, the court proceed to correctly define the circumstances under which, if found by the jury, they might award to the plaintiff not only compensatory damages, but in addition thereto exemplary or punitive damages. The court even cautioned the jury that they should not award exemplary damages, unless they should find that the expulsion of the plaintiff from the car was done not only without justification, but in a malicious and insulting manner.' The court then proceeded to say, 'Otherwise, you should only allow such an amount as would fairly compensate him. * * * And as a matter of compensation you would have a right to allow him a reasonable amount for the services of his counsel in bringing and maintaining this action against the company.' In this last sentence, we think that the court fell into a serious error. * * *

"But, although we have made a somewhat extended search we are not aware of any well considered case in which it was held that, in the absence of statute or express agreement, attorney's fees might be included as part of the damages where compensatory damages only could be allowed. There are, however, numerous cases in which the contrary doctrine has been distinctly announced and applied. * * *

"The court below properly said to the jury that if they should find that the ejectment of plaintiff from the car was not justified, but was not done with malice or in an insulting manner, they could award compensatory damages only; but the court erred in instructing the jury, in that connection, that, in case they should so find, as a matter of compensation they might allow to the plaintiff a reasonable amount for services of his counsel."

While counsel fees in bringing the action in the court below might be a proper matter to consider in allowing damages, even though it is sometimes done under the theory of compensatory damages to the plaintiff who brings the action, it can only be considered and allowed in cases where the facts found by the jury are such as would justify them in allowing punitive or exemplary damages designated in the case at bar as "smart money."

The other matter in this charge which seems to us to be erroneous, is that in allowing compensatory damages the jury might consider that $25 which was paid to the counel in having the

proceedings of the justice of the peace set aside. Under the facts as developed in this case, we do not think that should have been submitted to the jury. The arrest in this case was lawful and the warrant issued was legal on its face. There was no false arrest, neither was there a false imprisonment after the proceedings were begun in the office of the justice of the peace.

In the case at bar, it is clear that under the testimony if the plaintiffs in error had taken the defendant in error directly to the justice of the peace and there filed an affidavit and a warrant was then issued, that the plaintiff below would have had no cause of action. There was no imprisonment, or at least no false imprisonment after the affidavit was filed and the warrant issued.

The justice of the peace had jurisdiction and did pass upon the affidavit; the mere fact that his judgment was erroneous would not make the plaintiffs liable. The testimony clearly shows that the justice of the peace gave the plaintiff below thirty days' time in which to pay the fine or give bond, and in the meantime let him go on his recognizance, and that the deputy sheriff hauled him back to the city. So we are at a loss to know upon what principle the defendants below could be held liable for attorney fees that were incurred in setting aside the judgment of the justice of the peace.

If these attorney fees had been incurred in an action brought to directly release the plaintiff below from imprisonment, that is from a false imprisonment, then it might have been proper; but in the case at bar there was no false imprisonment, actual or constructive, resulting from the action of the justice of the peace.

In an action for malicious prosecution, such attorney fees, under a proper charge of the court, could be considered by the jury in making up their award of damages, but we think that under the circumstances of this case, under a charge of false arrest and imprisonment, that such services of an attorney could not be considered as an element of damage.

The plaintiff in error complains further of this charge of the court wherein the jury is instructed that—

"Rutter, agent of the plaintiff, is justified for a length of time only reasonably required to take the detained person, that is the plaintiff, to the proper officer."

This is admitted to be correct as an abstract proposition of law, but is claimed to be misleading. But we think, considered with other matters in the charge, that it did not mislead the jury.

The court seems to have submitted this matter fully and clearly to the jury and that the defendants below would not be liable unless Rutter did detain the plaintiff for an unreasonable time and in an unlawful manner.

Judgment of the court below, for error in the rejection of of testimony offered by defendant below and erroneous and prejudicial statement of the law in his charge to the jury, will be reversed and the case remanded to that court for further proceedings.

POWER TO FIX RATES FOR WATER.

Circuit Court of Lorain County.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY v. CITY OF ELYRIA.

Decided, 1910.

Municipal Corporations—Special Contracts for Water at Special Rates—Necessity of Approval of Council—Sections 3958 and 3973.

The power to "assess and collect * * * water rent," as provided in Section 3958, General Code, is limited to power to fix rates to be assessed equally upon all water takers of a given class, and the board of trustees is without authority to bind a municipality for a period of years by special contracts with individual takers.

Error to common pleas court.

This is an action by which the city seeks to recover from the Lake Shore & Michigan Southern Railway Co. for water used by the railway company in its watering tanks and at the depot for flushing closets, etc.

A petition and answer were filed, and the case was submitted to the court upon an agreed statement of facts, in which it is agreed:

"That the plaintiff is a municipal corporation, and that the defendant is a railway corporation operating its railway through the city of Elyria, Ohio.

"That said city owns and operates a system of waterworks, which is under the charge and control of the board of public service, according to law.

"That on May 18, 1905, the board of public service of said city entered into the agreement, which is marked "Exhibit A" and attached to the defendant's answer herein."

This contract reads as follows:

"This agreement, made May 18, 1905, by and between the city of Elyria, by its board of public service, party of the first part, and the Lake Shore & Michigan Southern Railway Company, party of the second part, witnesseth:

"That first party does hereby agree to furnish to second party, at such points on first party's water pipe lines as second party may choose to take the same, such quantities of water as second party may need for its use in said city, all water furnished to be metered and to be furnished at the rate of six cents per thousand gallons, bills to be rendered monthly, second party being privileged to read or inspect meters jointly with first party.

"That the second party agrees to take said water to the amount of at least fifty million gallons per year, and to pay first party for the same on the rendition of monthly bills therefor at the rate of six cents per thousand gallons.

"That this agreement shall take effect January 1, 1905, and continue for the period of five years, but it is understood and agreed that if at any time the first party shall fail to furnish second party with a sufficient supply of water and of a quality satisfactory for its purposes, second party may terminate this contract.

"That said contract was signed by the members of the board of public service and was approved by the solicitor of said city and all the formalities required by law relating to contracts made with municipal corporations were complied with; but the said contract was not approved by the council of said city, nor authorized by said council.

"That in pursuance of said contract plaintiff began the furnishing of water and the defendant the using thereof under said contract, and that said defendant complied with the terms of said contract, and that the defendant paid and the city accepted pay for water furnished under said contract according to the terms of said contract until shortly prior to October 1, 1908, when the plaintiff notified the defendant that beginning

October 1, 1908, it would not furnish water to the defendant for the price named in said contract, but would charge defendant a higher rate for water thereafter furnished.

"That the plaintiff continued to furnish water and the defendant used the amount of water claimed in plaintiff's petition, but refused to pay therefor except at the price named in said contract, which defendant was willing to do, but which plaintiff refused to accept.

"It is further agreed that if the court shall find that said contract is not binding on the city, then the court shall render judgment against the defendant for the amount claimed in the petition, but if the court finds that said contract is binding upon the plaintiff, then the defendant shall pay for said amount of water consumed at the rate of six cents per one thousand gallons, and in the event the petition shall be dismissed at the costs of the plaintiff."

E. G., H. C. & T. C. Johnson, for plaintiff in error.

H. A. Pounds, City Solicitor, contra.

Mr. Pounds argued:

This is a contract with a municipal corporation, and the law with reference to the rights of the parties under those circumstances is well stated in *Schaaf* v. *Railway*, 65 Ohio St,. 219.

While there is implied municipal liability at common law, the statutes of this state provide the manner in which contracts, agreements, obligations and appropriations shall be made and entered into by municipalities, and they can not be entered into otherwise than as provided by statute.

There has been no implied municipal liability in matters *ex contractu* in this state since the passage of the act of April 8, 1876 (73 O. L., 125), part of which now forms Revised Statutes, 1693.

To state a good cause of action against a municipality in matters *ex contractu*, the petition must declare upon a contract, agreement, obligation, or appropriation made and entered into according to statute. A petition on an account merely, or *quantum meruit*, in such cases is not sufficient.

Persons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation or appropriation have been complied with.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

The sole question in this case is whether the board of public service of the city of Elyria had power to enter into a contract with the railroad company to supply it with water at a given rate for five years, the company agreeing to take and pay for not less than a stipulated quantity of water each year during the continuance of the contract.

Two sections of the statutes require consideration in connection with this question. Revised Statutes, 2425 (General Code, 3973) provides:

"Any city or village which has established or hereafter establishes water works, may enter into a contract with any contiguous city or village for the supply of the latter with water, upon such terms as shall be mutually agreed upon by the councils of the respective municipal corporations; and any city or village which has water works, is hereby authorized and empowered to dispose of any surplus water, for manufacturing or other purposes, by lease or otherwise, upon such terms as may be agreed upon by the board of trustees of the water works, or public works, and approved by the council of such city or village."

Manifestly the contract here involved, if it be considered as an agreement concerning the disposition of surplus water, can not be sustained, because it was not approved by the city council.

The other section is Revised Statutes, 2411 (General Code, 3958), which reads as follows:

"For the purpose of paying the expenses of conducting and managing the water works, * * * the trustees or board shall have the power to assess and collect from time to time a water rent of sufficient amount in such manner as they may deem most equitable upon all tenements and premises supplied with water."

The power here granted to "assess and collect from time to time a water rent," must be taken as meaning the power to fix general rates which shall be assessed equally upon all water takers of a given class, and we so hold. The board is not here authorized to tie its hands or that of the city for a period of years by special contracts entered into with individual takers. Such contracts are authorized under certain circumstances by

the other section referred to. Having legislated particularly upon the subject, the general power granted by the Legislature should not be amplified by judicial interpretation, "*expressio unius est exclusio alterius.*"

The judgment of the common pleas court being in accordance with the views here expressed, it is affirmed.

RUNNING AN AUTOMOBILE AT UNLAWFUL SPEED.

Circuit Court of Hamilton County.

A. B. FISHWICK v. THE STATE OF OHIO.*

Decided, August 1, 1911.

Sections 12603 and 12604, General Code, providing a penalty for operating automobiles at a speed of more than eight miles an hour within the built up portions of a municipality or fifteen miles an hour in other portions or twenty miles an hour outside of the municipality, are constitutional; and a fine imposed upon one who struck and injured a human being while operating an automobile at unlawful speed will be sustained.

[For a full statement of this case see opinion of the trial court, *State of Ohio* v. *Fishwick,* 7 O. L. R., 392.]

Thomas H. Darby, for plaintiff in error.

C. H. Urban and *W. C. Lambert,* contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

As the court is of the opinion that Sections 12603 and 12604, General Code, are constitutional it would seem that the judgment of the court below is correct.

The case we think is fully within the rule laid down in *Johnson* v. *State,* 66 O. S., 59.

Judgment affirmed.

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* Affirming *State of Ohio* v. *Fishwick,* 7 O. L. R., 392.

APPROPRIATION OF NAVIGABLE WATER FRONT RIGHTS BY A MUNICIPALITY.

Circuit Court of Cuyahoga County.

JOHN G. WHITE AND CHAS. N. WHITE v. CITY OF CLEVELAND, AND FIVE OTHER CASES.*

Decided, November 27, 1911.

Eminent Domain—Appropriation by Municipality of Lands on the Lake Shore for Park Purposes—Easement Only Acquired—Riparian Rights and the Right to Build Piers Included—Underlying Rights of Former Owners—Further Compensation May Be Demanded for the Imposing of Additional Burdens—Constitutionality of Act Providing for Conversion of Park to Railway Uses—Authority to Lease Piers and Appurtenances to Transportation Companies—But such Action May Be Enjoined if Attempted before Underlying Rights Are Acquired.

1. The city of Cleveland having, in 1872, appropriated for park purposes certain lands bordering on Lake Erie, thereby acquired an easement for park purposes in the shore and the riparian rights appurtenant thereto, which include the right to wharf out and make land to the limit of navigability, unless prevented by the state; having made land without interference by the state, the made land is affected by the same easement for park purposes with which the shore lands are affected, as are also any piers built out in front of the made land.
2. Under the amendment to the municipal code adopted in 1906 (98 O. L., 164), the city has the right to perfect its title in fee simple absolute to both the shore lands and the made lands and piers, by condemnation proceedings providing for the payment of compensation for the underlying right of property to those who were the owners of the lands at the time they were appropriated for park purposes in 1872, or their successors in interest.
3. Said act of 1906 authorizes the city to appropriate the said underlying right of property for park purposes, *plus* the right to sell, lease or exchange the lands to a railroad or railroads for depot purposes, if the same are suitable for the location of a railroad passenger station.

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* Affirming, with slight modification, *White* v. *Cleveland*, 12 N.P.(N. S.), —.

4. Said act of 1906, though it authorizes the completion of the title to the park property for the purpose of turning over part of it to the railroads for depot purposes, is constitutional, and it is no objection to the councilmanic proceedings authorizing the re-appropriation, that the councilmen had the latter purpose in mind when they voted to complete the title "for park purposes" only.
5. The act of 1910 (101 O. L., 236) is a valid enactment, and authorized the city to lease piers in front of said park for use for passenger or freight carriers, with buildings and appurtenances necessary to such use, and it is no objection to the councilmanic proceedings authorizing the completion of the title to said lands and piers under the act of 1906, that the councilmen had in mind to so lease said piers when they voted to complete the title "for park purposes" only.
6. A lease of said piers entered into between the city and navigation companies, pursuant to said act of 1910, before the city had completed its title thereto by appropriation of the underlying rights of property, pursuant to said act of 1906, will be enjoined at the suit of a tax-payer or one owning said underlying right of property.

White, Johnson & Cannon, C. A. Neff, Squire, Sanders & Dempsey and *Luther Day*, for plaintiffs.

N. D. Baker, Golder, Holding & Masten and *Frank E. Stevens*, contra.

WINCH, J.; MARVIN, J., and HENRY, J., concur.

Heard on appeal.

In these cases we are asked to enjoin the city of Cleveland from appropriating certain so-called reversionary interests in the lands of Lake View Park for the ostensible purpose of perfecting its title in fee simple to said lands for park uses, but really for the purpose, as it is claimed, of selling about thirty-five acres of said lands to the railroads for depot purposes, and from leasing a pier or dock in front of said park, near the extension of East Ninth street, to the navigation companies.

For these purposes, four suits were orginally brought in the court of common pleas, two by tax-payers, one addressed against the appropriation proceedings, and one against the lease of the pier, and two by owners of reversionary rights, one against the appropriation proceedings and one against the lease of the pier.

By separate appeals of various parties interested, these four common pleas cases have become six cases in this court.

The lands of Lake View Park, originally appropriated in 1872, lie on the side hill fronting Lake Erie, for a distance of over 2,000 feet, between Erie, now East Ninth street, on the east, and Seneca, now West Third street, on the west, and extending from Summit avenue on the top of the hill at the south, to the right-of-way of the Cleveland & Pittsburgh Railroad Company at the bottom of the hill on the north, an area of about nine acres, which, in these proceedings, have been called the uplands; next north of the Cleveland and Pittsburgh right-of-way is the right-of-way of the Lake Shore Railroad Company, at that time nearly at the waters edge, and by the same proceedings all the property *north* of the Lake Shore right-of-way was appropriated, it being then a narrow strip of land, but a few feet in width. In 1894 the city of Cleveland put in a row of sheet piling and bulk heads parallel to the shore in front of the park and over 1,000 feet out in the lake, and established a public dumping ground there, so that since said date the same has been filled in, and there are now about ninety-nine acres of made land in front of the upland.

In front of this made land, as an extension of East Ninth street, the city has built a pier 100 feet wide, extending out 713 feet to the harbor line established by the United States Government in 1898. Two hundred feet west of this pier is another pier of the same dimensions, whch is the pier the city has undertaken to lease to the navigation companies.

The claims of plaintiffs with reference to the rights and title of the city in the premises, as acquired by the appropriation proceedings of 1872, are as follows:

"The claim of plaintiffs in all four suits is that the appropriation proceedings of 1872, the city acquired only an easement for park purposes in Lake View Park, including the uplands; that by appropriating an easement for park purposes in the shore, it at the same time appropriated for park purposes the riparian rights which were appurtenant to the shore; that these riparian rights included the right to wharf out, to make land to the limit of navigability, unless prevented by the state; that the city appropriated this right for park purposes; and having made land by the exercise of this riparian right without interference by the state, the made land was affected by the same easement for park purposes with which the upland was affected; that the piers are but a portion of the made land. Having the right to

fill out the entire land to the harbor line, unless prevented by the state, the city had the right to fill out so much of it as it desired for this purpose, and its rights were neither lessened nor increased by the fact that it did not fill it out uniformly, but made part into piers and left part water."

For the reasons and upon the authorities cited by counsel for plaintiff in his brief, we conclude that the above recited claims are well founded.

As to the rights in the property which were not taken by the appropriation, and which in these cases are represented by the so-called reversioners, their claims are that "the word 'easement' presupposes an underlying right of property in somebody else than the owner of the easement. What is the nature of that property, whether it is to a reverter or a right to additional compensation in case of change of use, or only a right to prevent the change of use is immaterial."

The city, by procuring an amendment to the appropriation laws in 1906, recognized that as the law stood in 1872, it acquired only an easement for park purposes in the lands appropriated, and that if its title to the lands was to be enlarged, additional compensation would have to be made to the owner of the "underlying right of property."

The amendment referred to is found in 98 O. L., 164, and as the city is proposing to proceed under that act, to perfect in itself a title in fee simple, and its appropriation proceedings thereunder are the proceedings here sought to be enjoined, it is necessary to examine the purpose and effect of the said amendment.

The law, as amended, is now found in General Code, Sections 3679, 3680, 3681, 3690, 3691, 3692, 3699, 3700, 3701 and 3702.

Said act reads as follows:

"Section 1. That Sections 12, 13, 18 and 24 of an act passed October 22, 1902, entitled, 'An act to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of such power as is required by the Constitution of Ohio and to repeal all sections of the Revised Statutes inconsistent herewith,' be amended to read as follows:

"Sec. 12. Whenever it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent,

defining the purpose of the appropriation, and setting forth a pertinent description of the land, *and the estate or interest therein desired to be appropriated;* and for water works purposes the council may appropriate such property as it may determine to be necessary; and immediately upon the passage of such resolution, declaring such intent, for which but one reading shall be necessary, the mayor shall cause written notice thereof to be given to the owner, person in possession thereof, or having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent, and such notice shall be served by a person designated for that purpose, and return made in the manner provided by law for the service and return of summons in civil actions, and in case said owner, persons or their agents, can not be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the corporation, and council may thereupon pass an ordinance by the votes of two-thirds of all members elected thereto, directing said appropriation to proceed.

"Sec. 13. Upon the passage of the aforesaid ordinance, the solicitor shall make application to the court of common pleas or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the lands sought to be taken is located, which application shall describe as correctly as possible the land to be appropriated, *the interest or estate therein to be taken,* the object proposed, and the name of the owner of each lot or parcel thereof.

"Sec. 18. The court shall make such order as to payment, deposit or distribution of the amounts assessed as may seem proper, may require adverse claimants to all or any part of the money or property to interplead and fully determine their rights in the same proceeding and may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order giving possession; *and upon the payment or deposit, by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in said corporation, unless a lesser estate or interest is asked for in the application, in which case such lesser estate or interest as is so asked for shall be vested; and any municipal corporation shall have the power to again appropriate, in conformity with the provisions of this act, any real estate which it has previously, lawfully appropriated, in order to perfect, in it, a title in fee simple absolute to such previously appropriated real estate.*

"Sec. 24. No contract for the sale or lease of any real estate shall be made unless authorized by an ordinance, approved by the votes of two-thirds of all members elected to the council and

by the board or officer having supervision or management of such real estate, and when such contract is so authorized, it shall be made in writing by the board or officer having such supervision or management and only with the highest bidder, after advertisement once a week for five (5) consecutive weeks in a newspaper of general circulation within the corporation, provided that such board or officer may reject any or all bids and readvertise until all such real estate is sold or leased, as the case may be: *provided, that whenever any city owns real estate suitable for the location of a passenger railroad station, and council shall by ordinance declare that it is necessary that such land be devoted to such use, it shall be competent for such city to sell or lease or exchange such land to such railroad or railroads for such purpose in the following manner: An ordinance authorizing and directing the mayor of the city to deed or lease the land shall be passed; council shall fix in such ordinance by metes and bounds the amount of land to be sold, leased or exchanged, the quantity of interest sold, leased or exchanged, and the consideration to be paid or exchanged therefor by such railroad or railroads, and in such ordinance shall call thereon a special election, to be held upon a day fixed by said ordinance not less than thirty (30) days from the passage thereof, and a majority of all the votes cast on such proposition shall be necessary to its ratification, and when so ratified, said ordinance shall be effective, and the mayor shall proceed to execute a deed of conveyance or lease of said property as therein provided, and in holding such special election, the provisions of Section 2837, Revised Statutes, shall apply.*

"Section 2. That said original Sections 12, 13, 18 and 24 be and the same are hereby repealed."

The amendment consisted in inserting the words given in italics.

Manifestly the purpose and intent of this legislation was to change the law of the state, as theretofore announced by the courts, and to provide that instead of the municipality acquiring only an *easement* when it appropriates property for a particular purpose, it shall acquire *an absolute estate in fee simple, unless a lesser estate or interest is asked for in the application.*

That the Legislature has a right to change the law upon this subject, in so far as it applies to proceedings thereafter to be brought, there can be no doubt.

But, it is said, that the city of Cleveland, having once appropriated the lands in question for park purposes, has the full and

complete use and enjoyment of the same for said purposes and has no need to appropriate for the same purpose the underlying rights of plaintiff reversioners. (It should be remarked here that the proceedings sought to be enjoined are for the appropriation of the reversioners' rights, as stated in the resolution and application therefor, "for park purposes.")

This brings us to a consideration of the purpose and effect of that part of the last section of the act, now found as General Code, Sections 3700, 3701 and 3702.

The whole act must be construed together and so construing it, it is perfectly apparent that the Legislature intended that appropriation should be authorized for the purpose defined in the resolution and the object proposed in the application, *plus* the right to sell, lease or exchange the lands appropriated to a railroad or railroads, for depot purposes, if the same should be suitable for the location of a passenger railroad station.

This gives a specific or good reason or purpose for the pending appropriation, although it is not required by the statute to be stated in the resolution or application, for the power to sell, lease or exchange is found in the chapter of the municipal code referring to the sale or lease of property, while the provisions regarding appropriation proceedings are found in the preceding chapter, yet the municipality has a right under the act quoted, to appropriate for any of the purposes *expressed* in General Code, Section 3677, with the *implied* right of dominion over the property after its acquisition set forth in Sections 3700, 3701 and 3702.

In other words, the last three sections may be read into Section 3677. It was not placed there by the Legislature, because it applies not only to property appropriated, but to that acquired in other ways.

A study of the act of 1906 confirms the suggestion of counsel for plaintiff that its enactment was procured by the city of Cleveland for the very purpose of getting rid of the rights of reversioners in Lake View Park, or acquiring them, so that the city might dispose of part of said park to the railroads for depot purposes.

Was there anything unlawful in this legislation, prohibited by the Constitution?

As already stated, one purpose of the Legislature was to change the law with regard to the nature of the title vested in the city by appropriation and to make it a fee simple. So far as this affects property thereafter appropriated, it is a valid enactment.

Another purpose was to perfect or complete the title to land already held under appropriation; this was brought within the Constitution by providing compensation to the owners of the underlying rights.

Another purpose was to authorize cities owning the fee simple title to real estate suitable for the location of a depot to declare the necessity that such land be devoted *to such use,* and to sell, lease or exchange it *for such purpose.*

The use here stated is for a public purpose. Railroads and depot companies are authorized to appropriate lands for such purposes. The great efforts required and immense sums of money expended in providing suitable terminal and depot facilities in our large cities, testify to the public importance of such conveniences.

The record of these cases is full of a recognition of the public importance of a new depot in Cleveland by the city council and executive officials and civic organizations. General Manager Moon, of the Lake Shore Railroad, with the shrewd insight of a business man, spoke of "such a station as apparently the people want and the railroads think is quite beyond the railroad's necessities."

By reason of the large amount of land now needed for such purposes in large cities, and the convenience of having depots as near the center of the city as possible, it is manifest that sites for such depots can rarely be acquired without including therein public property, property of the city at an earlier date naturally devoted to some other public purpose, but, by reason of the city's and the railroads' growth, now peculiarly adapted to depot purposes.

It will be noticed that Section 3700 limits the use of the land sold to a public purpose; this is a *dedication* to that use; "the municipality may sell, lease or exchange such land to such railroad or railroads *for such purpose.*"

A long line of cases in Ohio recognize the right of the Legislature to authorize a change of use in land already appropriated

for a public purpose, and the exercise of such right can be delegated by the Legislature to a municipal or a private corporation. The only question raised in such cases has been as to the rights of the owners of "the underlying rights of property," where the title has not been held in fee. *Malone* v. *City of Toledo,* 28 O. S., 643; *Vought* v. *Railroad Co.,* 58 O. S., 123; *Newton* v. *Railroad Co.,* 115 Fed., 781.

We find no infirmity in the legislation of 1906, and have treated of the matter at length because of the reason assigned for the alleged infirmity in the councilmanic proceedings regarding the pending appropriation proceedings.

If there is no infirmity in the law, how can there be any in the councilmanic proceedings?

The law authorizes the completion of the title to the park property for the purpose of turning over part of it for depot purposes. What taint of fraud is there in the proceedings if the councilmen had all this in their minds when they voted for the resolution upon which the proceedings depend?

What are they trying to accomplish by indirection when they follow the express language of the statute?

We find no answers to these questions which require us to grant the prayer of the petitions, either of the tax-payer or of the reversioners for an injunction against said appropriation proceedings, so far as the depot use is contemplated.

Turning now to a consideration of the lease of the *pier* in question attempted to be made by the city to the navigation companies.

This lease was authorized by an ordinance passed in November, 1909.

May 10, 1910, the Legislature passed the following act (101 O. L., 236):

"Sec. 3699-1. All municipal corporations shall have power to construct, maintain, use and lease, or grant the right to construct, maintain and use, any pier, dock, wharf or landing for use by passenger or freight carriers, with buildings and appurtenances necessary to such use, on any land belonging to the corporation, and on and over any made or submerged land, whose title is in the corporation or the state of Ohio, in front of land belonging to the corporation. All municipal corporations shall also have power to construct, maintain, use and lease, or grant the right

to construct, maintain and use, on and over any land belonging to the corporation and such made or submerged land, any steam, electric or street railroad tracks and appurtenances, necessary for the use of any pier, dock, wharf or landing as aforesaid. Such lease or grant may be made by the passage of an ordinance fixing its terms and conditions and by the acceptance thereof by the lessee or grantee. Land belonging to the corporation shall be construed to include also any land heretofore or hereafter appropriated or held by the corporation for streets, parks or other public purposes; but this section shall not be construed to authorize the taking of reversionary or other property rights without such compensation and proceedings as are authorized by law."

May 31, 1910, another ordinance was passed confirming the original lease. It is claimed that the legislative act quoted authorized and made good the lease in question, for its terms are within the wording of said act.

The same line of reasoning as that which led to a conclusion that the city may be authorized to perfect its title to the park property so as to enable it to sell part thereof for depot purpose, leads to the conclusion that the act of May, 1910, is a valid enactment.

This act, by its sectional numbering, is inserted between the old and new part of the last section of the act of 1906. We treat it therefore as if it were a part of said act.

Had it been enacted in 1906, as part of said law, the only additional question to be determined would be: Is the use of the city's property for piers, docks, wharfs or landing places for passenger and freight carriers a public use of said property?

It is conceded that if exercised by the people for the benefit of all the people, it would be a public use. Indeed, if only pleasure crafts were permitted to land, it might be termed a park use.

Is it lawful, however, for the city to lease or grant to the navigation companies the right to construct, maintain and use the pier with buildings and appurtenances necessary to its use as a landing place for the passenger and freight carriers of the defendant companies only?

One objection to it raised by counsel is that the navigation companies have no power of eminent domain. A very slight in-

quiry into the nature of the business carried on by the navigation companies removes this objection.

Like the railroads, the navigation companies serve the public, the one on the land and the other on the water. Their business in other respects is identical.

For use and convenience of the public they require a wharf and proper buildings as much as the railroads require a depot; nay more, they can not deliver passengers at all without a fixed landing place, while a railroad train can stop at any place where the track runs, whether there is a depot there or not. There is more than a public *interest* in the steamboat's landing place; there is a public *use* of it.

It would seem, therefore, that there is no good reason why navigation companies should not be *directly* granted the right of eminent domain, to the end that they may better serve the public by providing proper and convenient landing-places. Landing-places proper and convenient for the *people,* as Mr. Moon said of the depot.

The Legislature appears to have authorized that such landing-places be first located and acquired by the city, and then leased or granted to navigation companies. If we are right in our conclusion that a public use is thus subserved, there can be no invalidity in the law because the city is given this oversight over the choice of location for such landing-places. There appears to be a good reason for the exercise by the Legislature of its discretion in thus *indirectly* granting to navigation companies what it has a right to, but has neglected, to grant them directly.

Such being the case, as was said of the depot proposition, there was no fraud or indirection in the passage of the ordinance to appropriate the reversioners' rights for park purposes, growing out of the intention in the minds of the councilmen to lease the pier to the navigation companies.

Having examined all objections to the appropriation proceeding, for the reasons stated, the petitions praying that they be enjoined are dismissed.

It does not follow, however, that the lease already entered into is valid. The act of May 10, 1910, itself says: "this section shall not be construed to authorize the taking of reversionary or

other property rights without such compensation and proceedings as are authorized by law."

We interpret this as meaning that the lease can not be entered into *until* the reversionary interests have been condemned.

Without reciting the terms of the lease, it is sufficient to say that it grants to the navigation companies the full and exclusive use of the pier, with the right to construct thereon a passenger station, ticket office, and freight warehouses. The lease is for a term of forty years, revocable, it is true, on terms, and grants and provides certain railroad switch rights over the made land which, with the pier, we have found belong to the city only in easement, the underlying right belonging to the reversioners. This is placing an increased burden upon the property rights of the reversioners. It can not be placed there, under the Constitution, until they are first compensated in money therefor.

The prayer of the petition of the reversioners against the lease is granted.

So in the tax-payer's suit, seeking an injunction against the lease. The city not owning the premises in fee can not lease or grant the entire estate therein to another, which it is seeking to do. To sustain the attempt to do so would not only involve the city in needless complications, but probably result in pecuniary loss to the city. Nobody would give the full value for such a title. To permit this lease to stand would be to permit an abuse of corporate powers.

For this reason the defendants are enjoined from carrying out the terms of the lease in question.

After the city has acquired the underlying rights, this judgment will not interfere with any valid lease thereafter entered into.

Judgment in the several cases will be entered as indicated.

AS TO FEES FOR SERVICE ON THE BOARD OF EQUALIZATION.

Circuit Court of Sandusky County.

THE STATE OF OHIO, EX REL E. C. SAYLES, PROSECUTING ATTORNEY, v. E. H. GANZ.*

Decided, October 9, 1909.

Office and Officer—Compensation of County Commissioners—Not Entitled to Additional Fees for Services as Members of the Board of Equalization—Sections 897, 2813 and 2813*a*, *Revised Statutes.*

County commissioners are not entitled to additional compensation for services as members of the board of equalization.

PARKER, J.; WILDMAN, J., and KINKADE, J., concur.

This suit was brought in the court of common pleas on relation of the prosecuting attorney to recover from the defendant, Ganz, monies which it is averred he drew while commissioner of the county as compensation for his services upon the board of equalization; whether upon the annual county board or the decennial county board is not stated. It is said that these monies, amounting in all to $402, were drawn between the 24th day of March, 1904, and the 10th day of November, 1906. What time the services were performed, on account of which these monies were drawn, is not stated in the petition. Between the 24th day of March, 1904, and the 10th day of November, 1906, some change was made in the law with respect to this matter. The view we take of the whole matter, however, renders that unimportant.

The statute in force between both these dates named in the petition (Section 2804 of the Revised Statutes), and for several years before, provided for an annual county board of equalization of real and personal property, monies and credits in each county, to be composed of the county commissioners and the county auditor. Section 2813 of the Revised Statutes provided for a decennial board of equalization to be composed of the county commissioners, the auditor and the surveyor. Section 2813*a* of the Revised Statutes provided—and these sections still stand as I am stating them—

* Affirmed without opinion, *Ganz* v. *State, ex rel*, 83 Ohio State, 468.

"Each member of the decennial county board, including the county auditor and the county surveyor, and each member of the annual county board of equalization shall be entitled to receive for each day necessarily employed in the performance of his duties, including his duties as a member of the board of revision, the sum of three dollars."

From April 24th, 1893, until April 23d, 1904, Section 897 of the Revised Statutes provided for the salaries for county commissioners, though I think there were some exceptions in some counties covered by special acts. At all events, the law provided for the salaries of the county commissioners in Erie county; and before the amendment of this section on the 23d of April, 1904, and the passage of Section 2 of the amendatory act of that date, the law providing for these salaries contains this provision:

"Each county commissioner shall devote his entire time to the duties of his office, and shall receive nothing in addition to the salary so provided, either directly or indirectly, by way of mileage, per diem, expenses paid out or otherwise, except when necessary to go out of their respective counties on official business, each commissioner may in addition to such salary receive his actual traveling expenses, and no more." And it provides how this shall be itemized and allowed.

Now while the law was in that form, a case was presented to us in Erie county, case against Commissioner Halliday. The court of common pleas had held that he was not entitled to extra compensation as a member of the board of equalization. We affirmed that decision, and the decision of this court was affirmed by the Supreme Court, and will be found under the title of *Halliday* v. *State of Ohio*, 70 Ohio St., 460. So that if any part of the services performed by Commissioner Ganz were performed before the amendatory act of April 23d, 1904, that question would be clearly determined by this decision by the Supreme Court to the effect that commissioners were not entitled to such compensation.

The question remains as to how a member would stand as to services performed after the amendment of April 23d, 1904. It will be observed that this act of April 23d, 1893, does not attempt to, nor does it purport to repeal any other law excepting Section 897 which it amended; so that we held and the Supreme Court held that, without any attempt to repeal Sections 2813

and 2813*a*, the provisions of these last mentioned sections as to the compensation of county commissioners were superceded by the provision of Section 897, R. S., above quoted, and that they were not entitled to the compensation. Now comes the amendatory act of April 23d, 1904, providing for salaries to the county commissioners varying somewhat from the provisions of the former statute upon that subject, and adding another section, which is put in the revision of 1908 of Bates Annotated Statutes as Section 897-2:

"The compensation provided in the preceding section shall be in full payment of all services rendered as such commissioner. But such total compensation shall not exceed the sum of $3,500 per annum."

And by Section 3 of that act (which is not carried into the revision) it is provided that:

"And all other acts or sections of the Revised Statutes, so far as they may be inconsistent with the provisions of this act, be and the same are hereby repealed."

Now can it be that the attempt to repeal all inconsistent acts, and the adding of the provision that the payment of the salary shall be in full payment of all services rendered *as such commissioners* would have the effect of giving the commissioners the benefit of the provision as to fees in Section 2813*a*, which it had been held by the Supreme Court they were not entitled to before the passage of the act of April 23d, 1904? We do not see how such a contention can be sustained. Of course, the question has not been presented to us in that form, because counsel do not seem to have been advised of our holding in Erie county, and of the affirmation thereof by the Supreme Court; but it comes to that, and that is the way it is presented, in view of that holding; and we think it is entirely clear that there is nothing in this amendatory act of 1904 that could give to the commissioners fees as members of the board of equalization which they were not theretofore entitled to receive.

The common pleas court sustained a demurrer to this petition. We hold that was error, and we hold that the demurrer should be overruled; and therefore the decision will be reversed and the case remanded, with an order that the demurrer shall be overruled.

INJURY TO PASSENGER STEPPING FROM CAR INTO HOLE IN THE STREET.

Circuit Court of Hamilton County.

JOSEPHINE HEILS v. THE CINCINNATI TRACTION COMPANY.

Decided, November 25, 1911.

Parties—Joinder of, in Action for Negligence—Torts which are Concurrent and Related but are not Joint.

A traction company and a municipality are improperly joined as parties defendant, where the action is for injuries to the plaintiff sustained in stepping from a car into a hole in the street.

The plaintiff sued for $10,000 damages on account of injuries received in alighting from a car on Spring Grove avenue. Plaintiff stepped into a hole twelve inches deep in the street, and was thrown violently to the ground. She charged negligence against the traction company in stopping the car directly over the hole, and against the city in failing to keep the street in repair and also in failing to have lighted a street lamp at that point, which if lighted would have disclosed the hole to plaintiff before she stepped from the car into it.

H. A. Reeve, for plaintiff in error.
Geo. H. Warrington, contra.

SMITH, P. J.; SWING, J., AND JONES, J., concur.

We think the demurrer of the Cincinnati Traction Company filed to the petition of plaintiff in error was properly sustained by the trial court.

While perhaps under the allegations of the petition the acts of negligence complained of against the traction company and the city of Cincinnati are such as constitute concurrent and related torts, yet the same are not joint, being independent in character, and therefore the defendants are not in law joint tort feasors. *Morris* v. *Woodburn,* 57 O. S., 330; *Village of Mineral City* v. *Gilbow et al,* 81 O. S., 263.

The action of the court upon the demurrer is correct and the judgment is affirmed.

CONSERVATION OF SURPLUS LIFE INSURANCE FUND.

Circuit Court of Cuyahoga County.

JAMES G. BELL v. THE UNION CENTRAL LIFE INSURANCE COMPANY.

Decided, November 20, 1911.

Life Insurance—Right of Participating Policy Holders to Maintain Action to Conserve Surplus Fund—Previous Action in Quo Warranto Testing Right to Declare a Dividend out of Surplus Fund not a Defense—Sections 12325 and 12327.

1. Participating policy holders in a life insurance company may maintain an action in equity to conserve for their benefit a surplus fund accumulated under the by-laws of the company for their benefit from earnings of participating policies.
2. It is no defense to an action brought for such purpose by and on behalf of all of said participating shareholders that the Supreme Court in an action in *quo warranto*, brought by the attorney-general against the corporation for the purpose of testing the right of the company to declare a dividend to its stockholders out of said surplus fund, has refused the relief prayed for, the participating policy holders not being parties to said action.

A. H. Martin, William Howell and *W. K. Stanley,* for plaintiff in error.

Jas. R. Garfield, Maxwell & Ramsey and *George A. Welch,* contra.

WINCH, J.; MARVIN, J., AND HENRY, J., concur.

Error to the Court of Common Pleas.

Plaintiff filed his petition in behalf of himself and all the policy-holders of the defendant company, similarly situated with himself, setting up the fact that he became a participating policy-holder in the company on March 15, 1904, and as such, entitled under his policy and the by-laws of the company to the benefits of a surplus fund accumulated by it which, on December 31, 1907, amounted to $2,422,184.25.

Up to that date the company had a capital stock of $100,000 on which the stockholders were entitled to a semi-annual divi-

dend of five per cent., and additional dividends from profits derived from non-participating policies.

The by-laws provide that from the residue of the profits arising from the mutual business, after paying necessary expenses and approved claims, setting aside a 4 per cent. reserve, establishing a surplus fund and paying said dividends to stockholders, the board shall annually declare a dividend to the mutual policy-holders according to the kind and class of each policy *or* place to the credit of the policy its equitable proportion of the undivided surplus which shall be payable according to the terms and conditions of the policy.

He alleges that up to the first day of January, 1908, the company made no separation of its receipts and expenditures, profits and losses, as they pertained to participating and to non-participating policies.

He alleges that the entire surplus fund on said date had accumulated from the profits derived from participating policies, and that by reason of the manner in which said fund had been kept and dealt with by it during the company's entire existence, the company had estopped itself from claiming, as against the participating policy-holders, that any portion of said fund had been derived from profits on non-participating policies.

He alleges that on said 31st day of December, 1907, the company undertook to apportion said surplus fund into two funds, such that the amount credited to one fund should represent the surplus arising from its participating policies, and that the amount credited to the other fund should represent the surplus arising from the non-participating policies, and without any basis therefor or right so to do, on said last named date placed $779,788 of said surplus fund into a separate fund, claiming the right to use and treat said fund as a fund derived from non-participating policies, to be used for the sole benefit and advantage of its stockholders.

He sets up that out of *this* fund the company, on June 16, 1908, declared a stock dividend to its stockholders of $400,000, upon which it proposes to pay to them a semiannual dividend of 5%, making an annual charge against the company therefor of $40,000.

The petition is voluminous and contains many other allegations tending to show the unlawfulness of the transactions mentioned, the interest therein of the participating policy-holders, the prejudice to their rights arising therefrom, the impossibility of estimating the money damages to each of said policy-holders, and ends with the following prayer:

"Wherefore, plaintiff prays that pending this action said company be enjoined from appropriating any part of said surplus fund to a stock dividend, and from delivering said stock certificates for said proposed dividend from said surplus fund; and from paying any dividends to stockholders other than said 5% semi-annual dividend on $100,000; and that on final hearing said injunction may be made perpetual. And plaintiff prays that said defendant may be required to account fully for said surplus fund, and that the amount and condition of said fund may be fixed and determined by the court; that the court find and determine and decree said surplus fund to be a trust fund for the sole use and benefit of participating policy-holders who became such prior to December 31st, 1907, and that the court make such order and direction to said company with respect to the keeping and maintenance of said fund, and its future accumulation, and share of profits of said business, and as to its distribution and apportionment among said participating policy-holders as shall be found to be just and equitable, and as will secure the full and complete enjoyment and distribution of the same by said participating policy-holders during the lives of their respective policies, and of all future accumulations thereon as well. And plaintiff prays for all such other and further relief in the premises, as shall be found to be just and equitable."

To this petition an answer was filed, setting up several defenses. The third defense, as a bar to the present proceedings, sets up the proceedings in the quo warranto case brought by the Attorney-General of the state in the Supreme Court against the company, to test its right to apportion said surplus fund and declare said stock dividend of $400,000, and the judgment of said court in favor of the company, found in 84 O. S., 459.

To this third defense of the answer, a demurrer was interposed and overruled, whereupon the petition was dismissed and judgment rendered for the defendant. The case is here on error, and we are asked to review the sufficiency of the petition as well as the sufficiency of said third defense.

We deem the petition sufficient to authorize an accounting, and part, at least, of the relief prayed for. Were the plaintiff and his class stockholders in the company, objecting to the division of funds accumulated for their benefit, and diverted to the benefit of other stockholders, nobody would question their right, after refusal of the company, itself, to remedy the matter, to invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation. The rule must be the same here.

The participating policy-holders, under the by-laws and their policies, have a very decided interest in keeping the surplus fund intact. This right may rest in contract, but is unenforceable by each policy-holder by an action for damages. The benefits to each policy-holder are contingent upon many circumstances, which may increase or diminish said fund before actual division of it by payment of aliquot shares thereof to beneficiaries of said policy-holders. Hence, there is no way of estimating the damages to them. However, they should not be left remediless, and equity, considering the mutuality of the relations of the policy-holders to the company and the company to them, assimilates such relations to that of stockholders in a corporation to the corporate entity.

As stockholders in a corporation can not sue for dividends until the directors have declared them, but can bring an action against the company, upon its refusal to act, requiring it to conserve the corporate assets, so here the policy-holders can not sue for dividends from the surplus until the directors have declared them, but should be entitled to require the company to protect said surplus and administer it for their benefit.

As to the third defense in the answer: The third paragraph of the journal entry of the Supreme Court reads as follows:

"That, as found by the circuit court, the defendant in error made no separation of its receipts and expenditures, profits and losses, as they pertained to participating and to non-participating policies, from the time it began the life insurance business up to the first day of January, 1908, and that, in such conduct of its business, it accumulated a surplus, which, on December 31, 1907, amounted to $2,422,184.25, of which a sum largely in excess

of $400,000 was derived from non-participating policies; and that the surplus derived from the non-participating policies of the defendant for the years 1908 and 1909 was in excess of $400,000."

The finding that the surplus derived from the non-participating policies of the defendant for the years 1908 and 1909 was in excess of $400,000, is not to be overlooked. It was December 31, 1907, that the company readjusted its books, and started to keep separately the profits from participating and non-participating policies.

The plaintiff here makes no objection to the company's separating said profits, *from that time forward,* and if the stock dividend is to be paid out of profits thereafter arising from non-participating policies, he will make no complaint, but he *does* object to taking out of the surplus fund heretofore accumulated, the sum of $779,788 and appropriating it to the benefit of the stockholders.

It was a matter of indifference to the state when this sum of $400,000 was accumulated; all it was interested in was whether the company had a right to declare the dividend and issue the additional stock. It would seem as if it purposely left to interested parties to determine from which fund the $400,000 was taken.

This brings us to the question of the effect to be given to an adjudication in quo warranto, a proceeding between the state and the corporation. Does it necessarily and always determine the rights of individuals, creditors for instance, as between them and the corporation? Such is claimed to be its effect by counsel for the company, and so the court below found.

In this, we think, it was in error. Some of the decisions in this state, throwing light on this question, are as follows:

In the case of *State, ex rel,* v. *Cincinnati Gas Light & Coke Co.,* 18 O. S., 262, it was held that a judgment in favor of the defendant in the district court of Hamilton county, upon an information in the nature of a quo warranto, filed by the prosecuting attorney of that county, upon an individual relation, is not a bar to a subsequent information of a similar character, filed by the attorney-general.

Also, that the state, in a quo warranto case, would not be bound by an injunction issued against the corporation by the circuit court of the United States in a case brought by an individual against the corporation, to which case the state was not a party.

In the case of *Rawland* v. *Meader Furniture Co.*, 38 O. S., 269, it was held:

"Where a corporation *de facto,* in a proceeding in quo warranto, has been ousted from the franchise of being a corporation, such ouster is no defense to a suit by a creditor against stockholders, to enforce payment of their stock subscriptions."

In the case of *Society Perun* v. *Cleveland,* 43 O. S., 481, it was held that rights acquired or liabilities incurred by a *de facto* corporation and by parties dealing with it in good faith, will not be divested or defeated by a subsequent judgment in *quo warranto* proceedings.

In *State ex rel* v. *Railroad Company,* 50 O. S., 239, the court *refused* to determine the private rights of the relator as against the corporation with regard to the use of certain lands, said use not being a usurpation of the property rights of the state.

But it is said that the rule to be deduced from these cases has been changed or modified, or explained by subsequent legislation, and our attention is called to that part of General Code, Section 12327, which reads as follows:

"The orders of the court in which *such* quo warranto proceedings are instituted, or of the court to which they are remanded, shall be binding upon the trustee or trustees, stockholders, creditors and other persons interested in such corporation, unless reversed by appropriate proceedings therefor."

This is taken from an amendment to Sections 6781 and 6782 of the Revised Statutes, found in 100 O. L., 102, the title of the act being: "To amend Sections 6781 and 6782 of the Revised Statutes of Ohio, relative to the authority of courts over trustees of defunct corporations."

This title correctly describes the original sections and the recent law, including what is now found in General Code 12327, has reference to orders made in the dissolution of corporations. "Such quo warranto proceedings" refers to quo warranto pro-

ceedings wherein the court renders a judgment dissolving the corporation and appoints trustees "for the benefit of the creditors and stockholders thereof" to wind it up.

Very properly *such* proceedings should bind the creditors; they are represented in the proceedings by the trustees appointed to represent them.

We do not think this statute applies to the case at bar, nor do we think the creditors of the defendant corporation were, as a class, or otherwise, represented in the quo warranto proceedings set up in the third defense of the answer, nor that their rights were in any manner adjudicated or affected by the judgment therein rendered.

For error in overruling the demurrer to the third defense and in not sustaining it, and for error in dismissing the petition, the judgment is reversed and the cause remanded, with instructions to sustain the demurrer to said third defense, and for further proceedings according to law.

CONSTRUCTION OF BEQUEST TO A WIDOW.

Circuit Court of Hamilton County.

GEORGE CLIFFORD, EXECUTOR, v. MARY FOSTER ET AL.

Decided, December 9, 1911.

Wills—Rules for Construction of—Meaning of the Word "Secured" When Used with Reference to the Rights Vesting in a Widow by Law—Evidence as to Extrinsic Facts—Section 8573 et seq.

An aged and childless man, possessed of personal and real property in Ohio and real property in Kentucky, all acquired by purchase, left surviving his widow, with whom he had lived for thirty-three years, and one brother. His will bequeathed to his widow all of his estate, real, personal and mixed, "which is secured to her as my widow by the laws of distribution of the state of Ohio, in cases where wives survive husbands who die intestate"; and to his brother he bequeathed absolutely all the rest and remainder of his estate.

Held: That all the personalty of the testator and all of his real estate situated in Ohio goes to his widow, and all the realty belonging to his estate and lying outside of Ohio goes to his brother.

Kramer & Bettman and *H. A. Bayless,* for plaintiff in error.
Oliver B. Jones and *Morse, Tuttle & Harper,* contra.

SMITH, J.; SWING, J., concurs; JONES, J., dissents.

In the above case this court is called upon to construe the following will:

"In the name of the Father of All, Amen. I, Thomas Foster of Cincinnati, Ohio, being of sound mind and memory, and well knowing the uncertainity of all life, do make, publish and declare the following for, and to be, my last will and testament, hereby revoking and cancelling all former wills by me made.

"1. I desire and direct that all my just debts be first paid out of my estate.

"2. I give and bequeath to my beloved wife, Mary Foster, all that part and interest in my estate, real, personal and mixed, which is secured to her, as my widow by the laws of distribution of the State of Ohio, in the cases where wives survive husbands who died intestate.

"3. I give, devise and bequeath absolutely all the remainder of my property, real, personal and mixed after the dispositions in items one and two herein have been made, and wherever the same may be situated, to my dear brother, James E. Foster, now of Chicago, Illinois.

"4. I hereby nominate and appoint my said brother, James E. Foster and George Clifford, of Cincinnati, Ohio to be the executors of this will, and my faith in each justifies me to request herein, as I do, that they be not required to give bond.

"In testimony whereof, I have hereunto set my hand and seal, this first day of March, 1906.

"(Signed) THOMAS FOSTER [seal.]

"Signed, sealed, witnessed and declared, this first day of March, 1906, by the said testator, Thomas Foster, in our presence as his last will and testament, and signed by us as witnesses at his request, in his presence and in the presence of each other.

"(Signed) M. W. CONWAY,
"JOSEPH CLIFFORD,
"EDWIN KELLY."

In the case of *Townsend* v. *Townsend,* 25 O. S., 477, the rule of construction of wills is as follows:

"1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.

"2. Such intention must be ascertained from the words contained in the will.

"3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear from the context that they were used by the testator in some secondary sense.

"4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it.

"5. If a dispute arises as to the identity of any person or thing named in the will, extrinsic facts may be resorted to, in so far as they can be made ancillary to the right interpretation of the testator's words, but for no other purpose."

The evidence discloses that the testator, Thomas Foster, a resident of Cincinnati, Ohio, died in December, 1908, leaving as his widow, Mary C. Foster, to whom he had been married 33 years at the time of his death; he was 83 years old; he left no children. An older brother, James Foster, survived him.

The property owned by the testator consisted of personal and real property, the latter being in Hamilton county, Ohio, and Campbell county, Kentucky; he had acquired all of this by purchase, no property that he left being ancestral.

With this evidence before us, under the rule above cited, we we do not find any ambiguity in the will of the testator. It is apparent that he gave to his wife all of his personal property and real estate that would go to her by the statutes of Ohio had he died without making a will and she survived him, and this is to be governed by the laws of distribution contained in Sections 8573, 8574, 8578, 8592, and 8606 of the General Code of this state.

He, therefore, devised to his widow all of his personal property and all of his real estate within the state of Ohio; and to his brother all of his real estate lying outside of this state.

Some argument has been made upon the use of the words "secured to her" by the testator, but it is evident that in the use of these words, he meant what she would "obtain" or "have" as his widow.

We do not think the evidence of the attorney who drew the will, as to the declarations of intention of the testator, is competent.

Judgment affirmed.

JONES, J. (dissenting).

The question in this case is: What portion of the estate of testator goes, under his will, to the widow?

It is conceded that James E. Foster, under the third item of the will, is made residuary legatee and takes the remainder of the estate after the widow's bequest is taken out.

Item two gives to the "wife Mary Foster all that part and interest in my estate, real, personal and mixed which is secured to her, as my widow by the laws of distribution of estates, of the state of Ohio, in the cases where wives survive husbands who die intestate."

I fail to see any ambiguity in this provision. No extrinsic evidence is necessary to explain it and it was error to have admitted such evidence in the lower court.

The widow takes what "is secured" to her by the laws of Ohio "as widow." Not "will be secured to her" but "is secured to her," meaning, of course, at the time the will was made.

Now, what portion of a man's estate is secured to his wife during his lifetime? The word "secure" as used here means "make safe," "make fast."

Nothing is secure to a wife, *i. e.*, "safe" to her or "made fast," except her dower interest in real estate and distributive portion of personal property. As to the balance of the consort's estate, even where there are no children, she is only the prospective heir at law. The remaining two-thirds of the estate is not secured to her in any way. Her coming into possession of it at his death is dependent upon the existence or non-existence of a will. If there are no children and he dies intestate she gets this two-thirds of the property, not by virtue of her being the widow, but as heir so designated by statute.

This portion of the estate is no more secured to her during coverture than a child's prospective share in his or her parent's estate is secured to such child.

The widow, therefore, takes under this will, in my opinion, an allowance for support for one year, free occupancy of the mansion house one year, one-half of the first four hundred dollars of the personal property and one-third of the remainder, one-third of the real estate for life and any other interests, if

any, in decedent's estate which were secured to her on the date of the execution of the will by the laws of Ohio.

Assuming that the will is ambiguous and that it is proper to resort to the evidence as contained in the bill of exceptions herein to explain its provisions, it seems to my mind that the above construction becomes the more manifest as the true intention of the testator.

It appears that testator was over eighty years of age and childless; that the wife was also far advanced in years; that the estate consisted of real and personal property valued at one hundred and sixty-five thousand dollars. There is real estate in Kentucky worth twenty thousand dollars and the balance of the property is in Ohio.

According to the construction contended for by counsel for the widow and adopted by the majority opinion of the court, the widow takes all the property in Ohio and the residuary legatee takes the Kentucky real estate.

To me, it is inconceivable that an attempt to express such an intention by the language employed in this will would be made by a man who possessed the business ability to accumulate this fortune, when such desire could have been expressed so briefly and clearly that a child could understand.

There is one more consideration leading me to the conclusion here recorded that I will briefly refer to.

Testator says that his wife is to have the portion "that is secured to her" by the laws of Ohio in "cases where wives survive husbands who die intestate."

There are several different statutes or sections making provision for widows and the widow's portion differs with differing facts and circumstances. It is dependent in amount upon whether the real estate is ancestral or non-ancestral and upon the decedent leaving children surviving. The construction which my associates favor can not be given without adding at the end of the second clause of the will the words "and childless" or words of the same import.

It is necessary to add to or supply nothing in this will. A portion of a man's estate *"is secured"* to his wife and can not be affected by the manner in which the property was acquired,

or by his leaving or not leaving issue, or in any other way except by her own act.

It was this portion that was given to the wife in this case.

MUNICIPAL LIABILITY FOR DEFECTIVE SEWERS.

Circuit Court of Cuyahoga County.

VILLAGE OF LAKEWOOD v. CATHERINE P. SWIFT.

Decided, December 27, 1910.

Municipal Corporations—Liability for Damages Resulting from a Defective Sewer—Municipality Not Saved by Fact that the Sewer was Constructed from a Fund Raised by General Taxation—Competent Evidence as to Obstruction of Main Outlet—Proper Use of the Words "Unprecedented Rainfall" in Charge to Jury.

1. Where the flooding of a cellar is due to the backing up of sewage in a private drain connected with a defective public sewer, the municipality is not relieved from liability for resulting damage by the fact that the said main sewer was built by the corporation with funds derived from taxation, and not by assessment upon the property benefited.
2. In an action for damages from the flooding of a sanitary sewer, evidence that property drained by a storm sewer emptying into the same manhole as the sanitary sewer, and also that other property having drains leading into the sanitary sewer were flooded at the same time, is competent as tending to show an obstruction in the main sanitary sewer below the manhole; but evidence of obstructions in the sewer above the property in question, and of sediment in the main sanitary sewer more than nine months after the flooding complained of, is incompetent.
3. In fixing the measure of municipal liability for the overflowing of sewers to the damage of the property drained, the use of the word "unprecedented," as applied to the rainfall which overtaxed the sewers, would be misleading if unexplained or qualified; but considering the locality under consideration the use of the words is not prejudicial in the instruction, "if the sewer * * * was not of sufficient capacity to take care of the ordinary flow of water and sewage, including that brought in by the new streets, and the backing up was caused by an unprecedented rainfall, something which could not have been reasonably anticipated, considering rainfalls in this latitude and vicinity," then liability results.

E. G. Guthery, City Solicitor, for plaintiff in error.
Patterson & Nieding, contra.

MARVIN, J.; HENRY, J., and WINCH, J., concur.

Error to Common Pleas Court.

Defendant is a property owner in the village of Lakewood and brought suit against the village, claiming damages by reason of the flooding of her cellar resulting from the backing up of water in a sewer drain leading from her cellar to a main sewer of the village on Detroit street. She recovered a judgment, and by proper proceedings the case is here for review.

Numerous claims of error are made, one of which is that the verdict should have been directed for the village for the reason that it is shown that the Detroit street sewer, the main sewer into which the drain sewer of the plaintiff below emptied, was constructed at the expense of the village, the money for the purpose being raised by general taxation and not by assessment upon property benefited; the claim being that the sewer being so constructed, the plaintiff whose sewer emptied into this main sewer, by permission of the village, could recover nothing, however defective the main sewer might have been. Authorities on this proposition are cited, notably the case of *Dermont* v. *Detroit,* 4 Mich., 435. This case seems to sustain the contention of the village, but the decided weight of authority is the other way, so far as we are able to find. A large number of cases are cited and commented upon in the brief furnished by counsel for the defendant in error. In *Hart* v. *Neillsville,* 125 Wis., 546, it is held by the Supreme Court of Wisconsin, at page 702, that where as a matter of right a private drain is connected with the main sewer through an opening left therefor, and damage results to the property from which the private drain leads, does not relieve the municipality from liability in case there is a flooding of the property of the person constructing the private sewer.

In the case of *Daggett* v. *Cohoes,* 54 Hun., 639, it is said:

"The fact that plaintiff had voluntarily connected her premises with the public sewer of defendant is no bar to her recovery for injuries caused by its negligence in permitting it to be out of repair."

To the same effect is *Bolton* v. *New Rochelle,* 84 Hun., 281.

See also the case of *Murphy* v. *Indianapolis,* 158 Ind., 238, where it is said in the syllabus: "A city can not by ordinance relieve itself from liability resulting from its negligence in maintaining a sewer."

And in the case of *Merzweiler* v. *Akron,* not reported, decided by this court in Summit county, April 8, 1910, the following quotation from 2 Dillon, Mun. Corp., Section 1049, was referred to and seems applicable here:

"A municipal corporation is liable for negligence in the ministerial duty to keep its sewer (which it alone has the power to control and keep in order) in repair, as respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition. If the sewer is negligently permitted to become obstructed or filled up, so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having the control of it, and which is bound 'to preserve and keep in repair erections it has constructed, so that they shall not become a source of nuisance' to others. The work of constructing gutters, drains, and sewers is ministerial, and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work."

But it is said that there was error in the admission of certain evidence. One Walter D. O'Donnell was permitted to testify, over the objection of the village, as appears at page 110 of the bill of exceptions, that his sewer was flooded at the time of the storm which flooded the cellar of Swift. It appears that the drain from O'Donnell's cellar connected with a storm sewer of the village along the same street and but a few inches higher along the street than the sanitary sewer into which Swift's private sewer entered. The fact being that both the storm and sanitary sewers emptied into the same manhole, and that the evidence tended to show that this manhole filled up with what was emptied into it from these two sewers. We think this evidence was competent, as tending to show that the injury to Swift resulted from an obstruction in the sanitary sewer which may have been further down the incline of the sewer than this manhole.

Complaint, too, is made as to the admission of any evidence as to the flooding of other cellars which had drains leading in to this sanitary sewer. We hold that the court did not err in admitting this evidence. The fact that other cellars were flooded tended to show that there was failure on the part of this main sewer to carry off what it should have carried off, and therefore tended to show that there was some defect in it. An examination of the record fails to disclose any error on the part of the court in its rulings upon evidence offered in the case, except that the court permitted evidence to be introduced tending to show obstructions in the Detroit street sewer at a point higher up in the sewer than the point where Swift's sewer emptied into the main sewer. This evidence did not in any wise tend to show that the plaintiff was injured by reason of any defect or obstruction in the sewer. However faulty the condition of the sewer may have been above the point where the sewer of Swift emptied into the main sewer it could not have caused or help to cause the flooding of which Swift complains. This evidence was erroneously admitted and was calculated to prejudice the jury against the municipality. Again, the court permitted evidence to be introduced over the objection of counsel for the village tending to show that some nine or ten months after the injury to Swift's property there was sediment and other obstruction in the main sewer below the point, that is further down the line of the sewer than the point where Swift's sewer emptied in. This evidence did not tend to show that there was any obstruction there at the time of Swift's injury, and it was error to admit it, and was calculated to prejudice the jury against the village.

For these two errors, and for these alone, the judgment of the court below is reversed.

It is not at all improbable that without this evidence the verdict would have been as it was, but since it is not certain that it would have been and since this testimony was erroneously admitted and may have affected the verdict, indeed, may have directly tended to affect the verdict against the village, we feel that the judgment must be reversed.

Complaint is made that the court erred in its charge to the jury. The court said to the jury:

"If the sewer in Detroit street was of sufficient capacity to take care of the ordinary flow of water and sewage, including that brought in by the new streets, and the backing up was caused by an unprecedented rainfall, something which could not have been reasonably anticipated, considering the conditions as to rainfalls in this latitude and vicinity, then the village would not have been liable."

Complaint is made of the use of the word "unprecedented." It is said that a rainfall may be so excessive as to overflow sewers, even though they are properly constructed and equipped, and so relieve the municipality from liability even though the rainfall be not "unprecedented." This is true. That for which the municipality would be liable would be injury sustained by reason of the insufficiency of the sewer to take care of the water and sewage that might reasonably be anticipated to be brought into the sewer during the times of such rainfalls as are likely to occur in this locality, and the court so said to the jury, using this language:

"If the storm was such volume of rainfall that ordinary prudence and foresight would not have anticipated it and provided against it, and this was the cause of plaintiff's injury, plaintiff could not recover."

The court explained what was meant by the use of the word "unprecedented" in the passage from the charge already quoted, by what immediately followed after the use of that word, for the language taken together is:

"If the sewer in Detroit street was of sufficient capacity to take care of the ordinary flow of water and sewage, including that brought in by the new streets, and the backing up was caused by an unprecedented rainfall, something which could not have been reasonably anticipated, considering the conditions as to rainfalls in this latitude and vicinity, then the village would not be liable."

We are of opinion that the charge as a whole was correct and was not misleading, although the use of the word "unprecedented," not explained or qualified, might be calculated to mislead.

The judgment of the court is reversed for the reasons given in this opinion and remanded to the court of common pleas.

AS TO THE SUFFICIENCY OF A NEWSPAPER FOR THE PUBLICATION OF ORDINANCES.

Circuit Court of Lucas County.

THE CITY OF TOLEDO v. JOHN M. BABCOCK ET AL.

Decided, 1911.

Publication of Ordinances—Determination as to the Sufficiency of the Periodical Selected—Designation of Paper by Council Creates a Presumption of Sufficiency Only—Basis for Determining Circulation.

1. The fact that council has determined that a periodical, wherein it is proposed to publish ordinances, is a newspaper of general circulation, creates no more than a presumption that such is the fact, and does not preclude a court from examining the question for itself and making its own determination.
2. The basis upon which the question of circulation should be determined is not subscriptions paid in advance, but *bona fide* subscriptions whether paid in advance or otherwise.

Cornell Schreiber, City Solicitor, and *Alonzo G. Durr,* for plaintiff.

George N. Fell, for Alonzo A. Reilly.

KINKADE, J.; WILDMAN, J., and RICHARDS, J., concur.

Appeal from Lucas Common Pleas Court.

This is an action that was brought in the court of common pleas to restrain the execution on the part of the officers of the city of a contract that had been entered into by them with the owner of the Toledo *World,* Alonzo A. Reilly, for the printing of the ordinances, resolutions, etc., of the city.

A contract had been entered into with the Toledo *Blade,* as a Republican newspaper, and then a contract entered into in regular form with the Toledo *World,* as being a paper of opposite politics.

The relief prayed for in the petition was denied in the court of common pleas and the case is here on appeal with quite a volume of evidence for the examination of the court.

The only question presented seriously in this court is the question whether the Toledo *World* is shown by the evidence to have been a newspaper of general circulation in the municipality. There seems to have been little question but that it was a newspaper, and practically no question made but what it was of opposite politics. Nobody has seriously claimed that it has traveled along the lines of the *Blade;* but the question is very seriously made here as to whether it is a newspaper of general circulation as contemplated by the statute, and the evidence is very largely addressed to that question.

It is said by counsel for the city that under the statute, the only subscription that can be recognized in determining valid subscriptions to a newspaper is a subscription that is paid in advance; it must be a paid subscription, and "paid" means paid in advance, it is said. Our attention is called to the fact that a provision of the statute relating to publications in German papers speaks of their having at least one thousand paid subscribers, and it is said that the language of the statute in this regard determines the construction that should be applied to English newspapers, and that the only subscriptions that can be counted are paid subscriptions, and "paid subscriptions" means subscriptions paid in advance.

We think this is too strict a construction of the statute. In our judgment the statute does not mean paid subscriptions in this sense—paid in advance—I mean. It has reference to *bona fide* subscriptions, whether paid in advance or not, we think.

But it is said, in addition to this, that the evidence shows that it is not a paper of general circulation within the municipalty anyhow, and that of course necessitates an examination of the evidence as to what is shown in this record.

We think, taking the evidence in full, that it clearly shows this is a newspaper of opposite politics from the *Blade* and that it is a newspaper of general circulation in the community.

Our attention is called to the fact that the court below held that the relief must be denied because the council had passed on the question, and that that was conclusive unless bad faith was shown. We are not prepared to admit this construction of the

statute, but are inclined to hold that this subject is open to inquiry and that the council have not the right to determine, beyond investigation, whether a newspaper is, or is not, a paper of general circulation. It is a matter of fact as much open to inquiry as is the determination of the council that a given piece of property is or is not already provided with sufficient local drainage in the matter of assessments. It has been repeatedly held that that subject may be inquired into. It may raise the presumption that the property has not local drainage, if additional local drainage is provided and an assessment made for it, but it is only a presumption. The action of the council may raise a presumption that a newspaper is one of general circulation, but it is only a presumption and it may be met by evidence overthrowing the presumption, if the evidence exists.

The statute requires that it shall be a newspaper of general circulation. Of course it would not do to say that the council might dispense with that provision, and find that something was a newspaper of general circulation which was not, and thereby dispense with the requirement of the statute.

We think the contention of the counsel of the city is correct in that regard, but upon a full investigation of the case, we are thoroughly satisfied that this paper in question, the Toledo *World,* meets the requirements of the statute, in that it is shown by the evidence to be a newspaper of general circulation in the municipality; and this necessitates the dismissing of the petition at the plaintiff's costs.

This action was brought here by the city solicitor at the request of a tax-payer.

AS TO NEGLIGENCE IN LITTERING SIDEWALK WITH SAND.

Circuit Court of Hamilton County.

ISAAC BISHOP v. GEORGE D. BECKER.

Decided, July 29, 1911.

Negligence—Cleaning Exterior of Buildings by Sand-blast—Ordinary Care—Weight of Evidence.

It is not negligence *per se* to clean the exterior of a building by the sand-blast process, and a court will not presume such manifest danger arising therefrom to persons passing along the sidewalk below as would require more than ordinary care on the part of those operating the device.

Prescott Smith, for plaintiff in error.
W. A. Rinckhoff, contra.

The plaintiff alleged that while passing a building, the walls of which were being cleaned by the defendant by the sand blast process, he fell upon the sidewalk and sustained serious injuries. The fall was alleged to have been due to the littering of the sidewalk with sand, pebbles and gravel which had been thrown against the building by the process employed. The jury found for the plaintiff and judgment was given thereon.

JONES, J.; SMITH, P. J., and SWING, J., concur.

We have searched the record of this proceeding in vain for any evidence of negligence on the part of plaintiff in error.

One of the plaintiff's witnesses below testified that there was a man with a broom sweeping sand from the sidewalk.

Another testified that they tried to catch all the falling sand by means of a canvas, but that same was impossible. He said "they tried to catch it all but couldn't."

We are not asked to hold, nor could we, that the cleaning of the exterior of a building on a public thoroughfare by sand-blasting is negligence *per se.* It seems that only upon such doctrine could the verdict in this case be sustained.

There is no evidence to show that sand scattered upon a stone walk is dangerous to pedestrians and we can not presume such manifest danger as would require of the defendant below extraordinary care.

Ordinary care is that degree of care which is commensurate with the danger naturally and necessarily connected with the act complained of.

There is a lack of evidence showing want of such care in this case and the judgment will be reversed.

VALIDITY OF AN ASSESSMENT FOR AN OUTLET DITCH.

Circuit Court of Sandusky County.

H. A. WINTERS v. JOHN FANGBONER ET AL.

Decided, 1907.

Ditches—Validity of Assessments Against Lands on Account of Construction of an Out-Let Ditch—Benefits to Lands with Natural Drainage which Cast Their Waters into the Ditch.

A land owner is not entitled to relief from the assessment for an out-let ditch, where it appears that the assessment is only one dollar an acre, and his claim for relief is based upon natural drainage of the land in question, but water flowing down from these lands finds its way into the out-let ditch, whereas it was formerly cast upon lower lands of the plaintiff and adjoining owners.

Richard & Heffner, for plaintiff.
Meek & Dudrow, contra.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This action comes into this court by appeal. It is brought by Mr. Winters to enjoin the collection of certain ditch assessments.

The petition sets forth that in 1891, Mr. Wahl petitioned the commissioners of Sandusky county, Ohio, and the commissioners of Erie county Ohio, for the straightening of a certain ditch, called the "Wahl ditch," along a certain route described in the petition; that the commissioners of said counties in joint session

found that the ditch would be necessary, and that its construction would be conducive to the public health and welfare, and thereupon ordered that said improvement should be made, and the improvement was thereafter made, and the plaintiff's lands were assessed therefor, as follows:

A certain tract of 120 acres, which is described as tract 1, was assessed $210; a certain tract of 10 acres, described as tract 2, was assessed at $70; a certain tract of 16 acres, described as tract 3, was assessed at $28; a certain tract of 40 acres, described as tract 4, was assessed at $70 and a certain tract of 140 acres, described as tract 5, was assessed at $89.70.

So that it appears that he had 333 acres assessed, and that the total amount of the assessment upon these different tracts was $369.70, or a little over a dollar per acre.

The plaintiff complains that this assessment was not made according to the actual benefit. He sets forth what he supposes to have been the theory upon which the commissioners proceeded in making the assessment, viz., that they proceeded upon the theory that they had a right to levy an assessment upon all the lands that cast waters into this ditch—which is an out-let ditch—all of the lands comprised within the bounding water-sheds, and he says that gross injustice was done in the apportionment of the cost of this improvement, and he asks that the consummation of this injustice may be prevented by injunction.

The averment as to these assessments not having been made according to the actual benefits to the lands is denied by the defendants in their answer. and it is averred therein that Mr. Winters was one of the petitioners for the ditch, and there are certain other facts averred therein in respect to plaintiff's conduct in the matter, which the defendants contend give rise to an estoppel.

It appears that Mr. Winters was one of the petitioners for this ditch improvement; that his lands, consisting of these five several tracts, lie contiguous to one another, and are in fact one body of land. The tracts extend quite a long distance from north to south, but are not so wide from east to west. This outlet ditch begins near the north part of his lands, and extends thence

through these and other lands into Erie county, and to the outlet in Sandusky bay.

It seems to have been quite a large and important improvement. It is described by the witnesses as a "dredged ditch," because a dredge was used in its construction. It was constructed through marsh land, and it was necessary on account of the condition of the lands to dig it with a dredge.

Part of these lands of Mr. Winters are marsh lands, wet and boggy, and at certain seasons of the year they overflow, especially the north parts. The whole territory thereabout is quite flat. From the southern to the northern extremity of his land there is a fall upon the surface of about fourteen feet, and along the east side of all of his lands (excepting tract 4, which is about 40 acres), there has been for years a township ditch which affords him some drainage facilities, but all the water was not carried away from the lower part of this land until after the construction of the improvement mentioned in the petition. Theretofore the water backed up quite a distance, and during wet seasons of the year it overflowed his lands and the lands of others in that locality.

I have said that Mr. Winters was one of the petitioners for this ditch, and he appears to have been present at the joint hearing before the commissioners of these two counties when they had this improvement under consideration, and he was one of the promoters, and the testimony is undisputed that on the day the apportionment was made of the costs and expense that would arise from the construction of this improvement, he was present and made no objection to the amount it was then stated in his presence would be assessed upon his lands for this improvement, to-wit, the amount afterward assessed thereon of which he now complains.

We are not advised whether the burdens of this improvement have been fairly and equitably apportioned upon all of the lands of the different proprietors that have been assessed. We have no evidence upon that subject.

The contention of the plaintiff is not upon the ground that there has been an unfair distribution of the burdens between himself and the other proprietors, but he says that his lands have

been assessed beyond the amount of the benefits accruing to them; and he invokes the aid of the court under Section 4911 of the Revised Statutes, which authorized a court of equity, even where the proceedings are legal and regular, to correct and remedy gross injustice, if it shall appear.

These assessments were distributed in six semi-annual payments. Two of the semi-annual payments were made by Mr. Winters without objection. The third and fourth were made by him under protest; that is to say, when he went to the treasurer's office, he offered to pay all of his taxes excepting the installments then due on account of these assessments, and the treasurer declined to receive any of his taxes and assessments unless he would also pay these. That occurred upon two occasions; and upon this statement being made by the treasurer, without more ado other than signifying his objection, and saying he did it under protest, plaintiff proceeded to pay these as well as the other taxes and assessments. He asks now that in adjusting his rights, the court shall take into consideration what he has paid upon the various tracts, and allow anything paid on any tract, in excess of the amount justly payable thereon, as a credit upon the unpaid assessments upon other tracts.

The view we take of the case will not require us to consider whether or not this may in any case be done. The contention of the plaintiff is based upon the theory, as it seems to us, that no lands can be assessed for such an improvement except such as at the time of the making of the improvement, or subsequently thereto, receive a direct benefit by way of drainage then or thereafter made or provided for.

We have considerable testimony here upon the part of the plaintiff as to the distance toward the south, up this township ditch, that water may be backed or banked by building a dam across it at the lower end. Experiments have been made, and it does not appear that the water can be backed up beyond the middle of tract 2, and the south part of tract 4, which lies immediately east of tract 2.

Now tracts 1 and 5, which are the largest tracts, 1 being the 120-acre tract, and 5 being the 117-acre tract, and which are the

tracts that plaintiff says are not benefited at all by this improvement, can not be affected by such backing up of the waters in this township ditch. It appears to be demonstrated that, even before the construction of this out-let ditch, tracts 1 and 5 might have been so thoroughly drained into this township ditch that all the water would have been carried therefrom to some point below. That has since been done; and it appears that the carrying of the water off of tracts 1 and 5, has not been facilitated by the construction of this outlet.

From this state of facts, it is contended that tracts 1 and 5 are not so benefited that any part of the assessment may be lawfully levied thereon.

It is contended by counsel for plaintiff that a decision of this court, in *Buckley* v. *Commissioners of Lorain County*, 1 Circuit Court Reports, page 251 (not exactly a decision of this court, but a decision of the circuit court of this circuit, before the circuit was changed), sustains their contention and view of the matter. They also cite as authority in support of their position the case of *Blue et al* v. *Wentz et al*, 54 O. S., 247.

In those cases it is distinctly held that it is not proper for the commissioners to levy ditch assessments upon land simply because water from such lands may or does find its way into the ditch improvement. But the fact was in each of those cases, that the water found its way into the ditch, not by reason of the improved drainage thereby afforded, or by reason of the flow of the water being facilitated by the industry of man, but by reason of the fact that the natural drainage carried the water down to the outlet. It does not appear to us in the case at bar that the natural drainage from tracts 1 and 5 would have carried the water therefrom to the outlet afforded by the improvement, or further than the lands lying immediately north of said tracts.

The holding in the case of *Blue et al* v. *Wentz et al*, is that:

"Where the lands of an owner, by reason of their situation, are provided with sufficient natural drainage, they are not liable for the costs and expenses of a ditch necessary for the drainage of other lands, simply for the reason that the surface water of his lands naturally drain therefrom to and upon the lands requiring artificial drainage.

"A lower tenement is under a natural servitude to a higher one to receive from it all the surface water accumulating from falling rains and melting snows or from natural springs, that naturally flow from it to and upon the lower one. This advantage of the higher tenement is a part of the property of the owner in it, and he is not indebted to the lower tenements therefor.

"In making an assessment on lands, benefited by artificial drainage, the extent of their water shed is not the proper rule, but the amount of surface water for which artificial drainage is required to make them cultivatable, and the benefits that will accrue to the lands from such drainage. However much water may fall on them or arise from natural springs, if, by reason of their situation, they have adequate natural drainage therefor, they are not liable for the cost of artificial drainage to other lands."

In the discussion of the case in the opinion of the court, it is distinctly indicated and emphasized that the rules laid down limiting the authority of the commissioners to extend the assessments beyond the immediate neighborhood of the improvement itself are based upon the right of a proprietor to have and enjoy, without charge or expense, his advantages of natural drainage. There is no question, I think, but that assessments for an outlet ditch may be extended so as to include all lands the drainage whereof is facilitated by artificial means, where the improvement on account of which they are assessed furnishes an outlet for the waters thus brought down from such lands.

If this township ditch and this county ditch, for instance, had both been constructed at one time, as one single continuous improvement, we think it is apparent that applying correct rules and principles applicable to the levying of assesments, the cost could have been assessed upon all these various tracts of land, and that the cost need not to have been limited to the amount that plaintiff might be required to pay for so much of the drainage as would be afforded by the township ditch, but, because of his having given this outlet, his assessment might include a just proportion of the cost of continuing the ditch to the ultimate outlet in Sandusky bay; and in that case the assessment might have been as much as he has been assessed on the two improvements without exceeding his benefits or his just proportion of the burdens.

These different tracts described as tracts 1, 2, 3, 4 and 5, though lying in one body, seem to have been treated by the commissioners as separate and distinct tracts and perhaps we should treat them so, perhaps we are required to do so; and we will consider the rights of the plaintiff viewing them in that light; and to make our views clearer we will treat tracts 3 and 4 (the lower or northern tracts) as if they belonged to another proprietor, as if they were not owned by the plaintiff at all. In that case, would the commissioners have a right to assess any part of the cost of this outlet ditch upon tracts 1 and 5 belonging to this plaintiff?

According to the testimony of the witnesses as I have said, tracts 1 and 5, as well as the other lands, are flat lands, although they lie from twelve to fourteen feet above that part of the northern portion of plaintiff's land where this outlet ditch begins. They require considerable artificial drainage. They had been tiled and ditched to some extent before this other ditch was dug, but they have been tiled and drained more effectually since.

It appears that part of tract 5 was marshy and in a bad condition and not cultivatable before this ditch was dug. One of the witnesses testified that in the spring of the year it was impossible to go upon part of it with horses, because they would become mired. And upon tract 1 was a large swail of an acre and a half or two acres, in which water stood the year round, and where persons skated and cut ice in the winter and fished in the summer, and in which, according to the testimony of one witness, who was very specific upon the subject, there were certain "fish known as pike that would swim in the water."

After this outlet ditch was dug, and not before, the boggy land of tract 5 was drained so as to be subject to cultivation, and the swail in tract 1 was drained so that it was made dry and subject to cultivation, and the remainder of these tracts were in some measure improved, to exactly what extent, measured in dollars and cents, we will not pretend to say; but we can not say that they were not improved after the digging of this outlet to an extent that would justify the assessment upon tract 5 of $89.75, and upon tract 1 of $210.

We think that enough land was reclaimed in tract 1, to nearly justify the assessment thereon. As I have pointed out, the as-

sessment upon the whole territory amounted to only about $1 per acre, which does not seem to us, who have been accustomed to ditch assessments in northwestern Ohio, to be a very heavy assessment.

Now while it may be true that it was possible and practicable to have drained tracts 1 and 5 as effectually before the construction of this outlet as after, yet we must consider the consequences to other property to have done that before the outlet was constructed—the consequences to the proprietors below, if we treat these lower tracts as lands of other proprietors. It must be considered whether plaintiff had a right to thus drain tracts 1 and 5; whether before he obtained his outlet he was in a situation where he might do it lawfully and without being subject to a claim for damages. We think he had not that right, and that the benefits that accrued to him from the construction of this outlet, were these: that, being the owner of the lower tracts, he was enabled to cast the waters down upon the same from tracts 1 and 5 without doing damage to the lower tracts, and with respect to the lower lands of other proprietors he was relieved of liability for damages. He has drained this large pond through the lands below without injury thereto, but, according to the testimony, if this had been done before this outlet was constructed, the water carried down to the lands below would have backed up in the township ditch, and would have overflown the lands below near where the outlet ditch begins, so as to damage the lands of plaintiff and those of his neighbors lying in that locality.

As throwing some light upon the legal phase of this situation, I refer to the case of *Sidney C. Butler* v. *Rufus Peck*, 16 O. S., 335. The syllabus reads:

"Where, upon the lands of 'B' there is a marshy basin, from which, in times of high water, a portion of the water contained in the basin overflows its rim and naturally finds its way through a swale to and upon the lands of 'P' while the remaining portion of the water of the basin has no outlet, and is dissipated by evaporation, 'B' can not rightfully, by an artificial drain, conduct the water that has no natural outlet from the basin and along said swale, so as to cause them to flow upon the lands of 'P' to his damage."

Now that case, as stated in the syllabus, and as more fully and distinctly stated in the report, described the situation of the plaintiff here, with respect to the injury and damage that would be done to his lower tracts and those of his neighbors by drainage of marshes and swamps and swails, if it were done before the opening of the outlet that this new improvement gives to them.

Upon this subject of the servitude for drainage, of lower lands to lands lying above, I read from this same report, at pages 342 and 343:

"The principle seems to be established and indisputable, that where two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a servitude to the upper to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude. Or, in other words, more familiar to the students of common law, the owner of the upper parcel of land has a natural easement in the lower parcel, to the extent of the natural flow of water, from the upper parcel to and upon the lower."

Besides his own lower tracts there were lands of other proprietors in that locality which were overflowed somewhat by water from this township ditch, and an increase of the overflow upon which would have been caused by the complete drainage of the waters from tracts 1 and 5. By making this improvement, the plaintiff is given the means of casting down the water from tracts 1 and 5, without increasing the damages to his lots below, and without incurring liability for damages to other lots below, and therein and thereby we think he has received a very substantial benefit to tracts 1 and 5 as well as to his other lands, and we are not prepared to say that these benefits are not as great as the amount assessed. Therefore the petition will be dismissed and the costs adjudged against him.

LIQUIDATED DAMAGES FOR BREACH OF COVENANT AGAINST RELEASING.

Circuit Court of Hamilton County.

GEORGE F. FISH ET AL v. JOHN F. ROBINSON. *

Decided, June 24, 1911.

Lessor and Lessee—Covenant Against Releasing—Liquidated Damages—Remedy of Lessor in the Event of a Breach—Hearing of Testimony Unnecessary, When.

1. Where the pleadings disclose all the facts, the introduction of evidence is unnecessary, and a judgment will not be reversed for refusal of the trial court to hear testimony as to the circumstances surrounding the parties at the time the contract was made.
2. A stipulation in the lease of a theater for payment of $5,000 to the lessor as a forfeiture in case of the releasing of the property, will not be regarded as a penalty, but treated as an agreement for liquidated damages in that amount; and in case of violation of the stipulation the lessor may elect whether he will sue for the sum named as liquidated damages or for a forfeiture.
3. An agreement between a lessee and one to whom he has surrendered possession of the property, that the lessee is to be saved from all losses and is to receive rent from said third party who is to pay all bills, does not establish a partnership between them but constitutes a renting to said third party.

Kramer & Bettman, for plaintiffs in error.
Sayler & Sayler, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

By consideration of the trial court, defendant in error recovered a judgment upon the pleadings in the above case, to set aside which this action is brought.

The pleadings disclose that defenadnt in error, being the owner of an opera house building in Cincinnati, leased the same to plaintiffs in error by indenture of lease dated September 5, 1904, for a term ending on the 19th of June, 1907, at a rental value of

* Affirming *Robinson* v. *Fish et al,* 8 O. L. R., 520.

$9,000 per year, the lease containing a provision that plaintiffs in error should not sell, rent, transfer or assign said leased premises, or any part thereof, without the written consent of the said lessor, under a forfeiture of $5,000; that in pursuance of said contract of lease, said plaintiffs in error entered into possession of said premises under the terms of the lease, the same being for theatrical purposes; that on December 26, 1906, a few months prior to the expiration of said term, said plaintiffs in error executed a contract with one Canfield, by the terms of which Canfield assumed control of the property in question and was to pay rent for the same to plaintiffs in error, and thereafter under this contract Canfield conducted the theatrical business in said premises.

Plaintiffs in error complain that the judgment of the court below is wrong for the reasons:

1st. That evidence should have been introduced to show all the circumstances surrounding the parties at the time the contracts were made.

2d. That defendant in error waived the condition and covenant in the lease against renting, and estopped himself from enforcing said contract for the reason that after December 28, 1906, the date of the execution of the contract between Canfield and plaintiffs in error, he accepted rent under the lease with knowlegde of the contract.

3d. That the provision against renting or assigning said lease is one for a forfeiture and not for liquidated damages; and

4th. That as a matter of fact there was no assignment of the lease in question; but that the contract between plaintiffs in error and Canfield was that of a partnership.

We do not think any of these contentions of plaintiff in error are well taken. The pleadings themselves sufficiently set forth the facts existing under the lease and contract to Canfield, and what was done thereunder.

There was no waiver on the part of defendant in error of the covenant not to transfer the lease, as defendant in error would have the right to sue upon the covenant and recover the liqui-

dated damages mentioned in the lease, or for a forfeiture under the terms of the lease.

Under the case of *Doan* v. *Rogan*, 79 O. S., 372, the court is of the opinion that the $5,000 mentioned in the lease as a forfeiture in case plaintiffs in error should assign or transfer the lease, was the sum fixed and intended by the parties as liquidated damages for the breach of the contract of lease, and was not a penalty. This we gather from the entire instrument itself.

Plaintiffs in error further contend that the contract between them and Canfield was not an assignment of the lease in question but was only a contract of partnership between them. In this contention we can not agree with plaintiffs in error. Under this contract plaintiffs in error were to receive rent from Canfield for the balance of the term, but not to be liable for any losses, and all bills were to be paid by Canfield; clearly the instrument shows that it was an assignment of the lease and not a contract of partnership.

The pleadings fully disclosing all the facts, the introduction of evidence was immaterial and unnecessary.

The judgment of the court below upon the motion for judgment, being correct, the same is affirmed.

CULVERT WITHOUT GUARD-RAILS IN CITY STREET.

Circuit Court of Shelby County.

CITY OF SIDNEY v. FRANCISKA SCHMIDT.

Decided, October Term, 1910.

Negligence—Responsibility of a Municipality for Maintaining a Culvert Without Guard-Rails—Question of Adjudication of a Former Trial —Jury Must Determine the Question of Contributory Negligence, When.

1. A culvert which forms part of a city street is under control of the city council, and the municipality, as well as the county commissioners, is responsible for maintenance of guard-rails thereon.
2. In the second trial of a case, wherein a reversal of a judgment in favor of the plaintiff has been obtained upon the ground that it is against the weight of the evidence and it does not affirmatively appear in the record that the evidence is substantially the same as at the former trial, it is not error for the trial court to refuse to direct a verdict for the defendant upon the ground that the former judgment of reversal was an adjudication.
3. The Act of May 9, 1908 (99 O. L., 454, 11577, G. C.), denying the right of the same court to grant more than one reversal in favor of the same party in the same action, upon the ground that the verdict is against the weight of the evidence, applies in the circuit court where the judgment to be reviewed was rendered and the proceedings in error were brought after its enactment.
4. Whether one in the lawful use of that part of the street intended for pedestrians was guilty of contributory negligence in turning out upon the gravel and rough stones, which caused her to trip and fall over the side of a culvert which was not provided with guard-rails, is a question for the jury which can be reviewed only by a court having jurisdiction as to weight of testimony.

D. Finley Mills, City Solicitor, and *John F. Wilson,* for plaintiff in error.

Percy R. Taylor and *Charles C. Marshall,* contra.

ALLREAD, J.; DUSTIN, J., and SULLIVAN, J., concur.

The defendant in error, Franciska Schmidt, recovered judgment in the court of common pleas for personal injuries resulting from a fall off a culvert, thirteen feet in height and forming part of North Main street in the city of Sidney.

The basis of the cause of action is the alleged negligence of the city in maintaining the culvert, without guard-rails or other safe-guard, by reason whereof the plaintiff in the lawful use of the street without her fault, in attempting to pass over the culvert, fell therefrom and was injured.

The city prosecutes error here to the judgment so recovered. Upon the admission of the petition that the culvert and highway of which it is a part was constructed by the county commissioners, and that the city received no part of the bridge fund, it is contended that there is no cause of action shown against the city.

In support of this contention counsel cite Section 4941-1, Revised Statutes (7563, General Code), requiring boards of county commissioners to maintain guard-rails "on each end of a county bridge, viaduct or culvert more than five feet high." But in such cities and villages as by law receives part of the bridge fund levied therein, such guard-rails shall be erected by the municipality. The petition states that this culvert was a part of the municipal street. It was, therefore, as a matter of law under control of the city council, who by the terms of Section 2640, Revised Statutes (3714, General Code), are bound to keep the streets and bridges forming part thereof reasonably safe for public travel. *City of Troy* v. *Brady*, 67 O. S., 65; *Cavey* v. *Cincinnati*, 12 C.C.(N.S.), 285.

Section 4941-1 imposes a primary obligation upon county commissioners in the prescribed cases to construct guard-rails, but does not limit nor supersede Section 2640. Both sections are available for protection of the traveling public.

The case of *Village of Mineral City* v. *Gilbow*, 81 O. S., 263, is not opposed to, but in harmony with this view. The distance, in that case, of the dangerous excavation from the street was such that the street itself was not defective nor unsafe.

There are other objections to the petition, but in our view the petition states a cause of action. And it also follows that the trial court did not err in the charge in stating that the culvert was under control and supervision of the city.

Reliance is placed upon the motion of the city for an instructed verdict offered at the close of plaintiff's evidence and renewed at the close of all the evidence. This motion was overruled by the trial court.

The motion is supported here upon the claim (1) that the judgment of reversal of this court upon the former petition in error is an adjudication; and (2) that the evidence is insufficient.

As to the adjudication it is insisted that the case presented here is substanially the same as upon the former hearing; that the decision of this court upon the former petition in error was binding upon the trial court in the second trial, if the evidence was substantially the same and called for an instructed verdict for the city. The case of *the Michigan Mutual Life Insurance Company* v. *Whitaker,* 9 C.C.(N.S.), 126, is cited. In that case the transcript of evidence of the former trial was offered in evidence upon the second trial, thereby establishing in the view of the circuit court the identity of the case. But the Supreme Court (77 O. S., 518) without denying the primary doctrine, as to the effect of the adjudication of the reviewing court, held that the record under review must affirmativey show the identity of the case to justify the application of the doctrine.

In the present case the plaintiff in error refiled in this court the former bill of exceptions with exhibits detached, and seeks thereby to differentiate the present case from the Whitaker case; but the former bill of exceptions was not presented to the trial court and is not embodied in the bill now under review.

Confining our consideration to the present bill of exceptions, we find that the witnesses whose testimony appears in Schedule "A" were called, sworn and examined.

In a stipulation appearing in the schedule in connection with the recital that the testimony of certain witnesses were read, it may be inferred that such testimony was the same as upon the former trial.

Assuming that the certificate of the bill is capable of reconcilation with the schedule, it still appears that Franciska Schmidt testified anew and it does not appear but that Otis McCreary and Dr. C. E. Johnston testified orally.

The cross-examination of Mrs. Schmidt contains reference to portions of her former testimony, and certain parts were offered by the city for impeachment. These extracts were referred to and offered to show contradiction, but nowhere in the record now under review does it appear that the testimony of Franciska

Schmidt was substantially the same as on the former trial, nor are we advised by this record that the testimony of Otis McCreary and Dr. Johnston is identical.

The trial court was not in error, therefore, in rejecting the plea or contention of former adjudication of the law of the case.

Upon the claim of insufficiency of evidence, it follows from what has been said as to the duty of the city, that the verdict so far as it establishes negligence in failing to maintain guard-rails or other safe-guards should not be disturbed. There is, therefore, left for consideration the question of contributory negligence.

Upon the question of the weight of the evidence, it is contended that the credibility of Mrs. Schmidt upon whose testimony the case mainly stood, as to contributory negligence is impeached by the former testimony, and this court upon the former review reversed the judgment for insufficiency of evidence. As the case was remanded for trial it is obvious that the reversal was upon the weight of evidence.

Under the act of May 9th, 1908 (99 O. L., 454; G. C., 11577) the jurisdiction of the court to review the weight of evidence after one reversal is withdrawn.

This act being one relating to the remedy and having been passed before the proceedings in error were begun and the judgment complained of rendered is applicable here. *Halderman* v. *Larrick*, 44 O. S., 438.

It is contended that plaintiff being familiar with the situation and having knowledge of the absence of a guard-rail was negligent as a matter of law, and that it was the duty of the court to so instruct the jury. We think, however, that the fact of the plaintiff going on the culvert and attempting to pass over the same along the portion intended for and used as a sidewalk is not negligence as a matter of law.

The cases cited by plaintiff in error can be distinguished. In case of *Village of Mineral City* v. *Gilbow, supra,* the plaintiff carelessly or knowingly departed from a known safe way and went beyond the limit of the street into danger. In *Schaefler* v. *Sandusky,* 33 O. S., 246, and *Dayton* v. *Taylor's Admr.*, 62 O. S., 11, it was decided that a traveler going into danger he can

easily avoid, can not recover. In the cases of *Norwalk* v. *Tuttle,* 73 O. S., 242, and *Village of Conneaut* v. *Naef,* 54 O. S., 529, the qualification as to avoiding the danger is omitted from the statement of the rule, but the cases under review and the citation and approval of previous cases make it obvious that no departure was intended. See *Smith* v. *Toledo,* 11 C.C.(N.S.), 167.

The plaintiff, was, therefore, lawfully upon the street and in the lawful use of it and upon the portion intended and devoted to footmen, and whether it was negligence to suddenly stop and turn in the gravel and rough stones and to trip and stumble and fall, over the coping is a question to be submitted to the jury, and can only be reviewed by a court having jurisdiction to weigh the evidence.

Judgment affirmed.

AS TO THE AUTHORITY OF COUNCIL TO FIX GAS RATES.

Circuit Court of Licking County.

THE VILLAGE OF GRANVILLE v. THE CRAWFORD NATURAL GAS & FUEL CO.*

Decided, March Term, 1911.

Municipal Corporations—Gas Rates Fixed by Council Are Not Binding on the Gas Company, When.

Where no rate has been agreed upon for gas used within the limits of a municipality, and council attempts by council to fix rates on both a meter and flat basis and to give to consumers the privilege of changing from one basis to the other at their option, and the gas company refuses to accept the terms thus imposed, the ordinance is not enforcible.

BY THE COURT (VOORHEES, SHIELDS and POWELL, JJ.)

The plaintiff filed its petition in the court of common pleas, alleging that it is an incorporated village of the state of Ohio; that the defendant is a corporation, doing business in Ohio in the way of furnishing natural gas for fuel and light to the vil-

* Reversing 11 N.P.(N.S.), 641. Through misinformation the note in that case makes the Circuit Court give the same judgment on appeal.

lage of Granville and its inhabitants aforesaid, by virtue of a franchise granted by the council of said village to the defendant company on June 7, 1898. That by the ordinance granting such franchise, there was granted to the defendant company the right and privileges of laying pipes through the streets of said village for the purpose of supplying and conveying gas to the inhabitants of the village for the period of twenty-five years. Said ordinance further provided that, for ten years from the passage of the same, the defendant should have the right to charge the consumers of gas twenty-five cents per thousand cubic feet, meter measurement.

Said period of ten years having expired, the plaintiff, by its council, duly and legally passed an ordinance on the 2d day of June, 1908, fixing the price which said defendant might be allowed to charge for gas furnished said village, and its inhabitants, at the rate of fifteen cents per thousand cubic feet, and which price should prevail, by the terms of said ordinance, for the period of ten years, the defendant to supply meters to all who desired gas at meter measurement. Said ordinance further provided that the consumer should have the option to take gas at either meter measurement or flat rate, and fixed the flat rate for the price of gas which the defendant company should be allowed to charge, and which rate was that it should not charge more than five cents per month for each gas light; for a cooking stove in private house two dollars a month from October 1st to May 1st of each year, and $1.50 a month for the period of the year from May 1st to October 1st; for each heating stove, grate or fire-place used in a private family $2.50 per month from October 1st to May 1st of each year; for each furnace, hot-water, steam, or hot air apparatus in private family $7 per month from October 1st to May 1st, of each year. The petition avers that said prices so fixed are reasonable.

The defendant, operating under said ordinance, notified the inhabitants of said village that on and after a certain date named, the price for gas would be twenty-two cents per thousand cubic feet, and that unless this price is paid by the people of the said village the defendant would stop the supply and refuse to fur-

nish gas at any less rate or price; and the petition alleges that said company intends to make the price for all gas furnished on and after the date named, to-wit, November 1, 1910, the sum of twenty-two cents per thousand cubic feet and no less; that unless restrained by the court, the consumers of gas furnished by the defendant will be required to pay twenty-two cents per thousand cubic feet, contrary to the provisions of such ordinance.

It is further alleged that the defendant company, contrary to the provisions of said ordinance, will refuse to furnish gas to the inhabitants of said village other than at meter rate, and refuses and will refuse to furnish gas at the rates provided in said ordinance, commonly called flat rates, or rates by the month with certain appliances.

The plaintiff prays for an injunction restraining the defendant from charging prices in excess of the amount fixed by said ordinance to either the village of Granville or to the inhabitants thereof, and from refusing to furnish gas other than by meter and at meter rates; and it further asks that defendant be restrained from shutting off the supply of gas to the village or the inhabitants of said village in the event that persons refuse to pay the price in excess of the price fixed by said ordinance.

A temporary injunction was allowed on said petition, to which a demurrer was filed. The demurrer, on hearing, was overruled, to which exceptions were noted.

The defendant filed its answer, in which it admitted the corporate capacity of the plaintiff, and the defendant, as alleged in the petition. It also admitted the passage of the ordinance of June 7, 1898, and that, by said ordinance, it acquired the privilege of laying its pipes through the streets and alleys of said village for the purpose of supplying natural gas to the inhabitants of said village for the period of twenty-five years. The provisions of said ordinance as to the price to be charged consumers were admitted. It admits the acceptance of said ordinance, and that it has been doing business in said village under the terms thereof. The answer further alleges that the defendant had no knowledge of the due and legal passage of the ordinance of June 2, 1908, other than the averments contained in the

petition, and denies the same. It admits that it was notified of the alleged passage of said ordinance, but it avers that it never accepted the terms and conditions of the same, but, on the contrary, expressly repudiated said ordinance, and notified the plaintiff of its refusal to accept under said ordinance immediately after the notice of the alleged passage thereof had been given.

For a second defense, the defendant adopts the averments of its first defense, and alleges that said ordinance of June 2, 1908, is contrary to and in violation of Section 1, Article II of the Bill of Rights, Constitution of the state of Ohio, and, for this reason, is null and void.

For a third defense, the defendant adopts the averments of the first defense, and says that the said alleged ordinance of June 2, 1908, is contrary to and in violation of Section 10 of Article I of the Bill of Rights, Constitution of the state of Ohio, and is therefore null and void, and of no effect, for the reason that it is a taking of private property without process of law.

For a fourth defense, it adopts the averments of the first defense, and says that the alleged ordinance of June 2, 1908, is contrary to and in violation of Section 1, Article XIV, of the amendments to the Constitution of the United States of America, and is therefore null and void, and of no effect, for the reason that it is a denial to this defendant of the equal protection of the laws, in that it attempts to compel the defendant company to furnish gas in a manner and at a price entirely at the option of the consumer, without the consent of the defendant thereto.

To this answer a demurrer was filed by the plaintiff, and, on hearing, the demurrer was sustained.

The defendant then came to this court by appeal, and a motion has been filed in this court to dissolve the injunction allowed in the court of common pleas. The motion is based upon the following grounds:

1st. That the plaintiff has not legal capacity to maintain the action as brought.

2d. The facts set forth in said petition are insufficient in law to entitle plaintiff to the relief sought by way of injunction.

It will be observed that the motion is, in effect, a demurrer.

The cause comes on to be heard in this court on said appeal. On consideration whereof, the court is of the opinion that the demurrer to the answer should be overruled.

And coming on further to be heard upon demurrer to the petition, the court is of opinion that said demurrer is well taken, and should be sustained.

The injunction heretofore allowed is dissolved, and the petition of the plaintiff dismissed, with costs.

A motion for a new trial is overruled, and exceptions.

INJURY TO EMPLOYE BY A SAW.

Circuit Court of Hamilton County.

THE STANDARD MILLWORK CO. v. WM. H. BICK, A MINOR.

Decided, December 23, 1911.

Negligence—Master and Servant—Independent Contractor—Liability for Injury to Employe Where There Was a Presumption of Negligence on the Part of the Master Which Was Not Refuted.

1. Where there is evidence creating a presumption of negligence on the part of a master, directly contributing to the injury to plaintiff, and no evidence is offered in refutation thereof, a judgment for damages in favor of the injured employe will not be set aside on the ground of weight of evidence.
2. One is not an independent contractor who operates a part of a manufacturing plant, under an arrangement whereby he is to hire and pay and have entire control of all the employes at work in that portion of the plant, and the owner is to furnish the material for manufacture together with the use of the plant.

The defendant in error recovered a judgment below of $2,500, on account of the loss of his left hand in a saw, operated in the factory of the Standard Millwork Company in Norwood. At the time of the accident one E. B. Swartz was operating a part of the factory for the construction of a certain kind of window blinds and shutters, under a contract that the company should furnish the plant, machinery, lubricating oil and material, and

Swartz was to employ and pay all the employes, the company to have no control or supervision over them.

Albert Bettinger and *Walter Schmitt,* for plaintiff in error.
T. R. Snyder and *Thos. L. Michie,* contra.

JONES, J.; SMITH, P. J., and SWING, J., concur.

There is evidence in this case supporting the allegation of the petition charging negligence in starting the saw, while the boy had his hand in the blow-pipe cleaning it, and that the saw was started without any notice or warning.

Such evidence *per se* raises a presumption of negligence on the part of the master and places upon him the burden of removing such presumption. No evidence was offered to explain the starting of the saw, and such presumption was in no way refuted.

The trial court correctly charged that Swartz was not an independent contractor, and we find the general charge in all other respects correct.

There was no error in the refusal to give special charges requested by defendant below.

Special charge number 11 (refused) is defective only in that it does not predicate its statement of law upon the condition that the jury find that the saw was in motion when plaintiff placed his hand in the blow-pipe.

With the saw motionless there was no apparent danger.

We find the judgment works substantial justice between the parties and there being no error it is affirmed.

ACTIONS AGAINST DECEASED DEFENDANTS.

Circuit Court of Ashland County.

CATHERINE GLASS v. GEO. W. BUZZARD ET AL.*

Decided, October 21, 1910.

Revivor—Administrator of Deceased Defendant Made a Party—Claim Involved in Action Need Not be Presented to Administrator—Section 11261.

1. Where a cause of action has been revived without objection against the administrator of a deceased defendant, and upon being served with summons he entered an appearance and filed a demurrer, nothing further appearing of record, the revivor must be regarded as sufficient.
2. No presentation or rejection is necessary of a claim against an administrator, where the claim was in suit at the time of the death of the defendant and the petition stated facts sufficient to constitute a cause of action; such a cause may proceed to judgment.

Chapman & Taggart, for plaintiff in error.
McCray & McCray, contra.

TAGGART, J.; DONNELLY, J. (of the Third Circuit), and VOORHEES, J., concur.

By this proceeding in error, the plaintiff seeks to reverse the judgment of the court of common pleas.

In that court Catherine Glass was plaintiff and James Buzzard and Geo. W. Buzzard were defendants. In her petition the plaintiff sought to recover from James Buzzard, then in full life, the amount which she claimed was due and owing to her for care, food and clothing for the infant children of the defendant, James Buzzard.

The second cause of action alleged the indebtedness set out in the first cause of action, and then claimed that, in order to defraud his creditors, the defendant, James Buzzard, had conveyed to George Buzzard certain real estate for a colorable consideration, but in fact without any consideration, and prayed that the defendant, George Buzzard, might be restrained from

* Affirmed by the Supreme Court, without opinion, 85 Ohio St., ——.

selling or incumbering said real estate, and that the conveyance so made might be set aside, and for such other relief as might be proper and equitable in the premises.

From the transcript of the docket and journal entries we learn that service was had upon both of these defendants, and while the action was pending James Buzzard deceased, which fact was brought to the attention of the court, and leave was granted to substitute George Buzzard, administrator, as party defendant. At whose suggestion this action of the court was taken we are not advised. If it was upon the suggestion of George Buzzard, it was entirely proper and legal. If it was on the suggestion of the plaintiff, no exceptions were taken by any one to the action of the court in respect thereto, but we are advised by this transcript that summons were issued and returned, serving the administrator personally.

Later George Buzzard, as administrator, filed a demurrer. The ground of such demurrer is that the petition does not state facts sufficient to constitute a cause of action against him as such administrator.

This demurrer was sustained by the court, and upon plaintiff not desiring to plead further the action against the administrator was dismissed and final judgment rendered, dismissing the petition. The entry recites that the court sustained this demurrer because the petition does not state facts sufficient to constitute a cause of action, and because said administrator was not made a party to this cause as provided by law.

We think it reasonably appears that this action was revived as against the administrator, without objection, and upon service of summons upon him he entered an appearance and filed a demurrer, which would give to the court jurisdiction of the person of the defendant, and nothing further appearing on the record would be sufficient revivor of the cause of action as against him.

As to the other ground, that the petition does not state facts sufficient to constitute a cause of action, we are advised the court adopted the view that the petition did not aver an exhibition or presentation of the claim and the rejection by the administrator.

We think that where an action is rightfully grounded against an intestate in his lifetime and subsequently revived, no presentation or rejection of the claim is necessary, and that the action may proceed to final judgment upon the cause of action as stated against the deceased, provided the petition stated facts sufficient to constitute a cause of action against the intestate.

We are supported in this view of the law by the 8th N.P. (N.S.), at 629, and by the case of *Mussers' Executors* v. *Melvina Chase,* 29 O. S., at 577 and 586.

For the error of the court in sustaining this demurrer, the judgment of the court of common pleas is reversed, and this cause is remanded for further trial and proceedings according to law.

DETACHMENT OF LANDS FROM A MUNICIPALITY.

Circuit Court of Lucas County.

WILLIAM BAY ET AL v. VILLAGE OF SYLVANIA, AND ERNEST H. CUSHMAN ET AL v. VILLAGE OF SYLVANIA.

Decided, June 12, 1911.

Annexation and Detachment of Territory from a Municipality—Civil Actions—Appeal.

A proceeding to detach unplatted farm lands from a municipality, as provided in Sections 3578 and 3579, General Code, is not a civil action, and is therefore not appealable.

Ray & Cordill and *B. L. Hart,* for plaintiffs.

E. C. Froehlich, contra.

KINKADE, J.; WILDMAN, J., and RICHARDS, J., concur.

Motion to dismiss appeal.

These were proceedings in the court of common pleas under General Code, 3578, 3579, to detach certain farm lands from the village of Sylvania. The court of common pleas found upon a hearing that the lands should be detached as prayed for and judgments were entered accordingly. The village of Sylvania

brings the cases here on appeal, and the plaintiffs in the actions have filed in this court motions to dismiss the appeals on the ground that they are not civil actions, and therefore not actions that can be appealed to this court under General Code, 12224.

The sole question presented here is whether or not this is a civil action and is appealable under the section of the code above referred to.

We think a good deal of doubt has existed among the members of the bar as to whether a proceeding to detach real estate from an incorporated village under General Code, 3578 and 3579, is in fact a civil action. Some appeals have been perfected and heard without the question being raised by either side as to whether the right of appeal existed, and were it not for a decision of the Supreme Court of Ohio, rendered in 1907, to which our attention has been called in this case, the subject would not be free from doubt with us. The case to which we refer is that of *Hicksville* v. *Bricker,* being a decision of the circuit court in Defiance county [unreported]. The decision of the circuit court was afterwards affirmed without opinion by the Supreme Court in *Hicksville* v. *Bricker,* 76 Ohio St., 563.

In that case, like the one at bar, a judgment was entered detaching the real estate from the village as prayed for in the petition and thereafter an appeal was taken to the circuit court, and in that court a motion was filed to dismiss the appeal on the ground that the case was not appealable, not being a civil action. This was the sole question presented to the circuit court, and upon hearing the circuit court dismissed the appeal.

The counsel for the plaintiffs here has secured and presented to us the printed record in *Hicksville* v. *Bricker, supra,* together with the briefs of counsel on both sides, and also a certified copy of the mandate from the Supreme Court, all of which we have examined with care.

General Code, 11237, defining a civil action, was taken from an opinion of the Supreme Court in *Missionary Society* v. *Ely,* 56 Ohio St., 407, and the reply brief in *Hicksville* v. *Bricker, supra,* calls attention specially to this definition given by the Supreme Court, as to what constitutes a civil action. The whole subject was very thoroughly and very ably presented to the Supreme

Court in the briefs of counsel in the Hicksville case. There was but one question in that case, to-wit, the question as to whether a proceeding of this kind is a civil action, and therefore appealable to the circuit court, and the Supreme Court having affirmed the circuit in dismissing the appeal, the decision of the Hicksville case is controlling here, and upon that authority, the motion of plaintiffs to dismiss the appeal in this case must be granted.

RELEASE BY EMPLOYE OF CLAIM FOR INJURIES.

Circuit Court of Hamilton County.

SALENA MAGUIRE, ADMINISTRATRIX, v. CINCINNATI TRACTION COMPANY.

Decided, June 24, 1911.

Release—Effect of, Where Executed by an Injured Employe Who Afterward Died from the Effects of His Injuries—Sections 10770 and 11397.

A release executed by an employe in full for all claims for damages growing out of an injury received by him while in said employment, bars his estate from further recovery in the event of his subsequent death in consequence of said injuries, but leaves intact any claim for loss sustained by the widow or next of kin.

D. T. Hackett, for plaintiff in error.

George H. Warrington, for the traction company.

JONES, J.; SMITH, P. J., and SWING, J., concur.

This action was brought below by plaintiff in error on behalf of the widow and next of kin of Hugh C. Maguire against the Cincinnati Traction Company, defendant in error, for damages on account of the death of said Hugh C. Maguire, which was caused, as alleged in the petition, by the negligence of defendant.

An answer was filed by defendant, one of the defenses therein being that the action is barred for the reason that after the alleged accident upon which the claim of plaintiff is founded, and before his death, plaintiff's intestate, upon payment to him of

the sum of $25 by defendant company, executed and delivered to it a "receipt and release in full of all claims for damages growing out of said accident which he or anyone by, through, or under him might have or assert against said defendant, and that defendant is still in possession of said release."

To this defense a demurrer was filed, which was overruled by the court, and, the plaintiff not desiring to plead further, the petition was dismissed and judgment given in favor of defendant. Plaintiff in error asks for a reversal of said judgment.

The question raised by the demurrer is: Does the release executed by plaintiff's intestate bar a right of recovery for the benefit of the widow and next of kin?

The right to bring an action for wrongful death for the benefit of the *estate* of decedent is given by Section 11397, General Code.

An independent right of action to be brought by the administrator on behalf of the widow and next of kin is given by Section 10770, General Code. The only condition imposed by this section is that the "wrongful act, neglect or default" must have been such as to have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued.

It will be seen that the circumstances of the accident or injury determine the right of such action. We do not think it is within the power of the party injured, by any act of his subsequent to the injury, to bar this action.

The case of *Railway Company* v. *Van Alstine*, 77 O. S., 395, is decisive of the case and clearly establishes the right to maintain an independent action for the beneficiaries named in the statute.

The right of the estate under Section 11397 is barred by the release, and when this case is tried the only ground of recovery will be the loss sustained by the widow and next of kin.

Judgment reversed.

AS TO DAMAGES FOR DELAY IN DELIVERING FIRE ENGINES TO A MUNICIPALITY.

Circuit Court of Cuyahoga County.

THE CITY OF CLEVELAND v. D. CONNELLY, DOING BUSINESS AS THE CLEVELAND STEAM BOILER WORKS.*

Decided, June 26, 1905.

Liquidated Damages—For Failure to Deliver Fire Engines to a Municipality—Can Not be Recovered, When—Indefinite Provisions as to Liquidated Damages—Reasonableness of Amount Fixed—Tests to be Applied as to Amount Claimed on Bond for Faithful Performance—Uncertainty as to whether a Proposition Attached to a Contract Becomes Part of the Instrument.

1. Where the formal contract, entered into by a municipality with a manufacturing concern for a specified number of fire engines, contains no reference to liquidated damages in case of failure to comply with the terms of the contract within the time fixed, but such a provision was written into the blank presented by the successful bidder, and is so ambiguous that it is impossible from the language employed to say that the parties had any definite intent with reference to damages for delay in delivery, an action will lie on the part of the contractor for recovery of the amount withheld on account of delay in delivery, especially in view of the admitted difficulty in determining accurately what amount of damage would be sustained through delay in a cause of that character.
2. The procurement of indemnity against loss from the threatened enforcement of a claim can not, of itself, be considered an admission, or in the nature of an admission, of liability on such claim.

Newton D. Baker, City Solicitor, for plaintiff in error.
Blandin, Rice & Ginn, contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Error to the court of common pleas.

The facts in this case are that on the 6th day of August, 1900, the Cleveland Steam Boiler Works, by D. Connelly, proprietor, entered into a contract with the city of Cleveland to furnish

* Affirmed without opinion, *Cleveland* v. *Connelly*, 75 Ohio State, 590.

seven steam fire engines, five being of the second size and two of the third size, for use in the fire department of the city. The contract was made pursuant to competitive bidding, the advertisement being authorized by resolution of the council passed in June, 1900; the advertisement required bids to be tendered not later than 12 o'clock M., July 12th, 1900, and contained a stipulation that each bid should be accompanied by a certified check on a solvent bank in the sum of $2,000 as a guarantee, if the bid were accepted, that a contract would be entered into, that the performance of the contract would be secured to the satisfaction of the city, and that, in addition to such guarantee, said check should be forfeited to the city as liquated damages for any failure to comply with the terms of the proposal. By resolution of the council, of July, 1900, the bid of the Cleveland Steam Boiler Works was declared the lowest and best bid, and the director of fire service was authorized to enter into a contract with that bidder to furnish the engines. The bid of D. Connelly was then attached to certain specifications and writing, and was signed as a contract. This contract appears as defendant's Exhibit "D," the first page of it being the bid of D. Connelly, the remainder being the rest of the contract. After being duly signed, the contract was certified to by the city auditor, as is required by the Burns law, approved by the board of control and the corporation counsel, and subsequently by the committee on fire, and on the 20th of August, 1900, received the final approval of the council and became a valid and binding contract.

The bidding pursuant to the advertisement, was required to be upon blanks furnished by the board of control, and Connelly's bid, partly printed and partly written, stipulated that the bidder proposes to furnish one or more second and third size steam fire engines, in accordance with specifications and guarantee accompanying the proposal, at Fire Station No. 1, within 210 days after the execution of the contract for the same; that for each day that the contractor shall fail to deliver said engine or engines, within the time specified, it is agreed that the contractor shall pay to the order of the director of fire service of the city, $25 per day as liquidated damages for such failure; and, in the itemized specifications as to price for the several sizes of engines,

that deliveries are proposed to be made, two engines in 120 days, two engines in 160 days, two engines in 200 days and one engine in 210 days.

The contract was made on the 6th day of August, 1900, and the engines were not delivered until the 21st day of May, 1901, fifty-one days over and above the 210 days within which the proposal accepted by the council agreed that they should be furnished. The city of Cleveland thereupon paid the agreed price for the engines, less the sum of $1,275 which it retained as liquidated damages for the delay. Subsequently the council of the city of Cleveland passed a resolution directing the payment of this $1,275 to D. Connelly. It was not paid and suit was brought.

The questions raised on this state of facts are as follows: 1. Is the proposition made by D. Connelly and physically attached to the contract a part of the contract? 2. If the proposal is a part of the contract, is the provision for $25 per day as liquidated damages a provision for stipulated damages or a penalty? 3. Has the council of the city of Cleveland power by resolution to exonerate the plaintiff from the payment of stipulated damages after default in his contract?

It is evident that if any one of these questions is decided adversely to the city, such decision disposes of the whole case. The court below held that the proposition made by D. Connelly and physically attached to the contract, was in law no part of the contract. Passing, however, to the question whether the provision for $25 per day as liquidated damages is to be construed as a provision for stipulated damages, or as in the nature of a mere penalty, as upon a bond given for faithful performance of the contract, the tests applied in such cases are usually these: 1. Is the subject-matter of the contract of such a nature that the actual damages in case of breach will be entirely uncertain and indeterminate? 2. Were damages evidently the subject of calculation and adjustment between the parties at the time the contract was made? 3. Is the stipulation reasonable? 4. What was the intent of the parties? 5. What was the language employed?

Without attempting formally to discuss or apply these tests in their order, we may note some significant facts shown in the

record. The circumstance that the formal contract, as distinguished from the proposition attached thereto, contains no reference to this subject nor any express reference to the paper which does mention it, is itself an indication that the parties did not have the subject of damages so prominently before their minds when they made their agreement as to make it a matter of deliberate calculation and adjustment. Moreover, if the attached paper is properly a part of the contract, the reference therein to the subject of damages is contained in the original form or blank furnished to bidders and not in the portion thereof afterwards filled in. It is a formal provision which does not apply with precision to the plan of installment deliveries which was written into the blank by Connelly when he presented his bid. It is on that account admittedly ambiguous and uncertain. Does it mean $25 per day forfeiture for each engine, the delivery of which is delayed? If so, it is manifestly exorbitant. The city insists that it has adopted the construction most favorable to Connelly. But, suppose he had been in default as to but one engine; or had made some deliveries punctually and had delayed others only until the day for delivering the last engine. If provision is made for some delays and not for others, what reason is there for the distinction? We can not ascertain from the language employed that the parties had any definite intent on the subject. It is true that damages in a matter of this kind are not easily susceptible of ascertainment, but we can not discover, from the contract or from any evidence in the record, that the parties, in order to meet this difficulty, deliberately set about in advance to estimate and adjust the damage to flow from a breach of this contract, and to stipulate and agree formally upon the rule or measure thereof. We think, therefore, that the court below was quite right in holding this action to be maintainable. As there was no attempt to prove actual damages, we do not find it necessary to pass upon any of the other grounds urged as productive of the same result that we have reached on this ground alone.

It is claimed by the city, however, that there was error in the rejection of certain evidence, which it tendered to show that Connelly, by exacting from his sub-contractor a contract similar in this respect to the one in question here, and by claiming there-

under the same rights that the city claims here, has evinced his construction of the contract here to be what the city claims. It is not contended that this evidence of *res inter alios actae* was admissable in order to prevent an unjust result here, but as tending to show how the parties themselves interpreted this contract. We think the evidence was properly excluded. This court has recently held that the procurement of indemnity against loss from the threatened enforcement of a claim can not, of itself, he considered an admission or in the nature of an admission of liability on such claim. The cases are not precisely the same, but a kindred principle applies here. Mutual conduct of parties to a contract may serve to put a particular interpretation upon it. Such, however, is not the case here. We find no error in the record, and the judgment is affirmed.

SUFFICIENT GROUNDS FOR DIVORCE AGAINST AN INSANE DEFENDANT.

Circuit Court of Lucas County.

ELIZABETH WOLCOTT v. ROBERT E. WOLCOTT.

Decided, June 12, 1911.

Divorce—Habitual Drunkenness and Extreme Cruelty Sufficient Grounds for Divorce Against an Insane Defendant—Where the Cause of Action Accrued Before Insanity Intervened—Appeal from Dismissal of Divorce Petition—Section 12002.

1. A petition for divorce states sufficient grounds for a decree against an insane defendant, where habitual drunkenness and extreme cruelty are charged as continuing for more than three years prior to the adjudication of the defendant as insane and his commitment to an asylum for the insane.
2. Appeal, but not error, lies to an order vacating the appointment of a trustee for an insane defendant in a divorce proceeding and dismissing, without hearing on the merits, a petition which charges statutory grounds for divorce which accrued prior to the adjudging of the defendant as insane.

Earl L. Peters, for plaintiff in error.

KINKADE, J.; WILDMAN, J., and RICHARDS, J., concur.

Error from common pleas.

This was an action for a divorce in the court of common pleas. The petition set forth as grounds for the divorce, extreme cruelty and also habitual drunkenness on the part of the defendant for more than three years prior to March 9, 1901, and stated that these grounds arose while the defendant was sane. The petition further stated that the defendant was, on March 9, 1901, duly and legally committed to the Toledo State Hospital for the Insane at Toledo, Ohio, by the probate court of Wood county, Ohio, as an insane person and that he has ever since been insane, and since 1901 has been continuously confined in said asylum, and that at the time of the filing of the petition the defendant was incurably insane.

On motion of the plaintiff a trustee was duly appointed by the court of the common pleas to represent the defendant in the action, and the trustee filed an answer.

When the case was called for hearing in the court of common pleas the trial judge was in doubt (so we are informed by counsel for plaintiff) as to the right of the plaintiff to maintain an action for divorce against one then insane, and yet the court was not disposed to enter judgment against the plaintiff in such form as to deny plaintiff the right to review, on appeal, that question in this court. The common pleas court vacated its order appointing the trustee, as having been made without authority of law, and then dismissed the petition, stating in the entry that such dismissal was without any hearing on the merits and was based solely on the statement in the petition that the defendant was an insane person. The plaintiff appealed the case to this court and also filed a petition in error here.

The statutes of Ohio never contained any provision authorizing proceedings in error to review a decision of the court of common pleas entered in a divorce case. The courts have uniformly held that no such right of review on error exists in Oho.

I read from the case of *Parish* v. *Parish*, 9 Ohio St., 534, the paragraph of the opinion of the court found on page 538:

"The statute of March 14, 1843, conferring jurisdiction in divorce cases upon the courts of common pleas, which was in

force when these proceedings were had, provides that 'no appeal shall be obtained from the decree, but the same shall be final and conclusive' (Curwen, 991). This statutory provision is nothing more than a legislative recognition of the principle of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well being of those who innocently relying upon the stability of a decree of a court of competent jurisdiction, have formed a connection with the person who, wrongfully perhaps, procured its promulgation."

This case was followed by the Supreme Court in the case of *Mulligan* v. *Mulligan*, 82 Ohio St., 426.

This court passed upon this question in the case of *Clowry* v. *Clowry*, 16 C. C., 302. The opinion is by Judge Scribner, and upon a full examination of all the cases in Ohio the right to prosecute error in divorce cases is denied. We find some statements in the opinion concerning the right of appeal which were unnecessary in deciding the error case then before the court (there being no question as to the right of appeal then before the court), in which we do not concur.

The court of common pleas was given jurisdiction in matters of divorce and alimony, concurrent with the Supreme Court, by the act of March 13, 1843, and by Section 3 of that act all right of appeal was denied and the decree was declared final and conclusive. 2 Curwen's Statutes, Chap. 466.

March 11, 1853, the law of divorce and alimony was again amended, and while Section 16 of that act denied all right of appeal, Section 17 provided for an appeal under certain conditions named in 3 Curwen's Statutes, Chapter 1252, Section 11.

The law was again amended April 15, 1857 (54 O. L., 131). This act gave the right of appeal under certain conditions, one being where a petition is dismissed without a hearing on the merits, and also provided for an appeal in any case from that part of the decree relating to alimony only.

These two provisions for appeal, when a petition is dismissed without a hearing on the merits, and from that part of the de-

cree pertaining to alimony alone, have been in the statutes ever since 1857, the different acts being but slightly different in form.

The provisions of the present General Code on this subject will be found in Section 12002, which reads as follows:

"No appeal shall be allowed from a judgment or order of the common pleas court under this chapter, except from an order dismissing the petition without final hearing, or from a final order or judgment granting or refusing alimony, or in cases under the next preceding section. When judgment is rendered for both divorce and alimony, the appeal will lie only to so much of the judgment as relates to the alimony. When an appeal is taken by the wife, she shall not be required to give bond."

Plaintiff's petition having been dismissed without a hearing on the merits, he is properly here on appeal, presenting for our determination the question whether his petition should have been so dismissed.

We are of the opinion that the petition states grounds sufficient for the granting of the divorce, it being stated in the petition that the statutory grounds therein set forth arose prior to the insanity of the defendant. It is not claimed that the insanity itself is a ground for the divorce.

The order of the court of common pleas appointing a trustee to represent the defendant was properly made, and should not have been vacated.

The appeal case will be remanded to the court of common pleas for further proceedings according to law.

The petition in error will be dismissed for want of jurisdiction.

DAMAGES FOR WRONGFUL DEATH OF A CHILD.

Circuit Court of Lucas County.

THE TOLEDO RAILWAYS & LIGHT COMPANY v. CORNELIUS WETTSTEIN, ADMINISTRATOR. *

Decided, February 24, 1908.

Child Run Down by Street Car—Weight of Evidence as to Negligence of Motorman—Unprejudicial Errors in Charge of the Court—Mistake in Statement by the Court as to the Number or Identity of Beneficiaries Not Material.

1. Running down a six-year-old girl, who fell upon the track 150 to 200 feet ahead of a street car, before she could recover from her fall, indicates negligence in operation, either in running the car at a reckless rate of speed, or inattention on the part of the motorman if he was running at reasonable speed; and proof that he did not cut out the power or apply the brakes until after passing over the child or until signaled by the conductor to stop at a regular place for passengers to alight, in the absence of a reasonable account by the motorman of the cause of the accident warrants a verdict against the company.
2. The use by the court, in his instructions to the jury as to determination of damages, of the word "peculiar" as applied to injury resulting from the death of a six-year-old child by negligence, where qualified or defined in other parts of the charge relating to the same subject as "pecuniary" injuries, is not necessarily or presumably prejudicial.
3. Under Revised Statutes, 6135 (General Code, 10772), prescribing the bringing of actions for death by wrongful act, the apportionment of damages therefor is of no concern or interest to the negligent party against which damages are recovered; and it follows, therefore, that an instruction to the jury in such a case to take into consideration the money value of the services of a child to the father, mother and next of kin, although erroneous as to the "next of kin," is not prejudicial in that nobody but the father, and in some contingencies, the mother, have any pecuniary interest in such services. The jury should allow the full value for such services, and it is not to be supposed that in apportioning the damages they

* Affirmed, without opinion, *Toledo Railways & Light Co.* v. *Wettstein, Admr.*, 79 Ohio State, 439.

would multiply the value of the services by the number of beneficiaries.

4. A verdict of $1,000 for the death of a six-year-old girl, large of her age and bright and active, and a helper in a large family of moderate means where all were expected to assist, is not excessive.

Smith & Baker, for plaintiff in error.

O. W. Nelson, contra.

PARKER, J.; WILDMAN, J., and HAYNES, J., concur.

This action in the court below was by the defendant in error against the plaintiff in error and was for damages on account of the death of Louisa Wettstein, caused, as alleged, by the negligent action of the motorman of the Toledo Railways & Light Company, in running a car whereby it ran down Louisa Wettstein and killed her. She was a child about six years of age. She appears to have been large of her age and bright and active, and as a helper in the family, which was a family of moderate means, where all helped—as helpful as could be expected of a child of her age. The jury found that the defendant company was guilty of negligence as charged and brought in a verdict in favor of the plaintiff for one thousand dollars. It is urged that this verdict is against the weight of the evidence, that it is excessive, and that there is error in the charge of the court—those are the principal errors relied upon by counsel for the plaintiff in error in argument in this court.

I shall not take time to discuss the facts. We have examined the case carefully and we conclude that the evidence warrants the verdict; that it fairly appears from this evidence that the motorman was negligent, either in running his car so fast that he could not bring it to a stop after he saw the child on the track —although the child was far enough away so that he could have stopped if he had been running his car at a reasonable rate of speed in the city. (In other words, if he saw the child and attempted to stop the car, the accident then must have been due to the fact that he was running at a reckless rate of speed in a city street, and, therefore, was not able to stop his car in time.) Or he must have been negligent, and the jury must have found

that he was negligent, in that he was inattentive and did not observe the child upon the street. The testimony tends to show that the child was crossing over the street and fell down upon the car track, anywhere from 150 to 200 feet in advance of the car, and that the car came on at a rapid rate of speed, and before the child could recover, regain her feet and get off the track, the car struck and crushed her. The evidence tends to show that the motorman did not cut out the power and apply the brake until after the child was struck or about the time the child was struck.

We think it was a fair inference from all the evidence in the case that the motorman did not in fact see the child on the track before it was struck—that he was not aware that anything unusual had occurred until after he had passed over the child. About that time he cut out the power and applied the brakes, but this appears to have been done in pursuance of a signal from the conductor to stop, that a passenger might alight, and he in fact stopped his car at the regular place of stopping after crossing over the street beyond where the child was struck and at which crossing the conductor had signalled him to stop the car. Upon one or other of these theories his action may be explained, and upon either theory, he was guilty of negligence. We think the account of the motorman of how the accident occurred, is not such a reasonable account as should control a jury. The jury evidently did not place much reliance upon it, and we think they were warranted in not placing reliance upon it. So that we find that the verdict is not against the weight of the evidence; we think that it is fairly supported by the evidence; and it does not appear thus to be excessive.

The complaint of the charge has reference to what the court said about the measure of damages, or as to the grounds and accounts upon which damages sometimes may be allowed. I will read that part of the charge:

"The statute provides that in every action the jury may give such damages, not exceeding in any case ten thousand dollars, as they may think proportioned to the peculiar injury resulting from such death to the persons respectively for whose benefit such action shall be brought."

Complaint is made of the use of the word "peculiar." We think it quite likely that that is a typographical error; but it stands in the record and we must regard it as a part of the language used by the court. But it is not apparent to us that, if there is any error in this, it could have been prejudicial to the plaintiff in error. The court proceeds to point out more particularly what the injury is on account of which damages may be allowed, and therefore, if the word "peculiar" required any definition or explanation, the jury might have found it in the language of the court. The court proceeds:

"The persons in this action for the benefit of whom this action is brought are the father, the mother, the brother and the sisters. They are the next of kin. The jury may give such damages as they think proportioned to the pecuniary injury resulting from such death."

Now that appears to have been written by the typewriter "peculiar" and changed to "pecuniary," and where the word "peculiar" occurs above, perhaps it should be changed also. The court now says:

"The pecuniary injury resulting from such death is the money value of the services of the little girl to the next of kin, the father, mother and next of kin. This would exclude generally all damages in the way of the mental pain and suffering over the death of the little girl and it would exclude all damages in the way of punishment of the defendant. There is no claim here that the motorman willfully and wickedly ran into and killed the little girl. The only claim is, he negligently killed the little girl and there should be no damages in the way of punishment to the defendant, for any acts of the motorman or as a warning to other motormen, but whatever after consideration of the age of the little girl and her health and expectancy of life and the uncertainty of life. The fact that when she reaches a certain age she might have a family of her own. Take into consideration all the facts and circumstances and then award such judgment and such value as you deem proportioned to the pecuniary injury resulting from her death, the money loss."

Now we think it was made entirely plain to the jury that there was nothing to be added on account of some further *peculiar* in-

jury that the court had not explained to the jury, but he says, and puts it very definitely and clearly, that it is only this *pecuniary* injury that is to be considered.

But complaint is made of this charge because it has said to the jury that they are to take into consideration the money value of the services of the little girl, to the next of kin—to the father and the mother and the next of kin; and it is said—and it is doubtless true—that at the time of the death of the little girl nobody had any pecuniary interest in her or her services but the father, and in certain contingencies, the mother might have had, but the next of kin, the brothers and sisters, could not have had, in any event, any interest in the services of the little girl; they were not entitled to her services; but the father was entitled to all her services until she reached her majority, and since he he was entitled to all of her services, and therefore was entitled to have a verdict returned for the full value of her services as they might be estimated by the jury, we can not see that any prejudice resulted to the plaintiff in error from the suggestion that the brothers and sisters might be entitled to participate in this recovery. The jury could allow no more than the value of the little girl's services; they could not multiply the value of her services because that value might have been supposed by them to be something to be divided amongst many persons; it would be the value of her services, no more and no less, whether received by the father or the father and mother or by them and others. The court was evidently in error in the suggestion that the others of the next of kin would be entitled to participate in the recovery, but as I have said, we can not see that this was prejudicial to the plaintiff in error. The jury had nothing whatever to do with the apportioning of the damages among the next of kin in whose behalf the suit was brought. The court of common pleas had nothing to do with it. The statute allowing the right to recover provides that it shall be done by the probate court. Section 6135, Revised Statutes (General Code, 10772) reads:

"Every such action shall be for the exclusive benefit of the wife or husband, and children, or if there be neither of them, then of

the parents and next of kin of the person whose death shall be so caused."

And it states how the suit shall be brought and that the damages shall not in any case exceed $10,000, or such amount as the jury "may think proportioned to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought." And further along in the section it provides that the amount of the recovery, whether received through a suit or settlement, "shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates, left by persons dying intestate." How this amount shall be divided, whether the father shall waive his right and allow some part of it to go to others, next of kin, is a matter of no concern or interest to the plaintiff in error. The suit might well have been brought perhaps without mentioning any others of the alleged beneficiaries than the father, if it turns out from the evidence that he was the only one really entitled to the avails of the judgment.

Finding that there was no prejudice in the erroneous statement or suggestion, there is, therefore, no ground for reversing the judgment. We find no prejudicial error such a would justify a reversal of the judgment and therefore it will be affirmed.

LIABILITY OF MUNICIPALITY FOR FAILURE OF CONTINUOUS WATER SUPPLY.

Circuit Court of Hamilton County.

THE CITY OF CINCINNATI v. GEORGE & ALLAN.

Decided, June 21, 1911.

Municipal Corporations—Loss to Florist Through Failure of Water Supply—City Held Liable as for Negligence.

A municipality is liable to a consumer of water for damages sustained by reason of failure of the water supply, where the failure occurs without excuse; and a failure due to the turning by an employe of a wrong valve in an effort to stop a leak is without excuse and renders the municipality liable as for negligence, without regard to the question whether the contract between the city and the consumer guarantees or implies a continuous supply.

Geoffrey Goldsmith, for the city.
Littleford, James, Frost & Foster, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

Counsel for plaintiff in error asks for a reversal of the judgment entered by the court below in the above case upon the ground that no negligence was proven against the city of Cincinnati.

The negligence complained of in the petition is that the city turned off its water valve in Edwards road, near Madison avenue, thus cutting off the water supply to defendants in error's plant and causing the freezing of their flowers in their greenhouses.

We think the evidence, both direct and circumstantial, when taken together, is sufficient to sustain the verdict and judgment of the court below.

Upon the question of contributory negligence, the jury in answer to special interrogatories found that at the time of the accident the boilers of George & Allan were in proper condition, and further, that if they were not in proper condition, then that this improper condition did not contribute to the accident.

Counsel for plaintiff in error argues that the evidence does not show that the valves at Edwards and Madison roads were turned off by the water works department. We think, however, that this view can not be maintained. The fact remains that for some hours after the leak in the water main had been discovered the water supply of George & Allan's plant was not diminished and it is reasonable to assume that it would have so continued notwithstanding the leak unless the valve on the main that furnished them with water was turned off, and the entire evidence, including that which is circumstantial, would seem to bear out the contention of defendants in error, that the Edwards road valve was closed, the closing of which was the proximate cause of the damage to defendants in error.

These questions were left to the determination of the jury under a proper charge of the court and we see no reason to disturb the finding.

Argument was made to the court on the matter of contract between the city and George & Allan as to whether the former guaranteed a continuous supply of water or an implied warranty for such supply. We do not deem it necessary to consider this question for the reason as stated in the case of *Watson* v. *Needham*, 161 Mass., 406. Whether there was a contract or not in this regard, the question to be determined is, was the city negligent in its duty to defendants in error in depriving them of their supply of water without any reasonable excuse therefor.

Under the entire evidence we feel that the conclusion of the jury was correct in this respect, and finding no error in the record the judgment will be affirmed.

INJURY FROM AN UNGUARDED BUZZ SAW.

Circuit Court of Lucas County.

MILBURN WAGON COMPANY v. ROY GAWRONSKI.*

Decided, June 6, 1908.

Safeguarding of Machinery—Pleading Statute Relating to, Not Necessary to Render Same Available—Evidence of Defective Guard Sustains Allegation of Absence of Guard—Assumption of Risk Not a Defense—Knowledge of Absence Need Not be Pleaded—Remaining at Work Not Contributory Negligence, When—Master and Servant—Sections 1027 and 6242.

1. Under the liberal practice of this state, an action for personal injuries based upon an alleged failure to guard a buzz saw as required by statute, although not specifically designating the particular statute, may be brought under Section 4364-89c, R. S. (Section 1027, General Code), providing for the boxing or guarding of certain machinery, including saws; or under Section 4238o, R. S. (Section 6243, General Code), relating to employer's liability for defective machinery; or under both statutes, if either or both support the action.
2. An allegation in a petition charging failure to guard a saw as required by statute is sustained by evidence that the guard supplied was ineffective—in this instance a board eight inches wide, four feet long, on the end of which was attached a heavy piece of belting, more particularly designed to keep sawdust out of the operator's eyes.
3. Assumption of risk by an employe can not be interposed as a defense to an action for personal injuries based upon the failure of the employer to guard machinery as required by statute, notwithstanding the employe continued at his work with knowledge that the machinery was not so guarded. Such statutes are enacted, not only for the protection of the individual working man, but for the protection and good of the whole community, and the benefits arising therefrom can not be frittered away by contracts between individuals.

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* Affirmed without opinion, *Milburn Wagon Co.* v. *Gawronski*, 81 Ohio State, 565; former judgment adhered to on rehearing, 82 Ohio State, 421.

4. The provision of Section 4238*o*, R. S. (Section 6243, General Code), excluding the defense of assumed risk in actions for personal injuries resulting from failure to guard machinery, creates no new cause of action, but simply operates to modify the requirements of pleading and evidence and amount of recovery. Hence, knowledge of absence of necessary guard and continuing at work notwithstanding such knowledge need not be pleaded in order to avail an employe of its protection.
5. An instruction to the jury "that the mere fact that the plaintiff knew that the top of the saw in question was not completely covered, and continued to work with it in such condition, is not evidence of contributory negligence on his part," does not imply that the jury should disregard such facts, but that standing alone they are not sufficient to justify a finding of contributory negligence; and in view of the fact that the question of contributory negligence is safeguarded in this case in two special requests and the general charge, such instruction is not so far erroneous as to justify a reversal. (Kinkade, J., dissents.)

W. H. McLean, for plaintiff in error.
C. A. Thatcher, contra.

PARKER, J; WILDMAN, J., concurs; KINKADE, J., dissents.

The action in the court of common pleas was by Gawronski, through his guardian, against the Milburn Wagon Company, to recover on account of injuries he received to his hand while working for the wagon company at a buzz saw, which injuries he alleged were due to the negligence of the wagon company, and especially in not guarding the saw as required by statute. The answer denied negligence, and alleged that the plaintiff's own negligence contributed to the injury. The cause was tried and submitted to a jury, which brought in a verdict for $2,000, in favor of the plaintiff, upon which judgment was entered.

It is contended by the Milburn Wagon Company that many prejudicial errors occurred during the progress of the cause through the court of common pleas. We can not take up all the alleged errors in detail, but we will make some mention of, and comment upon, those which appear to us to be the most material and worthy of attention.

Section 1 of act 94 O. L., 42 (R. S., 4364-89*c*; General Code, 1027), contains provisions requiring the boxing or guarding of

certain kinds of machinery when in use in workshops and in factories, and among the machines to be guarded are saws. I read a portion of that section:

"Owners and operators of factories and workshops, which terms shall mean all manufacturing, mechanical, electrical and mercantile establishments, and all places where machinery of any kind is used or operated, shall take ordinary care, and make such suitable provisions as to prevent injury to persons who may come in contact with any such machinery, or any part thereof; and such ordinary care and such suitable provisions shall include * * * the guarding of all saws and other wood-cutting and wood-shaping machinery," etc.

Section 2 (R. S., 4364-89*d*; General Code, 1028) provides a penalty for the violation of any of the provisions of the foregoing section.

Act 95 O. L., 114 (R. S. 4238*o*; General Code, 6242), provides that:

"An employer shall be responsible in damages for personal injury caused to an employe, who is himself in the exercise of due care and diligence at the time, by reason of any defect in the condition of the machinery or appliances connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to the negligence of the employer, or of any person in the service of the employer, entrusted by him with the duty of inspection, repair, or of seeing that the machinery or appliances were in proper condition."

The petition does not charge the violation of any specific statute, that is to say, it does not disclose, by mention thereof, the particular statutes upon which the plaintiff relies. It is said by the plaintiff in error that the plaintiff in this case relied upon R. S., 4238*o*. We find nothing in the record, however, disclosing that his reliance was upon that statute, and in argument here, and in his brief, he seems to rely upon both the statutes that I have mentioned and from which I have quoted—and I may say in passing, that we can see no reason in the circumstances of the case why he may not do so, why the judgment, if it is to be supported, may not receive support from the one statute as well from the other, or from both, if either or both lend support to it.

In the case of *Krause* v. *Morgan,* 53 Ohio St., 26, an action founded upon the alleged negligence of a mining company for injuries to a servant arising out of violation of a duty both at common law and under the statute, this was said, page 30:

"The defense was a denial of negligence and omission of duty, and that the injury occurred by reason of the willful negligence of plaintiff after being warned not to enter the part of the mine where the explosion occurred. Plaintiff, by reply, denied the warning and the negligence.

"Under the construction given the petition, the plaintiff was permitted, against the objection of defendants, to introduce testimony tending to show what would be proper practice in operating mines in that vicinity independent of the statute. To rebut this, the defendants, against objection of plaintiff, were permitted to offer proof showing the ordinary and general practice in mines in the vicinity in the respects referred to. We need not take the trouble to determine whether or not the liberal construction given the pleading by the trial court was correct. Clearly, it would have been proper practice to embrace both charges in the petition, and, inasmuch as the plaintiff sought to try his case upon that theory, and could, if necessary, have amended the pleading to meet the facts, he ought not to be heard to object to testimony in contradiction of the case he had thus voluntarily made. We think the testimony offered by the defendants was competent."

Of course the precise question as to the form of objection raised by the pleading is not the question presented here, but this opinion illustrates the view of the court that under our liberal practice the case could be tried upon both theories. It seems to us from an examination of the statutes, however, that the section which is applicable here, is the one from which I first quoted, R. S., 4364-89*c,* and that the petition in charging the violation of duty adopts in a measure the language of this statute requiring the taking of ordinary care to "make such suitable provision as to prevent injury to persons who may come in contact with any such machinery, or any part thereof."

The petition charges that the saw was not guarded, so that the person attempting to operate the same would be in danger, etc. It is said, however, that the evidence does not support this case as stated in the petition; that the evidence discloses a case,

if any case at all is made against the plaintiff in error, of a defective machine or appliance provided against by R. S., 4238*o*. The alleged fault here was a failure to have a guard over the saw. It appears that hanging in front of the saw, that is, between the operator and the saw, was a board eight or ten inches wide and perhaps four feet high, that came down close to the table through which the saw ran and upon which the lumber to be sawed was laid and moved, and that from the end of this board there was a piece of heavy belting extending down quite to the table or nearly to it, and it is said that this was a guard within the meaning of the statute, and that, therefore, this is not a case where there was no guard, but a case where there was a guard, but perhaps a not entirely effective one. A reading of the record leaves some doubt as to whether this was ever designed as a guard to protect the operator, further than to keep the sawdust from the saw from flying in his face and eyes and bothering him about his work. But whether it may be regarded as a guard or not, we think that, nevertheless, the plaintiff contending that it was not a sufficient guard might therefore contend that it was not a guard that complied with the statute, was not a guard in the furnishing of which the obligation resting upon the employer under the statute was discharged; that he might well allege the absence of the guard required by law, and that the fact that it appeared that there was some pretense of a guard would not defeat his recovery, or would not make the cause as presented by the evidence so different from the cause presented by the pleadings as to amount to a material variance; and certainly, under the circumstances of this case, it can not be pretended that this could have been misleading or in any way prejudicial to the plaintiff in error.

A great deal of the controversy in this case centered about the question whether the employe remaining in the employment, remaining at his work with knowledge that the machine was not guarded as required by law, assumed the risk and hazard of continuing his work there, so that no cause of action could arise in his favor on account of injuries received in consequence of the saw being unguarded; or, to state it in another way, so that

the contention that he assumed the risk and hazard could be interposed as a defense to his recovery.

The prayer in the petition was for a judgment of $15,000 R. S., 4238*o* (General Code, 6242), was invoked on behalf of the plaintiff below in answer to this contention, and, besides, it was urged that independently of the provisions of this section of the statute, the doctrine of assumed risk did not apply to such a situation as was here presented.

The view of this court upon a case of like character, *Ziehr* v. *Paper Co.*, 28 O. C. C., 342 (7 C.C.[N.S.], 144), involving this statute in which this question was raised, was expressed by Judge Hull, and it was there held, as expressed in the fourth clause of the syllabus, which I read:

"At the common law, a servant continuing to use dangerous machinery without objection on his part or promise to repair on the part of the master, was held to have assumed the risk thereof; under the statute, however, which requires certain machinery to be covered, and makes it negligence on the part of the master if it is not, a servant will not be held to have assumed the risk thereof so as to bar a recovery, unless he be guilty of contributory negligence."

The words "unless he be guilty of contributory negligence" might well have been omitted, because the court was considering the question whether there was an assumption of the risk, and to mix up with the question of contributory negligence has a tendency to confuse. I want to say with respect to this report that it was published after the death of Judge Hull; that he never had an opportunity to revise it and it contains some clerical and some typographical errors that would have been corrected no doubt had he been afforded an opportunity to examine the proof. But the substance of the decision can not be mistaken.

Now, in support of the contention that the doctrine of assumed risk applies, notwithstanding this penal statute, the alleged violation of which forms the basis of the claim for recovery, counsel for the plaintiff in error has cited the case of *Krause* v. *Morgan, supra,* and the case of *Hesse* v. *Railway,* 58 Ohio St., 167, and some other decisions by the Supreme Court, and, besides,

the case of *Johns* v. *Railway,* 3 C.C.(N.S.), 545, which was affirmed by the Supreme Court, without report, *Johns* v. *Railway,* 69 Ohio St., 532.

A reading of the opinion of Judge Hull will show that this court considered most of those cases, and I think all of them. Most, if not all, are commented upon. The one especially relied upon before us, in the case of *Ziehr* v. *Paper Co., supra,* was the case of *Krause* v. *Morgan, supra,* and it was urged that it had been therein distinctly held by the Supreme Court that the doctrine of assumed risk still obtains in Ohio, even where statutes of this character are invoked; but Judge Hull undertook to point out, and we think he did it very successfully, that the real question involved in that case was one, not of assumption of risks, but of contributory negligence, and in this attempt he had the assistance of a decision by Judge Taft of the United States Circuit Court of Appeals, *Narramore* v. *Railway,* 96 Fed. Rep., 298, from which he made certain quotations. I mean that he had this assistance, not only in distinguishing the case of *Krause* v. *Morgan, supra,* as not being a case founded upon the doctrine of assumption of risk, but he also had its support to the contrary doctrine; that is to say, that the doctrine of assumption of risk could not be invoked in the face of a violation of a statute of this character.

Quoting from *Narramore* v. *Railway, supra,* Judge Taft says, page 11:

"The doctrine of the assumption of risk rests really upon contract; the only question remaining is whether the courts will enforce or recognize as against a servant, an agreement express or implied on his part, to waive the performance of a statutory duty of the master, imposed for the protection of the servant, and in the interest of the public, and enforcible by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal, in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract, and it would entirely defeat this purpose thus to permit the servant to 'contract the master out' of the statute. It would

certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that."

There is another consideration that I think is taken up in the decision by Judge Taft—I know it is in some of the cases—and that is that these statutes are passed, not only for the protection of the individual working man, but they are passed for the protection and the good of the whole community, and it need not be argued at length, nor enforced by illustrations, that the whole community is interested in the physical health and welfare of each individual, pecuniarily and selfishly interested therein, putting it upon no higher ground, and that it would not do for the benefits to the public sought to be secured by statutes of this character to be frittered away by contract between individuals.

But, as I have said, the views of this court upon this subject are expressed in that opinion, and the court as at present constituted feel disposed to adhere to that decision until a higher authority shall direct a different course.

This case of *Johns* v. *Railway, supra,* was decided at an earlier period. I do not remember whether Judge Hull takes notice of it in his opinion, but I know that it was under consideration, and it seems that the court which announced that decision, the Circuit Court of the Eighth Circuit, felt impelled to do so by its understanding of the decision of *Krause* v. *Morgan, supra,* and not because it was quite satisfied with the doctrine of the case. Judge Marvin, in delivering the opinion, says, page 443:

"The opinion in this case, by Judge Spear, I will not stop to read. It sustains this proposition: That, although the railroad company is in violation of this statute, still one who is in the employ of the company, and knows all about such violation, must be held to have assumed the risk. However hard that doctrine may seem, it seems to be the doctrine of the Supreme Court of Ohio."

I read an earlier paragraph:

"In *Valley Ry.* v. *Keegan,* 40 Bull., 167, Judge Taft of the federal circuit court delivers an elaborate opinion, holding that

one violating a statute in the prosecution of its business, can not avail himself of his employe assuming the risk that comes from the violation of that statute. Judge Taft makes an argument which, to me, is very satisfactory, but is not so to our Supreme Court, which holds directly opposite."

Our view of the matter was that our Supreme Court had not held "directly opposite," but that its decision had been misunderstood by the circuit court of the eighth circuit. The case of *Ziehr* v. *Paper Co., supra,* went to the Supreme Court, but it was settled out of court, so we never had the judgment of the Supreme Court upon it.

Now, holding this view, to discuss the possible effect of act 97 O. L., 547 (R. S., 4238*o*-1; General Code, 6243), seems somewhat like discussing a moot question, for if the doctrine of assumption of risks did not apply at all, it was not necessary to invoke R. S., 4238*o*-1. This section has no effect on the matter at all. It was a sort of work of supererogation upon the part of the Legislature. But assuming that this statute was necessary for the purpose of affecting this question of assumed risk as it applies to the case at bar, we come to consider the question whether it may be invoked and whether it may be applied in this case.

This statute was passed after the decision by the circuit court of the eighth circuit cited *supra.* It seems to have been in force when *Ziehr* v. *Paper Co., supra,* was before this court, but no heed was given to it, and it probably had no application to the case being presented to the court. It was not in force when these decisions of the Supreme Court which are cited to us were decided, or at least when the causes of action in those cases arose. In other words, what the Supreme Court was considering was the question independent of this statute. But now it is said to us, on behalf of the defendant in error, that "even if we are not right about the doctrine independent of the statute, here is the statute for his protection," while, on the other hand, the plaintiff in error urges that he may not avail himself of this statute because he has said nothing about the statute in his pleading, he has not invoked it, and he has practically abandoned it or rejected it by asking for $15,000, whereas the statute applies only to cases where but $3,000 may be recovered on account of

a personal injury, or $5,000 on account of a death. In other words, the statute steps in to modify or affect the doctrine of assumed risks only as to a limited amount of recovery. We think of this statute, as we remarked of the others, that it need not be specifically mentioned in the pleadings, in order that it may be invoked, or in order that the party may avail himself of its provisions. We do not regard it as a statute which creates a new cause of action in favor of the person injured. The cause of action is the ordinary one, sounding in tort, and the action to recover on account of an injury arising through negligence. The statute operates upon the case so as to, in effect, modify the requirements as to pleading and evidence, and to modify the rights as to amount of recovery.

Act 97 O. L., 547 (R. S., 4238*o*-1), reads:

"In any action brought by an employe, or his legal representative, against his employer, to recover for personal injuries, when it shall appear that the injury was caused in whole or in part by the negligent omission of such employer to guard or protect his machinery or appliances, or the premises or place where said employe was employed, in the manner required by any penal statute of the state or the United States in force at the date of the passage of this act the fact that such employe continued in such employment with knowledge of such omission, shall not operate as a defense; and in such action, if the jury find for the plaintiff, it may award such damages not exceeding, for injuries resulting in death, the sum of five thousand dollars, and for injuries not so resulting, the sum of $3,000, as it may find proportioned to the pecuniary damages resulting from said injuries; but nothing herein shall affect the provisions of R. S., 6135 (General Code, 10772, 10773). Nothing herein contained shall be construed as affecting the defense of contributory negligence, nor the admissibility of evidence competent to support such defense."

Had the recovery been for more than $3,000, then the question would be presented whether the plaintiff might not even then come in and enter a remitter for all in excess of $3,000, and so save the judgment under the statute.

Here the evidence disclosed that the employe, the plaintiff below, was well aware that the machine was not guarded, and that he continued at his work notwithstanding such knowledge.

He does not say in his petition that he had such knowledge, but it is open to that construction. We do not think he is required to state specifically in his pleading that he was aware of the absence of a guard in order to bring himself within the provisions of this statute. We do think that the effect of the statute is to modify certain rules of pleading in cases coming within it, particularly the rule of pleading as laid down in *Chicago & O. Coal & Car Co.* v. *Norman,* 49 Ohio St., 598, and *Hesse* v. *Railway, supra,* requiring the servant to allege and show that he did not have knowledge of alleged defects. Such allegation and proof are not now necessary in cases coming within the purview of this statute.

There were a great many requests to charge on behalf of plaintiff below that were given, and that were objected to by the defendant below, plaintiff in error, and requests to charge on behalf of plaintiff in error, that were refused, of which matters the plaintiff in error complains. We can not take them up and discuss them one at a time, but we have to say generally that we find no error in the rulings of the court upon those matters or in the general charge, and that this conclusion naturally follows, as to most of the questions presented, from what we have said in respect to the rights of the plaintiff under R. S., 4238*o*-1, 4364-89*c*.

There is one instruction, however, that was given on behalf of the plaintiff below that has bothered us a great deal, and we are not in entire harmony in our views upon it. One member of the court finds no difficulty in sustaining it, another has finally become reconciled to it, but not very heartily, and another thinks it radically wrong. It is the sixth request given on behalf of the plaintiff:

"The jury is instructed that the mere fact that the plaintiff knew that the top of the saw in question was not completely covered, and continued to work with it in such condition, is not evidence of contributory negligence on his part."

The fourth request given on behalf of plaintiff below, we think correct, and we think it substantially covers the matter of the sixth request, and that it would have been better to have refused the sixth.

The fourth reads:

"The jury is instructed that should you find from the evidence that the plaintiff knew that the top part of the saw was not covered, that fact, of itself, is not as a matter of law proof of contributory negligence on his part in working with said saw."

Perhaps the same thing was meant in the sixth, that is to say, knowledge that the saw was uncovered, and continuing in the work with that knowledge, those facts of themselves would not be sufficient evidence of contributory negligence to defeat recovery by the plaintiff. If that had been given, because of the provisions of R. S. 4238*o*-1, we think it would have been correct.

While the title of this act, as found in 97 O. L., 547, "An act qualifying the risks to be deemed as assumed by employes," and while it has been discussed as if it were an act that dealt only with what is known as assumed risk, as distinguished from contributory negligence, yet upon looking into the statute, it will be observed that it provides distinctly that the fact that the employe continued in said employment with knowledge of such omission shall not operate as a defense; so the fact of continuing at work with such knowledge is not to operate as a defense whether it be regarded as giving rise (in the absence of the statute) to what is known as "assumed risk" technically and distinctively, or whether it be regarded as an act of contributory negligence.

It is conceived that one may enter an employment, or remain in an employment, under circumstances where the hazard is so apparent, where it is so clear, that a man of ordinary prudence would not undertake the risk of the character of the machinery, the character of the place, or defects in the machinery, or other hazard, and that therefore he would be guilty of contributory negligence in so doing, and that that defense might be asserted and maintained quite independently of the doctrine and defense of assumption of risks as distinguished from contributory negligence. But under this statute, no matter whether you should treat the act as coming within the scope of the doctrine of assumption of risk or of contributory negligence, "the fact," the statute says, "shall not operate as a defense." So

that we think it would have been quite right for the court to charge that remaining in the employment with knowledge of the condition would not defeat a recovery even if, independent of the statute, so doing would have amounted to contributory negligence that would defeat a recovery. Under the statute such use might not be made of that fact alone. This charge seems to go beyond that. It seems to be open to the construction that when the jury came to consider the whole case upon the question of contributory negligence, which is an issue in the case, they may or should disregard the circumstance that the plaintiff remained in the employ and at work at this machine, with knowledge that it was not covered, and that if they find facts and circumstances from which they may impute to him contributory negligence, such facts must be sufficient in and of themselves and entirely independent of any consideration of this fact of remaining at work with knowledge of all conditions. If given such construction, we think the charge wrong; but we have concluded that that would perhaps be a strained construction and one which the jury probably did not give it; that it is not meant by such instruction that when they come to the consideration of the question of contributory negligence they are to disregard those facts, but it is simply meant that these facts, standing alone, are not sufficient to justify a finding of contributory negligence. Because of this statute standing alone they are not evidence, certainly not effective evidence, certainly not evidence of any value in law, of contributory negligence. And giving the instruction that construction, and giving further consideration to the fact that in the requests on behalf of plaintiff in error the rights of the plaintiff in error are well safeguarded upon this question of contributory negligence, and that such view is strengthened also in the general charge, we think we should not hold that this instruction is so far erroneous as to justify a judgment of reversal.

On the requests on behalf of the plaintiff in error these charges were given:

"If the jury shall find that the saw was so guarded as to protect a person operating it in the usual and ordinary manner, and that the plaintiff's injury resulted from his operating the

saw in some other manner, your verdict should be for the defendant."

"If the jury find that the plaintiff was injured while reaching with his hand over the saw, and further find that in the exercise of ordinary care and in the ordinary course of operating the saw, the plaintiff would not have placed his hand over the saw and reached over the saw, then your verdict should be for the defendant."

"The jury are instructed, as a matter of law, that it was not the duty of the Milburn Wagon Company to protect the plaintiff against injury which might result to him while operating the saw in a manner other than that usually adopted by ordinarily prudent operators of rip saws."

And also in the general charge:

"You are instructed that it was the duty of the plaintiff, while operating the saw, to exercise ordinary care to avoid injury. Notwithstanding any negligence on the part of the defendant in failing to guard the saw, if you find that it failed to do so, the plaintiff can not recover, if he himself was guilty of contributory negligence; that is, if by his own failure or omission to exercise ordinary and reasonable care while operating the saw, he contributed directly to the injury of which he complains. If you find that the defendant, the Milburn Wagon Company, did not exercise reasonable care in the maintenance and operation of the saw at which the plaintiff claims he was injured, in that it did not properly guard the saw, and if you further find from the evidence that the plaintiff in attempting to operate the saw was injured by reason of the failure of the defendant to guard the saw, and that the plaintiff was exercising reasonable care and caution at the time to avoid injury, then you will find that the defendant is liable and your verdict will be for the plaintiff," etc.

Under the circumstances a majority of the court hold that there is not in the record prejudicial error justifying a reversal.

The judgment will be affirmed.

EXCEPTION TO ALLOWANCE TO WIDOW.

Circuit Court of Ashland County.

IN RE ESTATE OF WM. F. HESS, DECEASED.

Decided, March 22, 1911.

Estates of Decedents—Sale of Property to Pay Debts—Allowance to Widow out of Proceeds—Exception thereto Does not Lie at the Filing of her Account.

Allowances to a widow made in a proceeding to sell real estate belonging to her deceased husband to pay debts, to which no error was prosecuted or appeal taken, can not be collaterally attacked by exception to her account as administratrix of the said estate.

McCray & McCray, for Nettie Kopp, executrix.
Chapman & Taggart, for administratrix.

VOORHEES, J.; SHIELDS, J., and POWELL, J., concur.

On or about February 1, 1910, Lydian Hess, as administratrix of the estate of William F. Hess, deceased, commenced a proceeding in the probate court of this county to sell certain real estate for the payment of debts of said estate, in which proceeding Lydian Hess, James Hess, Roy Hess, Cora Switzer, Nettie Kopp and Christian V. Kagey were made parties defendant.

In this proceeding the said Lydian Hess filed an answer and cross-petition as the widow of said decedent, claiming dower and allowance in lieu of homestead, and setting up her claim to be allowed a lien upon the real estate of said decedent, in the sum of $600 for moneys alleged to have been loaned by her to her husband, William F. Hess, in his lifetime.

Christian V. Kagey, one of the defendants, filed an answer and cross-petition, setting up his certain mortgage for $1,500 with interest from October 1, 1909, upon said real estate.

Such proceedings were had in said court, as that the said real estate was ordered to be sold, by said court, and a finding was made by said court, in favor of Christian V. Kagey, for the

amount of his said mortgage, and said sum of $600 was found to be due the said Lydian Hess from said estate, on account of moneys loaned to her said husband, William F. Hess, during his lifetime, and the same was declared a lien on said decedent's real estate; that the said Lydian Hess was entitled to be paid the sum of $500 for allowance in lieu of a homestead, and that the sale of said real estate was necessary to pay the debts of said estate.

Now, pending these findings, no error was prosecuted or appeal taken, but said findings remain unreversed, and in full force, but when said administratrix filed her account in said probate court, taking credit for said sums so allowed to her, as aforesaid, exceptions were filed to her account, which exceptions were overruled.

Thereupon an appeal was taken to the court of common pleas, and the court of common pleas affirmed the finding of the probate court, and error is prosecuted to this court to reverse the judgment of said courts.

We hold that said finding and judgment of the probate court upon said claims was final, and can not be collaterally attacked by exceptions to the account, after said allowance is made. Therefore, we are of the opinion that the judgments of the probate court and the common pleas court are affirmed with costs, and the said cause remanded to the probate court for execution.

LIABILITY OF MUNICIPALITY FOR CHANGE OF GRADE OF STREET.

Circuit Court of Cuyahoga County.

IRVIN W. METCALF v. CITY OF ELYRIA. *

Decided, April 29, 1910.

Grade of Street—Designation by City Engineer of Grade for Sidewalk—Entitled Abutting Owner to Damages—Where Grade of Street is Subsequently Fixed at a Substantially Different Level.

Where a stone sidewalk has been laid by an abutting owner, pursuant to a resolution of the city council requiring that this be done, and the city engineer at that time designated a grade for the sidewalk as he was required and authorized to do both by the resolution ordering that the sidewalk be laid and also by an ordinance providing that he should determine the grades of city streets and sidewalks, the acts of the municipality amount to such a permanent fixing of the grade of the street as warrants an abutting owner in improving his property in accordance therewith and to recover damages in the event that the municipality subsequently establishes a grade for the street at a substantially different level.

Webber & Metcalf, for plaintiff in error.

H. A. Pounds, contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Error to the court of common pleas.

The parties stand as they stood below. The action below was brought by the owner of property abutting upon West River street in the city of Elyria, for damages alleged to have been sustained by the plaintiff by reason of a change of grade of said street. A verdict for the city of Elyria was directed at the close of the plaintiff's evidence.

Prior to plaintiff's purchase of said premises a stone walk was laid along the street in front of his lot, pursuant to a resolution of the city council requiring the same to be done. At that time the city engineer designated the grade for the side-

* Affirmed without opinion, *City of Elyria* v. *Metcalf*, 84 Ohio State, 501.

walk, as required and authorized not only by the said resolution, but also by an ordinance providing that he should determine the grade of the city streets and sidewalks. The street grade had not, however, been established by any other action of the municipality until July, 1907, when a grade was fixed by the city substantially differing from and out of accord with the grade of the sidewalk as previously established. This action of the city is alleged by the plaintiff to have amounted to a change of grade of the street within the familiar rule, and he therefore seeks to recover the damages which he has admittedly sustained in consequence of such change of grade, if, in contemplation of law, it be a change.

The authorities which the city relies on and on which the court below founded its decision, are: *Neubert* v. *City of Toledo,* 9 C. C., 462; *Taber* v. *Bowling Green,* 7 C.C.(N.S.), 385.

The syllabus of the former case as reported in 9 C. C., 462, and quoted in 7 C.C.(N.S.) 387, contains the following language:

"The fact that a city has left a street for many years with its natural grade, that the public has used the street at that grade for all that time, and that the city has even had sewers laid and sidewalks constructed in such street in that condition does not preclude the city from afterwards finally adopting a different grade for such street, and a property owner has no right to assume that the city has adopted such original grade for the street."

Upon examination of these cases however, we find that the facts are not as in the case at bar such as to compel the inference that the municipality in connection with the laying of a sidewalk had intended to fix or had fixed permanently the grade of the street where such sidewalk was laid. The rule laid down in the second paragraph of the syllabus of the case of *City of Akron* v. *The Chamberlain Company,* 34 Ohio State, 328, and followed in various cases since, is as follows:

"The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or

such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or, where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade."

In the opinion by McIlvaine, J., at page 336, it is said:

"That the establishment of a grade whereby lot-owners are justified in assuming that no change will be made in the grade of a street, and may, therefore, improve their lots with reference to its present condition, so that the municipality will be liable for injuries to their improvements, resulting from a subsequent change of the grade, does not necessarily require the passage of an ordinance or other legislative action; but it may be shown, by the nature of the improvement on the surface of the street, under the direction or sanction of the proper authorities, whether in accordance with an ordained grade line or not; but otherwise, if the surface improvement indicates a mere temporary use or condition of the street."

Not without some hesitancy we are of opinion that the ordinances before referred to and the acts of the city engineer in pursuance thereof at the time the sidewalk in question was laid, amount to such a permanent fixing of the grade of the street as entitled the abutting lot owner to improve his premises in relation to such grade, as was done in this case.

It follows that the court below erred in directing a verdict in behalf of the city, upon the ground that no liability was indicated by the facts in evidence, and the judgment of the court of common pleas is therefore reversed and the cause remanded for further proceedings.

OBJECTION OF ABUTTING OWNER TO TELEPHONE LINE.

Circuit Court of Licking County.

THE JOHNSTON & CROTON TELEPHONE COMPANY v. WILLIAM F. HUGHES.

Decided, September Term, 1911.

Telephone Poles Cut Down by Abutting Owner—Injunction Made Perpetual Against Further Acts of that Character—Rights of the Public in Use of the Line—Abutter Relegated to His Legal Remedy.

Where a telephone line has been erected along a highway by virtue of an express agreement with the grantor of the present abutting owner, injunction will lie against destruction of the line years afterward by the present owner, because of failure of the company to accede to his demand for a large sum as compensation for the increased burden upon his lands arising from the erection of the telephone line.

Kibler & Kibler, for plaintiff.
Fitzgibbon & Montgomery, contra.

BY THE COURT (Voorhees, Shields and Powell, JJ.)

This case comes into this court by appeal from the judgment of the court of common pleas and was heard upon the pleadings and evidence.

Plaintiff in its petition alleges that it is a corporation and as such corporation in the year 1900, under franchises granted to said plaintiff by the village of Johnstown and the county commissioners of Licking county, the said plaintiff constructed a telephone exchange in the village of Johnstown, Monroe township, said county, and also extended country or toll lines therefrom into the surrounding territory and in so doing built a line on the north and south road, which is described as extending along on the east line of lots eight and nine, owned by the defendant, William F. Hughes; that at the time said telephone exchange was established and lines constructed, the said lots eight and nine were owned by one Martha Hughes and others. The said line was

built, constructed and since maintained under and by virtue of an express agreement made between the said plaintiff and the said Martha Hughes and others, previous to the location and construction of said line, by which the said defendant agreed and consented that the plaintiff might locate said line, which consisted of seven poles, cross-arms and wires along said road and maintained same for said purpose as part of said system of telephone communication; and in pursuance of such contract the plaintiff did construct said line as part of its system and extended the same to the north of said farm and beyond the limits of said Jersey township into Monroe township and southwardly below said farm and has since said year 1900 used and maintained the said pole line and appurtenances as a part of said telephone system without any objection, let or hindrance on the part of said Martha Hughes, or any other person, except as hereinafter stated. It then alleges the services furnished by said line and appurtenances to the patrons of said company; that in the year 1907, the defendant received a conveyance from the said Martha Hughes, mother of the defendant, for the said real estate, and at the time mentioned the said pole line and its appurtenances was located upon said highway, and that the defendant had full knowledge and notice thereof, and that the same had been located thereon for many years and was so located by virtue of the contract above mentioned. It then sets out that about the time last mentioned the said defendant without objecting in any way to the presence or maintenance of said line of poles along said highway demanded of the plaintiff therefor compensation; that afterwards the said plaintiff failing to make compensation or conceding the said defendant's right thereto, the defendant threatened and gave notice to the said plaintiff that unless the said plaintiff paid him a large sum of money for the privilege of having and maintaining said pole line along said highway he would destroy said pole line. And that in violation of the property rights of the said plaintiff, and without any right or authority the said defendant has since that time dug up six of said poles and thrown the same upon the ground upon said highway and left the same there, with the cross-arms and wires attached there-

to, and they remained thereon obstructing public travel and liable to produce serious damages and injury to travelers upon said highway; that the digging up of said poles and prostration of said lines has resulted in putting out of service all telephones on said line to the south of said premises, and cut out from service thereover all of the subscribers with whom the said plaintiff is under contract to furnish said service, and has resulted in the violation of said contract by the said plaintiff *ex necessitate*. It next alleges that there was consideration of money, and that the defendant had full knowledge of said pole lines.

It alleges that it has reset said poles in the same location and restored the line to its former use and efficiency, but the said defendant threatens to and, unless restrained by the court, will again remove said poles and attempt to destroy said line, and asks that an injunction be granted restraining and enjoining defendant from in any way removing or disturbing said poles, cross-arms, etc., along or on the highway through the farm of the said defendant in Jersey township, above mentioned, or in any way interfering with the use of said lines. And that, on the final hearing, such injunction be made perpetual, and for all proper relief.

To this petition of the plaintiff an answer was filed in which the defendant admits the corporate capacity of plaintiff and the fact that it is operating a telephone line in the village of Johntown, county of Licking, furnishing telephone connections with the exchanges mentioned in the petition, and as part of its business located a line on the route described in the petition in the year 1900; he admits that he became the owner of the farm in the petition described after the death of said Martha Hughes and that at said time the pole line was located on the highway adjacent to said land; he admits that he dug up the poles adjacent to his property and that since that time the plaintiff has reconstructed said line; and he denies each and every other allegation contained in said petition not herein specifically admitted to be true, and prays that the injunction before that time allowed should be dissolved, and for such other relief as he may be entitled to in law or in equity.

A reply was filed to this answer and an amended and additional reply in which it was alleged that said telephone pole line was so constructed as not to incommode the public and in such a manner as not to discommode or interrupt the access of the said defendant to and from said highway and to his said property. It further alleges that the defendant did not within three months after the erection of said poles, wires and other equipment along said highway, make application to the county commissioners of said county of Licking, alleging any grievance or damage by reason of the construction of said pole line, wires, appurtenances, etc., nor for the appointment of three disinterested persons as appraisers, nor were any appraisers appointed, nor was any appraisement made of any loss or damage claimed to have been sustained by the said defendant by reason of the said line, poles and other equipment, nor were any steps or proceedings taken by the said defendant under the provisions of 3461-2 of the Revised Statutes of Ohio, or at all. And he asks that the said defendant be barred by reason of the statute above quoted from making the said defense or objecting to the present existence, maintenance and operation of said pole line, wires and other equipment for the purposes mentioned in the said petition, and that by reason thereof has now no right to interfere with the location and construction of said pole line.

By its amended and additional reply filed in this court July 29, 1910, it alleges that the said defendant had full knowledge of the erection of said poles, wires and appurtenances along said highway and of the nature and character of the local and long distance business intended thereby to be transmitted and which was actually thereby transmitted over and across said lines, and that between the year 1900 and the time of the commencement of this action he made no objection to the construction, maintenance and use of said wires as aforesaid, and made no attempt to interfere with said construction, maintenance and use, but acquiesced in the same; and plaintiff says that the said defendant is estopped from now objecting to or from now interfering with the maintenance and use of said poles, wires and appurtenances

as aforesaid, and this plaintiff asks judgment as prayed for in the petition.

A temporary restraining order was allowed upon the filing of the petition herein. Afterwards the defendant filed a demurrer to the reply, which demurrer was sustained in the court of common pleas and the petition was dismissed and the case was then appealed to this court, where, at the last term of this court, to-wit, March, 1911, the demurrer to the reply was overruled and the case was heard upon the evidence and tried upon its merits at this term of court.

Upon all the evidence adduced this court is of the opinion that the equities are with the plaintiff, and that the defendant is without any legal right or authority to remove the poles of the plaintiff so placed upon his lands as set out in the petition; that the plaintiff is in the nature of a public service corporation, and that the public have acquired certain rights in the services to be rendered by it which the defendant ought not to be allowed to infringe or trespass upon, and that he has a legal remedy without taking the law into his own hands, as alleged in the petition, and admitted by him in his answer to be true; and that the plaintiff is entitled to the relief prayed for in its petition and that the temporary restraining order heretofore allowed in favor of the plaintiff should be made perpetual, and plaintiff recover its costs against the defendant.

AS TO THE BAR OF A FORMER JUDGMENT.

Circuit Court of Hamilton County.

ADDISON Y. REID ET AL v. GEORGE MATHERS ET AL.

Decided, February 3, 1912.

Adjudicata—Claim Not Heard on Its Merits Not Affected by a Former Judgment—Identity of Claims Set Up in Former Suit.

1. A claim is not barred on the ground of *res judicata* unless such claim has been adjudicated on its merits in the former case.
2. In the trial of an action for money where the defense of *res judicata* is interposed it is proper for the court to admit as evidence so much of the record of the former trial as will aid in the determination of such issue.
3. It appearing from such evidence that, in the former action between the same parties for damages for breach by the lessee of the covenants for the payment of taxes and assessments, judgment was rendered for an amount which included certain items not then due and paid by plaintiff (lessor); and that upon deciding a motion for a new trial, the court, for that reason reduced the judgment to the extent of such unpaid items finding that they were included "by inadvertence" in the judgment entry; and it also appearing that the plaintiff consented to a remittitur of said excess: *Held*, that the judgment is not a bar to an action for recovery of the amount of said assessments thereafter paid.

Horace L. Smith and H. E. Engelhardt, for the plaintiffs in error.

Chas. B. Wilby and *Oliver S. Bryant*, contra.

JONES, J.; SMITH, P. J., and SWING, J., concur.

We think it was proper to admit all evidence in the court below which tended to prove what the entry of April 21, 1903, in case No. 121794 in common pleas court really meant. The former judgment could only be a bar to recovery in case the court in that case decided the claim here sued upon on its merits. It is claimed that this was done; that the court regularly rendered judgment for a sum including the items upon which the petition in this case is based.

The record bears out this claim.

But, after the case had been heard and decided by the court without the intervention of a jury, a motion for a new trial was filed in which there was no mention of mistake or excess in the amount of the judgment. The motion was overruled and in the entry the court, apparently on its own motion, corrected the former judgment entry in the amount thereof, expressly stating that by inadvertence it included certain items or sums of money not yet paid by plaintiffs.

The action was one for damages and the trial court evidently acted upon the theory (correctly, as we think) that where the assessments had not been paid the right of action had not accrued.

But, it is not material whether or not this view was correct. The entry shows clearly that the reduction was made solely for the reason, as before stated, that the assessments had not yet been paid and that the right of action had not accrued. There was, therefore, in the action of the court, no adjudication of these separate items of the account upon their merits.

The use of the word "remit" in the final entry can not change the rights of plaintiffs as the manifest intention was to consent to the reduction only, and this, for the reasons given by the trial judge. There is no waiver, express or by implication, of the items of the account which the court found have been erroneously included in the judgment. There is no remittitur of the claim, but simply, "from said judgment." There is no language in the entry that could be construed into a voluntary relinquishment of the claim.

The verdict below and judgment thereon are sustained by the evidence and we find in the record no prejudicial error.

Judgment affirmed.

LIABILITY FOR COST OF ELECTION BOOTHS.

Circuit Court of Lucas County.

HENRY CONRAD v. DAVID T. DAVIES, JR., AUDITOR OF LUCAS COUNTY.

Decided, October 5, 1907.

Election Booths—Where Constructed for Municipal Use Must Be Paid for by Municipality—Submission of Question which Might Become the Subject of a Civil Action—Sections 2966-27 and 5207, Revised Statutes.

A county is not liable for the cost of election booths constructed for use within a municipality located in that county.

C. S. Northup and *C. H. Masters,* for plaintiff.

L. W. Wachenheimer, Prosecuting Attorney, and *Ben. W. Johnson,* Assistant Prosecuting Attorney, contra.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

This is a proceeding brought under Section 5207 of the Revised Statutes, as to the submission of a controversy to a court without pleadings and upon an agreed statement of facts. The section reads:

"Parties to a question which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action were brought; but it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties; and the court shall, thereupon, hear and determine the case, and render judgment, as if an action were pending."

The preliminary proceedings under this section have been followed and the court is satisfied that the submission is in good faith and by parties between whom a controversy has arisen which might be the subject of a civil action. The situation is, briefly, this: This plaintiff, Conrad, is a contractor who entered

into an arrangement with the board of deputy state supervisors and inspectors of elections for the city of Toledo, Lucas county, Ohio, to build certain election booths for an aggregate price, as shown by the agreed statement, of $7,245. He has so far carried out the arrangement as to have constructed booths amounting under the agreed price to $6,800, and has received his pay for a part of this amount—$3,000—leaving still his due $3,800. The board of supervisors and inspectors, on or about September 3d, 1907, approved this claim, finding that there was then due and payable to him upon the contract said sum of $3,800, and they directed the defendant, the county auditor, Davies, to issue an order upon the treasurer of said Lucas county to pay the sum out of the moneys of said county in his custody, under his control as such treasurer. The claim was then presented to the auditor with the demand that he issue his warrant upon the treasurer for the amount, and this the auditor refused and still refuses to do. The agreed statement shows that the city of Toledo, located in said county, at the last federal census, had a population of more than 11,800; which allegation is material as to certain sections of the statutes supposed to be applicable to the present claims. The plaintiff asserts and the defendant denies that by reason of the facts agreed upon, the plaintiff would be entitled in an action in mandamus, if one were in this court, properly commenced and prosecuted, to have a peremptory writ issued in his favor commanding the defendant to issue his warrant upon the treasurer as aforesaid. Both parties pray the court to hear and determine the case and render judgment as if an action in mandamus upon the relation of plaintiff as relator, against defendant as defendant, were heard and now pending upon said controversy.

The sections of the Revised Statutes which have direct or indirect bearing upon the question submitted to the court here, are 2966-27; 2926*t* and 2926*d*. There are some other sections which should be read in connection with these, perhaps, but they are so closely associated with them in the statutes that I will not stop to make more specific reference to them; nor do I care to make any detailed analysis of these three sections. We are disposed to adopt the view contended for by the assistant prosecuting at-

torney, representing the defendant, of Section 2966-27, enacted thirteen years ago, as being practically, by virtue of later legislation, although not specifically, repealed. It is, we think, repealed, or at least modified, by implication, by virtue of the repealing clause in 97 O. L., page 241, applicable to acts and parts of acts inconsistent with this later legislation. The contention of the contractor, through his attorneys, is, that Lucas county is liable under the existing statutes for the costs of these election booths constructed for use within the city of Toledo. The language of the sections to which I have referred is somewhat ambiguous and difficult of construction. A literal and technical interpretation of their phraseology may justify the claims of the relator. We are not, however, disposed to adopt such construction, or any construction which would result in throwing the burden of the costs of constructing election booths to be used entirely within the municipality of Toledo, upon the county of Lucas and requiring payment therefor from the county treasury while the expenses incident to the taking of the votes in township precincts or in the precincts in non-registration towns is borne entirely by the taxpayers outside of the city of Toledo; we think that the construction of the statutes contended for by the assistant prosecuting attorney, while it may not meet the technical phraseology of these sections, is such as must have been contemplated by the Legislature in the enactments. The courts should not adopt a construction of the statutes which will be an unreasonable construction, and one which can not be presumed to have entered into the minds of the Legislature in their enactment. And this view as to our duty in the rule of construction, is the governing principle with us in the present case. I might tarry to discuss the precise meaning of words and phrases used by the Legislature in the sections to which I have made reference, but it would not be profitable and it suffices that it is the judgment of the court that the contention of the plaintiff here—Conrad—should not prevail; that the county of Lucas is not liable for the cost of these booths, and the writ prayed for is refused; and the petition dismissed. The costs will be upon the plaintiff.

STREET RAILWAY CONSENTS.

Circuit Court of Cuyahoga County.

TAYLOR EMERSON v. THE FOREST CITY RAILWAY COMPANY.*

Decided, October 29, 1906.

Municipalities—Action By, in Dual Capacities—Jurisdiction so to Do in the Matter of Street Railway Consents—Not in Derogation of the Rights of Minority Owners Who Oppose Building of the Line—Sections 1536-185 and 3439, Revised Statutes.

It is not against public policy for a municipality to act in the dual capacity of grantor of a street railway franchise and as consenting in the capacity of an abutting land owner to the building of the line, notwithstanding the city's frontage is necessary to make up the requisite one-half of the frontage from which "consents" must be secured.

Squire, Sanders & Dempsey, for plaintiff in error.
Garfield, Howe & Westenhaver and *Gilbert H. Stewart,* contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

This is an appeal from the judgment of the common pleas court denying a permanent injunction against the exercise by the defendant of its alleged street railway franchise on East Fourteenth street for want of the necessary majority of abutting owners' consents. It is admitted that the production of sufficient consents is jurisdictional and that without them the council is without power to grant a franchise. If the Fourteenth street frontage of the Erie street cemetery property owned by the city is to be included in estimating the total frontage, and if the city's consent given pursuant to ordinance of its council can be counted to make a majority, then the injunction should be denied.

The sole issue is thus one of law depending upon the construction of Sections 1536-185 and 3439, Revised Statutes, the latter of which reads in part as follows:

* Affirmed without opinion, *Emerson* v. *Forest City Railway Co. et al,* 77 Ohio State, 596.

"No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof," etc.

And in part of the other section referred to is substantially the same provision.

The literal reading of these sections is against plaintiff's contention. But it is urged that since the privilege of abutters to give or withhold their consents is a personal right given to them for their protection against the granting of the right to operate a street railway in front of their premises contrary to their desire and interest, it is against public policy for the city, in its adversary and dual capacity as both land owner and grantor of the franchise, to confer upon itself jurisdiction to act in derogation of their rights.

There is of course a suggestion of anomaly in this situation. Various analogies of action by public officers in dual capacities have been instanced, but we have found none which precisely meets this situation. It is not easy to see why the city as land owner should be deprived of the privilege enjoyed by land owners generally of favoring the establishment of a street railway by giving consent, where a street railway is deemed to be beneficial to the abutting property. And it is apparent that the denial of that privilege might hinder or prevent the establishment of a street railway along a street bordered largely or wholly by property belonging to the city, and that, too, when ease of access to such property by the public is peculiarly desirable, as in the case of city parks.

It is, indeed, conceivably true that the interest of the city as a whole may be favorable to the construction of a street railway along a street where its own and other abutting lands would be depreciated thereby, and that it may thus force the establishment of a street railway against the interests of the owners of abutting private property. But the same argument, in some degree, would lie against the right of any other public corporation, owning abutting city lands, to give or withhold consent to the construction of a city street railway in front of its property.

Yet the right of the federal, or state, government, or of a county, or school district, in this behalf is, we believe, unchallenged. This privilege being personal to the owners of abutting lands, may be exercised even to the manifest detriment of the land itself, if they so please. Can it be doubted that a street railway company may, as owner of abutting lands, yield the decisive consent to the grant of a franchise to itself? It having been decided that consents may be purchased, can it be seriously claimed that any abutting owner who refuses to yield his consent can invoke high considerations of public policy against the contrary exercise of the same privilege by any owner, though it be the city itself, upon the ground of biased judgment, impure motive, conflicting duties, or cross interests? Can supposed public policy of so doubtful a nature operate to vary the plain letter of the law? We think not.

Viewing the question from another standpoint and considering the history of this legislation, the rule of majority consents was formerly founded on assessed valuations of abutting property, so that owners of property exempt from taxation had no power to further a street railway project by their consents. When the Legislature changed this basis to that of foot frontage, it obviously had this fact in view. It could hardly have escaped attention that the change thus made would affect property owned by the city. Yet the Legislature made no exception of city property. If it had expressly conferred upon municipalities the privilege of giving consent in respect of their property abutting on proposed street railway routes, it can hardly be claimed that considerations of public policy would defeat such provision. And the same conclusion results from the reasonable presumption that the Legislature must have had in contemplation the plain application and natural meaning in this behalf of the language it did employ.

If abuses arise from the literal interpretation of the law, it is much better that the Legislature should amend the law than that the courts by judicial legislation should attempt to do so.

The injunction will be denied, as upon final hearing, and the petition dismissed at the plaintiff's costs.

UNAUTHORIZED CHANGES IN TAX DUPLICATE.

Circuit Court of Cuyahoga County.

H. M. BROOKS ET AL v. M. A. LANDER, TREASURER OF CUYAHOGA COUNTY, ET AL.*

Decided, March 28, 1905.

Taxation—County Auditor May Restore Deductions Made in the Tax Duplicate—By a Board Acting Under an Unconstitutional Law—Fundamental Errors—De Facto Officers—Identity of Powers.

The decision of the Supreme Court which ousted the board of equalization and assessment in the city of Cleveland, authorized the county auditor to thenceforth treat as clerical errors the changes which had been made in the tax duplicate pursuant to the order of said board and to correct them in accordance with the current duplicate.

W. W. Boynton and *Smith & Taft*, for plaintiffs.

C. W. Stage and *Z. T. Armstrong*, contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

This cause is here on appeal, having been commenced in the Cuyahoga common pleas court to enjoin the collection of certain taxes. After the board of equilazation and assessment in the city of Cleveland was held, in *State, ex rel,* v. *Molyneaux*, 58 O. S., 736, and *Gaylord* v. *Hubbard*, 56 O. S., 25, to have been acting under an unconstitutional law, the county auditor expunged from the duplicate certain deductions from the taxable values of real estate made pursuant to the orders of said board. The persons affected now seek to have those deductions restored.

If the deductions, which the auditor thus corrected or expunged, can be regarded as mistakes, in the sense of being erroneous and void, they were in our opinion such mistakes as under Section 1038, Revised Statutes, as construed in *State, ex rel,* v. *Raine*, 47 O. S., 448, he was entitled so to correct. It is, however, contended by the plaintiff that those deductions were not erroneous, but valid, as having been regularly made by *de*

* Affirmed, without opinion, 74 Ohio State, 428.

facto officers in the exercise of powers which they were presumed to possess under color of then unchallenged law. It is pointed out that this court has refused to undo the acts of that board so far as their operation and effect are concerned prior to the decision in *State, ex rel,* v. *Molyneaux, supra.* And the present case proceeds upon the theory that a like rule may be invoked with respect to the prospective operation of the same acts.

No case has been cited to us, and we know of none which thus applies the doctrine of *de facto* officers to the prospective operation of acts performed by incumbents of merely *de facto* offices. It is claimed, however, that this was not merely a *de facto* office, but that it falls rather within the principle of *Kirker* v. *Cincinnati,* 48 O. S., 507. That was a case where one board was supplanted by another having the same powers. The decision turned on this identity of powers. In the case at bar the board was attempted to be clothed with powers substantially different from those conferred by the general statute. It was expressly so held in *Gaylord* v. *Hubbard, supra.*

It is claimed, however, that the powers here exercised were not those which differentiated this act from the general statute, but were in fact those authorized by general law. This claim does not, in our opinion, serve to bring this or any other action of this board within the rule of *Kirker* v. *Cincinnati, supra.* The fact remains that this board can not be so identified with any pre-existing board as to validate the prospective operation of its acts. Whatever vitalizing power the law which created the board may have given it with respect to the operation of its acts within its lifetime, it is certain that such power ceased when the board was ousted. Thenceforward it was void so far, at least, as any prospective effects thereof are concerned.

In the unreported case of the *State of Ohio, ex rel Anna M. Marshall et al,* v. *A. E. Akins, etc.,* decided May 12, 1899, this court did indeed determine that taxes paid without protest on additions made by this board while its status was yet unchallenged could not be recovered back, and that it was not a mere clerical error for the auditor to omit to declare this statute unconstitutional and void and to disregard the orders of the board under it. The error was a fundamental one and not to be reached by man-

damus against the auditor. With that decision we are still content. But we now hold that the decision of the Supreme Court, ousting the board, authorized the auditor thenceforward to treat as clerical errors the changes which had been made in the tax duplicate pursuant to the board's orders, and to correct them accordingly in the current duplicate. The petition is therefore dismissed.

REMARKS OF A PREJUDICIAL CHARACTER BY JUDGE IN HEARING OF JURY.

Circuit Court of Hamilton County.

LEVI P. HAZEN ET AL v. THE MORRISON & SNODGRASS COMPANY.*

Decided, December 23, 1911.

Reversible Error—Results from Prejudicial Remarks by Trial Judge—Influence on Jury of Display of Bias or Prejudice by the Court.

Statements made by a trial judge during the progress of the trial and within hearing of the jury, are of the same effect as though embodied in the charge to the jury, and where such remarks exhibit a bias against either party to the case, or an opinion on the part of the judge as to the credibility of witnesses or an opinion on his part as to the facts of the case, prejudicial error results and a reversal becomes necessary of the judgment obtained under such conditions.

Littleford, James, Frost & Foster, for plaintiff in error.
Robertson & Buchwalter and *John C. Healy,* contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

The action below was one to recover $26,961.62 from plaintiffs in error on account of an alleged fraudulent contract entered into between Levi P. Hazen, Alexander T. Hazen and Silas L. Snodgrass.

There are thirty-four similar counts in the petition of which the first may be taken as a sample.

This cause of action alleges that the plaintiff, the Morrison & Snodgrass Company, is a corporation organized under the laws

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* For opinion below, see 10 N.P.(N.S.), 353.

of Ohio, and complains of the defendants, Levi P. Hazen and Alexander T. Hazen, partners doing business under the firm name of L. P. Hazen & Company, and Silas L. Snodgrass, and says that at the times hereinafter named said Silas L. Snodgrass was its duly elected secretary and treasurer, authorized and empowered by it to make estimates on the value of mill-work in the building trade and to make contracts in its name and behalf therefor.

That his co-defendants, Levi P. Hazen and Alexander T. Hazen, were building contractors, and well knowing the employment and the trust reposed by the plaintiff in said Snodgrass, did on or about the 19th day of June, 1903, wrongfully, corruptly and fraudulently agree with the said Snodgrass, and he with them, to make and did make a contract by and between the plaintiffs and the said L. P. Hazen & Company to furnish said firm the mill-work for a certain building in the city of Cincinnati of the true value of $4,765, or more, for the nominal contract price of $3,000, to be paid to the plaintiff; said plaintiff delivered said mill-work to said L. P. Hazen & Company; said defendants wrongfully, corruptly and fraudulently intending and agreeing to divide between themselves all value thereof in excess of $3,000, to-wit, the sum of $1,765, or more, the exact portion thereof to be given to said Snodgrass and said Hazens the plaintiff can not definitely state, but that the said Hazens did distribute and pay to said Snodgrass individually on or about November 25, 1903, in pursuance of their said wrongful, corrupt and fraudulent agreement the sum of $500, and did retain to themselves about the sum of $1,265 of the said value of said mill-work in excess of said nominal contract price of $3,000, which sum of $3,000 was accepted by the plaintiff, without any knowledge of said corrupt and fraudulent agreement between the said defendants.

That all of said money paid to Silas L. Snodgrass and retained by said Hazens, to-wit, the difference between said sum of $3,000 and the true value of said mill-work, was justly due to the plaintiff, which the defendants fraudulently converted to their own use, and it was thereby damaged in the sum of $1,765 with interest from November 25, 1903.

Each of the defendants filed answers denying these allegations.

The case was tried to a jury, who returned a verdict of $13,-200. upon which judgment was subsequently entered by the trial court; and to reverse which judgment this suit in error is brought.

The first error complained of is, that competent proof was not offered by defendant in error to establish the true value of the mill-work that was fraudulently sold. In this regard we think the evidence offered was competent and that no error was committed by its admission.

The second ground of error urged upon the court consists in statements made by the trial judge during the progress of the trial, which it is claimed were prejudicial to plaintiff in error. Without setting forth in detail the matters complained of in this regard, it seems to us that they are sufficient to justify the reversal of the judgment of the court. It is well understood that juries are influenced by the language of the presiding judge, and in fact the law recognizes this. In his charge to a jury the court can readily sway it in its judgment; if he expresses an opinion on any disputed fact or upon the character of a witness which in any way tends to prejudice the jury, he commits an error of law, for which the verdict and judgment should be set aside. The facts of a case and the credibility of witnesses are solely for the determination of the jury, and statements of the court during the trial practically have the same effect as though they were embodied in its charge.

In the case at bar it is evident from the record that the suit was a very bitterly contested one. Many disputed facts arose. We are mindful of the fact, that a verdict of the jury in any case should not be set aside, unless the error claimed is such that it affects the substantial rights of an adverse party to the suit, or is prejudicial, but we believe from the record that such is this case.

Undoubtedly, any remarks of the presiding judge made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford grounds for a reversal of the judgment. *1 Thompson on Trials*, Section 218.

During the trial the judge should refrain from making any unnecessary comments which might tend to a result prejudicial to a litigant, and when calculated to influence the minds of the jury, such remarks constitute grounds for reversal. *38 Cyc.*, p. 1315.

The question of the credibility of witnesses is solely for the determination of the jury, and it is improper for the court to comment on or express an opinion directly, or by implication, on the credibility of the witnesses. The reason is that words or conduct of the trial judge may on one hand support the character or testimony of a witness or on the other may destroy the same in the estimation of the jury, and thus his personal and official influence is exercised to the unfair advantage of one of the parties with a corresponding detriment to the cause of the other. *8 Cyc.*, p. 1320.

Remarks of a trial judge showing bias in favor of one of the parties constitute prejudicial error. So it is ordinarily held to be reversible error for him to make remarks which will tend to incite prejudice or hostility in the minds of the jury towards one of the parties, and sympathy for the other and it has been held in a number of cases that the error is not cured by directing the jury to disregarded the remarks. *38 Cyc.*, p. 1321; *State* v. *Tuttle*, 67 O. S., 440; *Insurance Co.* v. *Howle*, 68 O. S., 614; *McDuff* v. *Detroit Evening Journal Co.*, 84 Mich., 1.

We think there is error also in the charge of the court as disclosed on pages 772, 790 and 791 of the record and also in that portion of the charge in which the court speaks of the Latin maxim "*falsus in unim, falsus in omnibus*"; also on page 783.

Counsel for defendant in error practically admit the existence of the above errors, but insist that they are not prejudicial and did not influence the jury.

In this respect we can not agree with counsel, as the questions in dispute in the case at bar were such as that the minds of the jury should have been left free to determine the truth or falsity of the charge.

For these errors in the record the judgment of the court will be reversed and a new trial ordered.

ACTION FOR WRONGFUL DEATH FROM BURSTING OF AN EMERY WHEEL.

Circuit Court of Huron County.

EVA HAZELBACH, ADMINISTRATRIX, v. OHIO CULTIVATOR CO.

Decided, 1910.

Negligence—Emery Wheel Bursts—Workman Struck and Killed—Necessary Allegations in Action for Damages—Knowledge of Speed at Which Wheel Was Running—Assumption of Risk—Circumstantial Evidence as to Cause for Wheel Bursting—Master and Servant—Trial.

1. A petition alleging that an emery wheel was operated on a certain day at an unusual, excessive and dangerous rate of speed, which caused it to burst and kill plaintiff's decedent, is good as against the claim that in addition to showing a defective condition or a dangerous place to work, the petition must also allege a lack of knowledge of the defect or the danger on the part of the deceased.
2. Where an emery wheel, operated at a high and dangerous rate of speed, bursts and kills an operative, and the allegations and proof show that the deceased was a skilled operative and had worked for a period of five or six years at this occupation, it can not be said as a matter of law that he assumed the risk of the danger attending revolution of the wheel at such a dangerous and excessive rate of speed, in the absence of proof showing that he both knew the rate of speed of the wheel and the danger attending the operation of such a wheel at that rate. The mere knowledge of the rate of speed itself would not be sufficient to charge him with assuming the risk, unless he also knew the danger attending that particular rate of revolution. *Pennsylvania Co.* v. *McCurdy*, 66 Ohio St., 118, distinguished.
3. Where there is no direct evidence of the cause of the bursting of an emery wheel and it is claimed that excessive speed caused it to burst, and the proof shows that the wheel was being operated at a rate of speed likely to cause it to burst, and a piece of the broken wheel shows a gouge in its face which might have been caused by the material being ground between the wheel and rest attached to the machine, and the proof further shows that such catching is also likely to cause the bursting of a wheel, unless there is proof that the latter cause was more probable than the other the case should be left to the jury to decide as to the cause of the bursting.

Ben. B. Wickham, L. W. Wickham, for plaintiff in error.
A. V. Andrews, contra.

KINKADE, J.; PARKER, J., and WILDMAN, J., concur.

Error to Huron Common Pleas Court.

This was an action brought to recover for the negligent killing of John Hazelbach, upon the bursting of an emery wheel he was working upon in the factory of the defendant.

The petition alleges three grounds of negligence:

First, that the wheel was run at a high, unusual, excessive and dangerous rate of speed that caused it to burst; second, that the wheel was one different from what had usually been used in the factory and was of a character likely to burst; third, that no guard was used in the use of the wheel as it should have been.

No proof was offered on the last two grounds of negligence mentioned, but the case was tried on the ground of excessive and unusual speed causing the wheel to burst by that alone.

At the close of the plaintiff's case, the court directed a verdict for the defendant on the motion of the defendant, and as appears by the file mark of the amended petition, but nowhere else, an amended petition was filed in which the plaintiff alleged that John Hazelbach did not know the dangerous rate of speed, or did not know that the speed was dangerous. The amended petition does not mention any journal entries that were furnished, but we find by reference to the file mark, on the back of it, that it was filed in the case.

It is said that the petition, with the last two grounds of negligence out of it upon which no proof was offered, does not state a cause of action because it does not contain this matter that was in the amendment to the petition; and that the amendment to the petition should not have been allowed to make it good, after the court had decided to take the case from the jury, and put into it that which was essential it should have; and, consequently, the court was wrong in allowing this amendment to the petition, although the court was right in withdrawing the case from the jury.

We are cited to *Chicago & Ohio Coal & Car Co.* v. *Norman,* 49 Ohio St., 598; *Coal Co.* v. *Estievenard,* 53 Ohio St., 43, and *Hessee* v. *Railway,* 58 Ohio St., 167, as supporting this proposition. We think the authorities cited do not go to the length contended for by counsel. It is not the case of defective machinery or a dangerous place in the sense contemplated in this case. The allegation in the petition is that at this time, not for a long time prior to this, but at this particular time, on the day mentioned, the wheel was caused to be revolved by the negligence of the defendant at a high, unusual, excessive and dangerous rate of speed, and it is said that because the petition does not contain the statement that plaintiff did not know the rate of speed, and that if he did know, he did not know it was dangerous, that the petition is so defective as that the case should have been taken from the jury. We can not concur in that proposition; we think the petition was good in that regard. Proof was put in without objection, as counsel for plaintiff in error contend, because he could not object and have it sustained to any proof coming in, there being the other two allegations of negligence in the petition.

It is said now, that the court was correct in taking this case from the jury because John Hazelbach, as shown by the record, to have been an experienced employe and therefore under the authorities, *Pennsylvania Co.* v. *McCurdy,* 66 Ohio St., 118, he must be held to have known, and knowing, to have assumed the dangers arising from the matter of which the plaintiff in error now complains; he must be held not only to know the speed, but he must be held to know the probable result of that speed. We think this is carrying it further than the doctrine in any case has carried it; we think it is not true that because a man knows the speed at which a machine is moving, or a wheel is moving, that it necessarily follows that he knows the result of that speed and that the centrifugal force generated is sufficient to burst that wheel with the same result as obtained in this case. In fact, the court declined to hold that a man with far more experience, as we view it, not in operating the wheel, but generally in this factory, could tell what his judgment was as to whether

1400 revolutions were dangerous or not; but when we come to the testimony of the experts in this case, we think this record very fairly shows that a speed of 1400 revolutions was a highly dangerous rate of speed for a wheel of this dimension, 18 inches.

The testimony of one of the witnesses we think was sufficient to take the case to the jury upon the question of negligence in employing that rate of speed at that particular time. The petition does not state or allege that it was the usual rate of speed, but alleges it was an unusual rate of speed.

It is an open question under the evidence as to whether it was the speed at which that wheel was run.

We think upon an examination of the record that it can not be successfully claimed that this man, with the experience that he had, must be held to know either the speed accurately, or the result of the speed and there being evidence in the case that the speed is dangerous at 1400 revolutions per minute, evidence for the jury to consider, in that regard at least, and reaching the conclusion that we do, we think this man is not bound, although a man of some years' experience, to know the effect of a wheel revolving at that rate of speed.

We think those two facts standing alone in this regard are sufficient to take this case to the jury and that therefore the action of the court below in withdrawing it from the jury was erroneous and that the judgment of the court of common pleas must be reversed accordingly.

I might add here that it is contended on the part of the defendant in error that the gouge shown upon the face of the wheel taken in connection with the evidence in the case, clearly showed that this accident was just as probably due to some other agency as it was to the bursting of the wheel by an excessive and dangerous rate of speed at which it was revolved. This on the authority of *Lake Shore & M. S. Ry.* v. *Andrews,* 58 Ohio St., 426.

We have carefully considered that phase of the case in connection with the evidence, and we think it is not of such a character as would at all justify the court in saying, with that evidence in and with the other evidence in the case relating to

the exploding of the wheel by virtue of its dangerous rate of revolution, that one was just as probable as the other and for that reason that he might withdraw the case from the jury. We think that was to be considered with such weight as it has, and that it certainly should have passed to the jury.

WAGON STRUCK AT A RAILWAY CROSSING.

Circuit Court of Hamilton County.

THE NORFOLK & WESTERN RAILWAY COMPANY v. STELLA BECK, DOING BUSINESS AS THE ANCHOR BOX COMPANY.

Decided, January 20, 1912.

Negligence—Want of Care on Part of Driver—Forbidding Recovery for Accident at Railway Crossing—Judgment Given on Review for the Railway Company.

Where suit has been brought for damages on account of the striking of a horse and wagon by a railway train at a crossing, and the railway employes are shown to have exercised the degree of care exhibited in this case, and lack of care on the part of the plaintiff's driver is shown to the degree testified to in this case, a judgment in favor of the plaintiff in the court below will be reversed and judgment entered for the plaintiff in error.

Hollister & Hollister, for the railway company.
Thorndyke & Capelle, contra.

The defendant in error recovered a verdict below of $229.64, on account of injury to a horse and wagon and its load from being struck by one of the N. & W. trains at Langdon and Floral avenues, Evanston.

SMITH, P. J.; SWING, J., and JONES, J., concur.

In this case it is urged by plaintiff in error that no negligence is alleged in the petition; that no case of negligence is made out by the evidence on the part of plaintiff in error; and that the agent of defendant in error who was driving

the wagon at the time of the accident was guilty of contributory negligence.

The acts of negligence alleged in the petition are, "that at the time of the accident, plaintiff's wagon was being driven along the public highway leading through Evanston, and that the defendant, by its agent, in approaching said crossing ran said train with great speed and omitted to give any signal by bell or whistle or otherwise of its approach."

Assuming that these facts would constitute negligence on the part of the plaintiff in error, the question presented is, whether or not these acts of negligence are proven.

In this respect we think the plaintiff has failed. The overwhelming evidence is, that at 1200 feet from the crossing, at the whistling post for the crossing, the engineer sounded the whistle, the fireman began to ring the bell and continued to do so up to the time of the accident, and the train was only running at from eighteen to twenty miles per hour. That as soon as the engineer and the fireman saw the horse upon the track, which was at a distance of 200 feet therefrom, being upon a curve, the engineer did all that he could to stop the train and did stop it within the train's length, at which time the wagon was right at the back of the baggage car. No witness testifies that the bell was not rung or that the whistle was not sounded, and according to another witness who was at the point of the accident at the time thereof, and first saw the driver walking away from the railroad track leaving his wagon stuck on the roadway.

The court is of the opinion, therefore, that the evidence clearly shows negligence on the part of the driver of the wagon, and that none is disclosed on the part of the railway company.

In this view of the case it is not necessary to consider other errors alleged.

The judgment of the court below will be reversed and judgment entered in this court for plaintiff in error.

STATUS OF A GENERAL JUDGMENT WHERE TWO ISSUES ARE PLEADED.

Circuit Court of Cuyahoga County.

GEORGE F. GUND v. THE CLEVELAND STORE FIXTURE COMPANY.*

Decided, March 11, 1907.

Judgment—Error Relating to One Issue Only—Not Ground for Setting Aside a General Judgment—Action against Guarantor of a Vendee.

Where there are two aspects under which the claim of plaintiff might be established, and the jury found in his favor, the judgment will not be reversed for error relating to one issue exclusively, but will be affirmed unless the errors complained of are of such a character as to vitiate the verdict as to both issues.

Meyer & Mooney, for plaintiff in error.
Carr, Stearns & Chamberlain, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Error to court of common pleas.

The Cleveland Store Fixture Company recovered a judgment below against George F. Gund, as guarantor of payment by the vendee in a contract for bar furniture to be furnished by said company.

In the view we take of this case, it is unnecessary to consider the question whether there is a defect of parties. Gund's guarantee was endorsed on the written contract of sale. By a separate written instrument the company promised Gund that the bar furniture should be accompanied with a union label, and this promise, he alleges in his answer, was not complied with. The plaintiff company in its reply alleges in substance:

1st. That the written promise in regard to the union label was executed and delivered subsquently to the endorsement by Gund of his guarantee upon the contract of sale, and that it was without consideration and void.

* Affirmed without opinion, *Gund* v. *Cleveland Store Fixture Co.*, 79 Ohio State, 446.

Second. That even if valid, the promise was fully performed, not indeed by furnishing bar fixtures that were wholly union made, but by tendering to the vendee a union label that had been in the company's possession from a former time when it carried on a union shop.

This label, it was claimed, was specifically contemplated by the terms of the written promise.

Upon the issues thus joined the jury found generally for the plaintiff company and against Gund.

It is obvious that this result may have been reached through either of the claims set forth in the reply. If the promise in regard to the union label was made after the guarantee, and was thus without consideration and void, it is unimportant whether plaintiff fulfilled it or not. If, on the other hand, the promise means what plaintiff claims, and was fulfilled according to its meaning, it is immaterial whether it was valid or invalid. The verdict as returned implies that the union label promise was an after consideration, and therefore, unforceable; also that it was performed according to the meaning and intent of the parties. It follows that unless the errors complained of here are such as to vitiate both aspects of the verdict, the judgment must be affirmed, inasmuch as the verdict and judgment can rest indifferently upon either ground. *McAllister* v. *Hartzell,* 60 O. S., 69, 95; *Smith* v. *Gardner,* 57 O. S., 666; *National Union* v. *Rothner,* 57 O. S., 679; *Beecher* v. *Dunlap,* 52 O. S., 64; *Tod* v. *Wick Bros. & Co.,* 36 O. S., 370, 389; *Union Cent. Life Ins. Co.* v. *Sutphen,* 35 O. S., 360.

(See, however, *The Pennsylvania Company* v. *Miller & Co.,* 35 O. S., 541, overruled, though not indeed on this point by *Railroad Company* v. *The Bowler & Burdick Company,* 63 O. S., 274, 287.) *Butler* v. *Kneeland,* 23 O. S., 196, and *Sites* v. *Haverstick,* 23 O. S., 626.

The errors complained of relate chiefly, if not wholly, to the latter issue, and we think one or two of the points made by plaintiff in error as to the admission and exclusion of evidence, are well taken. On the other issue the evidence is in sharp conflict. Mr. Gund testifying that the written promise in regard to the union label was executed and delivered before his guarantee was

endorsed on the contract of sale. On the other hand the Cleveland Store Fixture Company's agent testifies just as distinctly that it was executed afterwards. The jury is the tribunal appointed by law to solve contradictions of this sort, and we can not disturb its finding in this case as being unsupported by the evidence; nor do we find any error in the record affecting the proper submission of this issue to the jury.

It follows, therefore, that the judgment below must be affirmed.

LIABILITY OF ASSIGNEE FOR RENT.

Circuit Court of Hamilton County.

ASSIGNMENT OF FRANK W. HOPKINS.

Decided, January 6, 1912.

Assignments for the Benefit of Creditors—Liability for Rent of Premises Occupied in Continuing the Business.

The fact that the lessor of premises occupied by an assignee for the benefit of creditors signed, together with the general creditors, an application for an order continuing the business, does not bar payment of rent by the assignee as part of the expense of administering the trust, where the lessor signed the application for a continuance of the business with the understanding that his claim for rent should not be affected thereby.

R. P. Hargitt, for plaintiff in error.
Worthington & Strong, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

Under the evidence in the above case with the law applicable thereto, it is apparent that the assignee of Frank W. Hopkins, by reason of the order of the court of insolvency to carry on the business of the assignor and the acceptance of the lease of the real estate, as well as the estate, became liable for the rent agreed upon in the lease. This being so, to relieve himself from personal liability, he and the general creditors in two papers

ask the court of insolvency to order the continuance of the business and at the same time relieve him from all personal liability by reason of his conducting the same; and they agreed that so far as they were concerned he should be so released. He continued in the possession of the leased premises as assignee for a certain period, and there is no doubt that the rent for the use of the same was an expense attendant upon the continuation of the business, and should be paid as such by the assignee in administering the trust estate, unless the lessors have waived such order or claim.

In this regard we find nothing in the paper signed by the agent of the lessors of the real estate, that in any way indicates such a waiver or agreement. The testimony on this point, and which we think was competent, distinctly shows that the application of the creditors to continue the business was signed by the agent of the lessors upon the understanding that their claim for rent should not be affected thereby, and that the object of the application was solely to relieve the assignee from personal liability for debts incurred by him in the running of the hotel.

For the above reasons the judgment below is affirmed.

PROSECUTION FOR EMBEZZLING BONDS.

Circuit Court of Cuyahoga County.

HARRY E. HAYES v. THE STATE OF OHIO.*

Decided, February 7, 1910.

Criminal Law—Embezzlement of Bonds by Brokers Held to Have Been Complete—Premature Pledging of Bonds for Loans and Conversion of the Proceeds—Misconduct of Court and Prosecutor—Evidence—Agreements—Agency—Partnership.

1. Where an agreement between a railway company and brokers handling the bonds of the company provides that the right of the brokers to retain the bonds should accrue contemporaneously with actual payment therefor, an indictment for embezzlement lies for the pledging of the bonds by the brokers for loans and the conversion of the proceeds of the loans by the brokers prior to a call for funds by the company.
2. Evidence is competent in such a case which tends to show that the pledging of the bonds and use of the proceeds therefrom by the brokers was not due to an honest misunderstanding by the brokers of their rights in the matter.
3. Misconduct by the court or prosecuting attorney is of little moment to an accused person against whom evidence has been presented which establishes his guilt completely.
4. An agreement to make mutual contributions to the subject-matter of an enterprise and to share the profits can not be taken as establishing a partnership, where there is nothing else in the agreement which is at all characteristic of a partnership.

Dawley & Sullivan and *A. A. Stearns,* for plaintiff in error.

John A. Cline, Prosecuting Attorney and *Walter D. Meals,* Assistant Prosecuting Attorney, contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

The plaintiff in error was indicted jointly with his partner in the firm of W. J. Hayes & Son, for embezzling on August 7, 1907, 198 one-thousand-dollar bonds of the Cincinnati, Bluffton & Chicago Railway. Upon separate trial he was found

* Affirmed without opinion, *Hayes* v. *State of Ohio,* 83 Ohio State, 490.

"guilty of embezzlement, as charged in the first count of the indictment," of property valued by the jury at $18,000, and was sentenced to five years' imprisonment.

The transaction evidently contemplated by the verdict is the pledging by the defendant below to the Pearl Street Bank, in Cleveland, on January 25, 1907, of twenty of said bonds to secure their note for $15,000. Their rights at that time with respect to these bonds are defined by the following contract:

"THIS AGREEMENT, made and entered into this 22d day of December, A. D. 1906, by and between S. H. Bracey, of Chicago, Illinois, party of the first part, and W. J. Hayes & Sons, of Cleveland, Ohio, parties of the second part, WITNESSETH:

"WHEREAS, the party of the first part is the owner of 10,080 shares of the capital stock of the Cincinnati, Bluffton & Chicago Railroad Company and of 1,275 bonds of said company, and is desirous that the said W. J. Hayes & Sons shall act as his brokers in the sale of said bonds;

"*Therefore,* in consideration of the sum of one dollar, and other good and valuable considerations, each to the other in hand paid and received, it is mutually covenanted and agreed by and between the parties hereto as follows, that is to say:

"1st. That, subject to the conditions hereinafter expressed, the said parties of the second part shall have and are hereby given exclusive sale of the said 1,275 bonds owned by the said first party and issued by the Cincinnati, Bluffton & Chicago Railroad Company.

"2d. The said party of the first part agrees to give to the party of the second part, pro rata as sales are made, as compensation for services, the total aggregate of 35 per cent. of the total issue of the capital stock of the said railroad; it being understood, however, that none of said stock can be physically delivered until there is a sale of the 575 bonds provided to be sold in Clause 6, so that the moneys derived from such sales can be used to release such stock from present collateral liens; provided that said stock shall be contracted to purchasers of bonds, or if retained by the second party, shall be retained with the understanding that said 10,080 shares of stock are pooled and that no stock shall be transferred unless all is sold and that each share shall participate equally and impartially in the proceeds of any sale thereof.

"3d. It is mutually covenanted and agreed that the 666 bonds of the said railroad now in the hands of Louis D. Daven-

port, of Bluffton, Indiana, as well as 34 of the bonds now in the control of the Reorganization Committee of said Railroad, making a total of 700 bonds, shall be sold and the proceeds thereof shall be devoted entirely to the cost of engineering, right-of-way for and construction of extensions of said railroad, as hereinafter described, including the securing of necessary and adequate equipment therefor. Said second parties shall have the right to sell the first 350 of said bonds at 75 per cent. of their face value, and the next 350 of said bonds at 80 per cent. of their face value, and all amounts received by said second party over and above said 75 per cent. for said first 350 bonds and 80 per cent. for said second 350 bonds shall be retained by said second parties as their compensation and commission for the sale thereof. The amount realized from the said sales of the said 700 bonds shall, from time to time, and as fast as sold, be placed on deposit with some responsible bank to the credit of the said railroad, to be drawn out and expended only for the purposes herein provided, upon checks signed by said railroad company and upon vouchers which shall be approved as being for such purposes by some responsible certified public accountant.

"4th. The party of the first part agrees to supervise the expenditure of the sums of money above provided, and to furnish necessary tools and construction equipment for the construction of said railroad, and shall receive for his compensation 10 per cent. of the actual cost of labor and materials used in the construction and equipment of said extension. It is agreed that the said extension shall be built from a point of connection with the present terminal of the said railroad in Bluffton, Indiana, to Huntington, Indiana, and form the present terminal of said railroad in Portland, Indiana, to Union City, Indiana; the construction to be in accordance with the present general standard of the construction of that portion of the railroad now in operation between Portland and Bluffton, Indiana, in relation to weight of rails, ties, grade, curves, roadbed and ballast; said entire railroad from Union City to Huntington, Indiana, to be built and placed in operation by August 1st, 1907, provided said second parties shall meet and pay all of the calls provided for in this contract in clause 7.

"5th. It is further mutually agreed that in case there shall be any profit represented by the difference between the amount of said bond sales of the 700 bonds as herein provided for, plus all subsidies and municipal aid voted or to be voted in aid of said railroad and the actual cost of the construction of said

extension and equipment therefor as provided in clause 4 (including the 10 per cent. compensation to first party) shall be divided equally between the parties hereto.

"6th. It is further mutually agreed that the remaining 575 bonds owned by the said S. H. Bracey may be sold by the parties of the second part at 85 per cent. of their face value, and that the said second parties shall retain in full for their compensation and commission all that they shall receive on the sale of said bonds in excess of 85 per cent.; all moneys received from said sales of said 575 bonds shall be used to release the same from collateral liens and the balance shall be paid to the said party of the first part.

"7th. It is further mutually agreed that the said party of the first part shall have the right to call upon the parties of the second part for the payment of twenty-five thousand dollars ($25,000) on the 15th day of February, 1907, upon the delivery to the said parties of the second part of bonds at the rate of 75 per cent. of their face value to the amount of said call, and the second party agrees to make said payment on said date to be used for the purposes herein provided for and upon the delivery of said bonds as aforesaid; subject to the right of refusal exercised as hereinafter provided; like calls for $25,000 each upon like conditions can be made by said first party, and the payment of the amount thereof shall be made by said second parties on delivery of bonds at said rate on the 15th days of March and April, 1907; and the following like calls for the following amounts upon like conditions can be made by the party of the first part, and payment thereof shall be made by the parties of the second part upon delivery of bonds at the rates herein provided for the sale thereof, that is to say:

"One hundred sixty-seven thousand five hundred dollars ($167,500) on May 15th, 1907, or later if not required for construction.

"Two hundred thousand dollars ($200,000) on June 15, 1907, or later if not required for construction.

"One hundred thousand dollars ($100,000) on July 15, 1907, or later if not required for construction.

"Four hundred eighty-eight thousand seven hundred fifty dollars ($488,750) on August 15th, 1907.

"Provided, however, and this contract is upon the express condition that the parties of the second part shall have the right to refuse any call above provided for, except the first call of February 15th, 1907, in the following manner, viz.: the said party of the first part shall give to the said party of the second

part, a notice in writing, fifteen days prior to the March and April calls, and if said parties of the second part, shall neglect or refuse within five days after such notice to notify the party of the first part of their election to meet such call, then such neglect or refusal to so notify shall amount to a refusal of such call, and said party of the first part shall give to said parties of the second part at least thirty-five days notice of all other calls provided for in this contract (meaning to except the calls of February, March and April), and if said second parties shall neglect or refuse within five days after such notice to it of such calls to notify the said party of the first part of its election to meet such call, then such neglect or refusal to so notify shall amount to a refusal of such call. All notices above referred to shall be given by mail, postage prepaid, addressed to the party of the first part at the Tribune Bldg., Chicago, Illinois, and to the parties of the second part at the Chamber of Commerce Bldg., Cleveland, Ohio; in case of such refusal and notice thereof, then the parties of the second part shall not be liable to meet and pay such call so refused, and this contract shall thereupon, at the option of the party of the first part, become null and void. The said parties of the second part shall have the right, however, to retain the bonds delivered to them for the payment of all previous calls; all other bonds to be returned to said first party.

"8th. It is further mutually agreed that the said party of the first part shall have the right to purchase materials and labor for construction, to be charged up to the construction account at the same rates and prices provided herein for the sales hereof, and in case the said first party shall sell bonds at par, said sales shall be turned over to the said parties of the second part, and the difference between the price for which said second parties are given the right to sell such bonds and the par value thereof shall be divided equally between the parties hereto.

"9th. It is understood and agreed that all bonds delivered to said second parties for sale shall have all coupons prior to the year 1907 clipped off and canceled.

"10th. This contract shall not take effect or become operative unless one P. F. Earling shall fail to perform a certain contract with party of the first part which expires by its terms December 24th, 1906, or unless said P. F. Earling shall, in the meantime, cancel or release the same.

"11th. Said first party agrees to cause the bonds to be delivered to said second parties as fast as sold, and shall deposit with second party in any event not less than 400 bonds on or

before January 5, 1907, and to give a good and sufficient bond satisfactory to second parties, with a penalty of not less than $50,000 for the faithful performance hereof by the said first party, said bond for performance to be furnished second parties on or before January 1st, 1907.

"WITNESS the hands and seals of the parties, the day and year first above written.

"(Signed) S. H. BRACEY. (Seal.)
"(Signed) W. J. HAYES & SON. (Seal.)"

Of the bonds contemplated by this contract 664 were delivered to W. J. Hayes & Son in Cleveland as follows: 400 Jan. 4, 1907; 164 March 19, 1907; and 100 June 3, 1907.

Of these, Hayes & Son subsequently returned 399; sold 42, and hypothecated the residue for money borrowed by them at various banks from January to October, 1907. As before stated twenty bonds were thus hypothecated on January 25, 1907, three weeks before anything was done or due to be done under the contract of December 22, 1906. Twenty-four more were similarly hypothecated to banks in New York and Iowa on February 19 and 20, 1907; but not until $7,500 had been paid February 16, 1907, to apply on the installment then due. On March 2, 1907, Hayes & Son paid $5,000 in short time paper; and on March 13, $18,500 more in long time paper. A call for the second installment of $25,000 to be paid March 15, 1907, had been duly made, but by mutual agreement the time of payment was postponed a month. Subsequently, all but $10,000 of the paper issued by Hayes & Son to complete the payment of the first two installments of $25,000 each was paid.

On the 10th day of March, 1907, a modification of the terms of the contract of December 22d was entered into by the parties, wherein it was agreed that Hayes & Son would issue their accommodation acceptances to the amount of $200,000 to enable the railroad company to immediately supply the funds for construction purposes, and it was agreed that the 400 bonds already delivered to Hayes & Son and the 164 bonds that were to be delivered on March 19th should be pledged to Hayes & Son as collateral security for these acceptances. Later, and on June 3d, 1907, the additional 100 bonds were delivered by Dav-

enport to Hayes & Son under a receipt which recited that they were to be used in accordance with the contract of December 22d, 1906, as modified by the arrangement of March 13th, 1907.

Thereafter on the 27th day of March, 1907, a further modification of the arrangement between the parties was made, wherein Hayes & Son were authorized to pledge upon mixed loans or otherwise, in their own business, the same as if they were their own, any and all of the bonds in their possession.

It was doubtless intended that the avails of such loans should be applied to the payment of the acceptances; but such application was not properly safeguarded. Thereafter without technical criminality, the funds derived from systematic hypothecation of the bonds were diverted by Hayes & Son until they could no longer conceal the insolvency in which they had involved not only themselves, but the railroad as well.

The plaintiff in error claims that Hayes & Son gained absolute title to the 66 bonds authorized to be retained by them in connection with the calls payable February 15, and March 15, 1907, and that the 48 bonds pledged before the contract of December 22, 1906, was modified were therefore their own bonds, or at least that Hayes & Son may well be deemed to have so supposed in perfect good faith. But there are several complete answers to this contention.

First, the letter of June 11, 1908, from the defendants below, reports "that out of the bonds which were purchased from you and which were paid for, the following have been sold," listing 42 bonds with names of purchasers.

There is no pretense that Hayes & Son ever purchased more than 66 bonds, and none of the 42 bonds so sold by them can be identified with the 48 bonds pledged in January and February, 1907. Ninety bonds were thus treated by them as their own, which is twenty-four in excess of the most they can claim to have owned. Moreover, as already pointed out, 20 bonds were hypothecated by them three weeks before they had any right to retain the same, and before they had any conclusive knowledge that they would be called upon to make the February 15th payment. Retail sales of bonds or construction de-

lays, or other contingencies might meanwhile make such call unnecessary; or they themselves might not be, as in fact they were not ready to respond promptly to their absolute liability to meet such call if made. It is not as if they had pledged the bonds at the time and for the purpose of applying the avails in payment of the call. For it is plainly provided by the contract that their right to retain the bonds should accrue contemporaneously with actual payment and not before. And their entire subsequent course of conduct and concealment conclusively shows that they themselves never put any other construction upon the contract.

Right here, also, it may be said, that the evidence of transactions after the modification of the contract, was properly admitted for this very purpose of showing that the defendants had erred under no honest misconstruction of their rights in converting the bonds to their own use. The court properly instructed the jury that they could find no embezzlement after February, 1907; and if further instruction were required as to the use which the jury were to make of the evidence of subsequent transactions, the court's attention should have been seasonably called to the omission.

The evidence of the unlawful conversion by the plaintiff in error of twenty bonds on January 25, 1907, is perfect and complete. It consists essentially of documents whose authenticity is conclusive in view of the papers produced by the plaintiff in error himself and introduced by him in connection with the cross-examination of the state's witnesses.

Unless, therefore, some other elements of the crime of embezzlement as charged in the indictment remain unproved, the alleged misconduct of court and prosecuting attorneys in the trial of the case becomes of little moment so far as the accused is concerned. We do not at all approve of the persistence of the state's attorneys in demanding letters and documents of the accused across the trial table and in the presence of the jury, especially after the court had specifically, repeatedly and correctly ruled against their right to do so.

True, the accused was not thereby compelled to give evidence against himself and hence his constitutional right was not in-

vaded. But his statutory right to exemption from comment upon his failure so to do would have been seriously invaded if his guilt were not incontestable and the court's cautions to the jury had not therefore sufficed to cure the errors thus complained of (*Sisson* v. *State,* decided by the Circuit Court of Lorain County, December, 1909). And the same is true of certain inflammatory appeals of the state's attorneys in their argument to the jury. The public prosecutor may appeal to the consciences of the jurors, but not to their prejudices. He may argue upon the facts as disclosed by the evidence in the case on trial, but not upon the demands of public opinion that the jury shall at all hazards convict persons accused of particular classes of crime.

There remains for consideration the contention that the contract of December 22, 1906, was an agreement of partnership between Bracey and Hayes & Son. We do not so construe it. True, it contemplates a certain sharing of profits and a mutual contribution to the subject matter of the enterprise. But these are often incident to contracts of employment or agency, such as this undoubtedly was. There is nothing else in the agreement that is at all characteristic of a partnership.

It is further claimed that Bracey was not the real party in interest, but that the railroad was at the outset his undisclosed principal and the real owner of the bonds, and that its status as such was fully revealed and acknowledged before the alleged embezzlement took place. The fact is that Bracey was the owner of the stock of the railroad and was expressly given plenary authority by the corporation to handle and dispose of the bonds for construction purposes. He testifies moreover that the bonds were his and the contract so recites. He had at least a qualified ownership, and this, as the court properly charged, is sufficient to support the allegation of the indictment that he was the owner. *State* v. *Kusnick,* 45 O. S., 535; *Stole* v. *Tillett,* Ind. Supreme Court, November 4, 1909; *State* v. *Spaulding,* 24 Kan., 1.

Upon the remaining assignments of error it is sufficient to observe that conviction under this indictment is a bar to con-

viction of the plaintiff in error under any other indictment for the embezzlement of any of these bonds or the proceeds thereof prior to August 7, 1907. Nor was the state required to elect under this indictment which of the various transactions prior to that date it would rely upon for conviction. *Revised Statutes of Ohio,* Section 6842; *Brown* v. *State,* 18 Ohio State, 497; *Gravatt* v. *State,* 25 Ohio State, 162.

It would unnecessarily prolong this opinion to enter upon a discussion and analysis of the cases cited in support of these views. Suffice it to say that we deem these decisions to be controlling, and the judgment is affirmed.

ELECTRIC CARS AT STREET CROSSINGS.

Circuit Court of Hamilton County.

CINCINNATI TRACTION CO. v. MORGAN CHARLES, ADMINISTRATOR.

Decided, February 3, 1912.

Negligence—Necessary Precautions of Electric Cars at Street Crossings —Not Incumbent to Sound the Gong, When—Charge of Court.

In an action for damages on account of fatal injury to a pedestrian from being struck by an electric car at a street crossing, it is error for the court to charge the jury that it is the duty of the company to cause a gong to be rung as a car is about to cross a street. All that is necessary is that a warning be given as a car approaches the crossing, and this duty only arises when an ordinarily prudent person would give such warning under similar circumstances.

Miller Outcalt, for plaintiff in error.
Theodore Horstman, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

Anna Charles, the decedent, about 5 o'clock P. M., on November 23d, 1909, while crossing Broadway from the west side to the east side thereof at New street in Cincinnati was struck by the right front end of the car of plaintiff in error running

north on the east side of Broadway, receiving injuries from which she subsequently died.

The petition alleges several grounds of negligence as follows: that the car was running at an excessive rate of speed; the lack of proper control of the car; the failure on the part of the motorman to sound the gong, to drop the fender, and to slow up the car after he saw her; the lack of proper appliances to stop the car speedily.

The answer denies these acts of negligence and sets up that if she received the injuries complained of that caused her death, the same were due to her own negligence.

Upon the trial of the above issues a verdict and judgment were rendered in favor of the defendant in error, to reverse which this action is brought.

The evidence of the plaintiff discloses that at the time the decedent stepped from the curb to cross Broadway, the car that struck her, was at Sixth and Broadway about 200 feet distant, and that no wagons, other cars or any obstruction was in the street to prevent her from seeing the approach of the car.

One witness testifies that she saw the deceased during all the interval before and up to the time that she was struck by the car, and that she did not look to the south or the north before attempting to cross. Another, who was just at her side, testified that she did look up and down Broadway and then started across.

All the witnesses agree that the headlight was burning, that the car was lighted inside, and that in running it made a noise like other cars; one witness saying that it made a great deal of noise and that the car could be plainly seen by its headlight. The evidence further discloses that she was a strong woman, never had been sick and "nothing was the matter with her." There is no evidence that her senses of sight or hearing were impaired.

It was the duty of the decedent to look for a car before crossing the street, and if she did not so look as testified to by one of her witnesses, then she was negligent.

On the other hand, if she did look as another testified, then she was again guilty of negligence, because from the evidence, her view being unobstructed, she must, and necessarily would have seen the car approaching; and if her looking had been effective, which it should have been, then no injury would have resulted. Besides, it was her duty to listen, and had she done so, she would have heard the noise made by the car as it approached equally as well as the witnesses who testified in her behalf, notwithstanding the fact, if true, that no gong was sounded.

As to the remaining acts of negligence complained of they are not borne out by the evidence, the great weight thereof being against their existence.

It was erroneous for the court to charge the jury that it was the duty of plaintiff in error "to ring its gong at street crossings." All that is rquired is that a warning be given as a car approaches, and this duty only arises when an ordinarily prudent person would give such warning under similar circumstances.

From the pleadings and particularly the evidence we can not see that the doctrine of last chance was involved in the case, and the charge of the court in this respect is also erroneous.

For the above reasons the judgment of the court below is reversed.

EFFECT ON SUIT IN ATTACHMENT OF DISCHARGE OF DEFENDANT IN BANKRUPTCY.

Circuit Court of Cuyahoga County.

THE SLEEPY EYE MILLING CO. v. E. M. WELSH.*

Decided, February 16, 1908.

Estoppel—Available, Notwithstanding Want of Express Allegation of—Where the Facts are All on the Face of the Record—Attached Property Released on Bond—Appeal Taken by Defendant—Defense of Subsequent Adjudication in Bankruptcy.

A defendant in a suit in attachment, who filed bond for release of the property attached and thereafter gave bond for appeal, is estopped from subsequently setting up a discharge in bankruptcy, where the attachment proceeding and giving of bond was prior to the proceedings in bankruptcy.

R. H. Lee, for plaintiff in error.
Klein & Harris, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Error to the court of common pleas.

This litigation originated in a justice court, and in all the courts the parties have stood related as they stand here. In the justice court plaintiff sued out an attachment, but the attached property was restored to defendant upon bond given by him. Upon the rendition of judgment sustaining plaintiff's claim and attachment, defendant appealed to the court of common pleas. Pending this appeal he filed his petition in voluntary bankruptcy and was discharged. Thereupon, he applied for and obtained leave to file a supplemental answer setting up this fact. Plaintiff replying to this supplemental answer alleges that its claim was

* Affirmed without opinion, *Welsh* v. *Sleepy Eye Milling Co.*, 84 Ohio State, 495.

not scheduled by the defendant in his bankruptcy proceeding, and that no notice of the pendency of that proceeding had ever been served upon it; but upon this point it is practically conceded that at the time of filing this reply the bankruptcy proceeding was still pending and open to the presentation of plaintiff's claim. This, of course, is sufficient.

Plaintiff's reply to the supplemental answer alleges further that if defendant is permitted to maintain his defense of discharge in bankruptcy, plaintiff's claim, though just, can not be put into judgment for the purpose of recourse to the liability of the sureties on the appeal bond. In argument it is urged that a similar inequitable result will follow as to the security upon the bond for the release of the attachment. If judgment goes against plaintiff by reason of this defense the condition of neither bond is broken, and unless defendant is estopped to interpose the defense of discharge in bankruptcy, we see no escape from the reasoning and conclusion of the court in *Merritt et al* v. *Pritchard,* 4 N.P.(N.S.), 571, wherein *Farrell* v. *Finch,* 40 Ohio State, 337, and *Hill* v. *Harding,* 130 U. S., 699, seem to us to be properly distinguished.

It would have been entirely proper under the circumstances for the court to have refused leave to the defendant to file the supplementary answer, but the record does not disclose any objection made or exception reserved to the granting of such leave in this case (*Holyoke et al* v. *Adams,* 59 N. Y., 233). The reply does not sufficiently allege any estoppel; but inasmuch as the facts in regard to the attachment, filing of bond for release, the filing of bond for appeal, filing of a voluntary petition in bankruptcy, the discharge in bankruptcy, and the attempt by supplemental answer to set up the discharge of defendant are and were all disclosed upon the record, and inasmuch as it is thus plainly inequitable to permit defendant, under these circumstances, to have and maintain this defense and thereby deprive plaintiff of its recourse against the sureties on the attachment and appeal bonds, we think the court below should have so applied the doctrine of estoppel as to prevent the interposition of

this defense (*State, ex rel,* v. *Smith,* 44 O. S., 348, 361). The want of express allegation of such estoppel does not prevent it from being available when the facts are all on the face of the record (*The Castalia Trout Club Co.* v. *The Castalia Sporting Club et al,* 8 C. C., 194, 208; affirmed 56 Ohio State, 749). Section 17 of the bankruptcy law should be construed with Section 16 thereof, so as to prevent, if possible, any discharge of a bankrupt's sureties.

Without this defense we can not say that the court would have rendered judgment for the defendant. If, upon retrial, judgment should be rendered against him, he can and no doubt will have his proper remedy against the enforcement of such judgment against him. Because, however, the judgment as rendered is contrary to law, it is reversed and the cause remanded.

NECESSARY ALLEGATIONS IN AN ACTION FOR A DOG BITE.

Circuit Court of Hamilton County.

LEOPOLD KLEYBOLTE v. CLIFFORD D. BUFFON, A MINOR.*

Decided, January 6, 1912.

Pleading—In an Action for Injuries from the Bite of a Dog—Misconduct of Counsel—How Presented to Reviewing Court—Section 4212-2, Revised Statutes.

In an action for damages on account of injuries resulting from a dog bite, it is not necessary to allege that the dog was vicious, or that its vicious disposition was known to the owner, and it is not error to admit evidence as to the character of the dog with reference to his being vicious or otherwise.

Kramer & Bettman, for plaintiff in error.
L. H. Pummill and *J. A. Rudel,* contra.

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* Affirming *Buffon* v. *Kleybolte,* 12 N.P.(N.S.), 80.

SMITH, P. J.; SWING, J., and JONES, J., concur.

As Section 4212-2, Section 2, R. S., now reads it is not necessary that the petition in this case should have stated that the dog owned and harbored by plaintiff in error was vicious and that this viciousness was known to the owner.

We see no error in the admission of evidence as to the character of the dog, whether or not he was or was not a vicious animal, nor in the charge of the court upon the question of damages. Under the facts as disclosed by the record we think the special charges and general charge correctly state the law in the case.

The verdict for $366 is not excessive.

The alleged misconduct of counsel for defendant in error in his address to the jury can not be considered by this court under the case of *State* v. *Young*, 77 O. S., 529, where it is held, that "remarks of counsel in addressing a jury, to be the predicate of a proceeding in error on the ground of misconduct, must be brought into the record of the trial by the certificate of the trial judge as are other matters occurring upon the trial and in his presence. They can not be introduced by affidavit."

As there are no errors in the record the judgment is affirmed.

ACTION FOR CANCELLATION OF A CONTRACT.

Circuit Court of Cuyahoga County.

HENRY C. BOWMAN v. BERNHARD SCHATZINGER ET AL.*

Decided, June 8, 1908.

Contracts—Waiver of Breach of Performance by Entering into a Supplemental Agreement—Agreement for Allotment and Improvement of Lands.

Where time for performance of an agreement is by mutual consent of the parties extended in a supplemental contract, the right is waived to subsequently sue for a cancellation of the original agreement for breach of its conditions by the other party thereto, and the parties will be understood to have covenanted, at the time of the making of the supplemental agreement, to treat the contract as in force in all respects, notwithstanding anything which may have happened prior to that time.

Weed, Miller & Nason, for plaintiff.
P. J. Kassulker, contra.

HENRY, J.; WINCH, J., and MARVIN, J., concur.

Appeal from the court of common pleas.

This is an action for the cancellation of record of a contract entered into between the parties February 7, 1900, as amended by supplemental agreement between them entered into on or about May 20, 1903, but dated May 1, 1903, and to quiet plaintiff's title to a part of the real estate therein described.

Plaintiff and defendant were the owners of adjoining lands situated in what was formerly the village of Glenville, but now a part of the city of Cleveland. The original agreement recites that "said parties, for their mutual interest, desire to allot said lands"; that "said Schatzinger is familiar with the allotting of lands, improving the same and handling allotments," and therefore it is agreed, "that the said Schatzinger is to make an allotment of the lands of said two parties substantially like the plat," which was made part of their agreement.

* Affirmed without opinion, *Bowman* v. *Schatzinger*, 81 Ohio State, 565.

A reference to the plat discloses that the lands of the plaintiff, Bowman, consisted of two long narrow tracts of six acres and one acre respectively, the west end of the one-acre tract slightly overlapping the east end of the six-acre tract. The east end of the smaller parcel fronts on Doan street, and, at the time the agreement was entered into, this small frontage afforded the only street access to and from the plaintiff's lands. The proposed allotment contemplated the opening up of streets in such manner as to give ample additional access to both of these tracts, through the defendant's lands. One of the proposed streets, called South Boulevard, was to run westward from Doan street, a short distance south of and parallel to the general trend of plaintiff's lands. This street was to be intersected by Haven and Hampden streets and to terminate in the North Boulevard, which was so laid out as practically to bisect plaintiff's six-acre tract lengthwise.

Thus plaintiff's lands were to be opened up in connection with defendant's lands in such manner as to facilitate the sale of lots in both. Without some such arrangement with either the defendant or some other adjacent land owner, it was manifestly impracticable for plaintiff to market his property in this manner.

The contract further provides:

"Said Schatzinger is to grade, flag and curb said streets; put in sewer, water and gas pipes and also pave the same with suitable brick, and further improve said lands as, in his opinion, is wise and practicable; the work to be started as soon as possible in the spring of 1900; South Boulevard from Doan to Haven street to be first improved and in all respects finished, but no further work to be done on North Boulevard until after said Schatzinger shall have sold three-fourths of the lots in said proposed allotment lying south of North Boulevard. So soon as said proportion of said lots are sold, then said Schatzinger to proceed with the improvements on North Boulevard and on Hampden street, completing the same without unnecessary delay.

"In case the lots on the north side of South Boulevard between Doan and Haven streets are not sold by May 1st, 1903, the interest in said lots at that time owned by said Schatzinger, his heirs or assigns, shall be appraised by disinterested persons

as follows: one to be selected by said Schatzinger, his heirs or assigns; one by said Bowman, his heirs or assigns, and if the two can not agree, then they to select a third, and the decision of any two of the three thus chosen shall be binding on both parties; and said Bowman, his heirs or assigns, shall thereupon pay to said Schatzinger, his heirs or assigns, the value of the interest of said Schatzinger so established by said appraisers, upon receipt from said Schatzinger, his heirs or assigns, of lawful conveyance of said interest, free and clear of all encumbrance, accompanied with abstract of title."

The remainder of the original contract relates to the manner of meeting the expenses of the undertaking and the division of the proceeds, specifically providing, however, that "said Schatzinger is to have full charge of alloting, improving and disposing of said lands."

The key to the opening up of plaintiff's lands was manifestly the opening and improving of South Boulevard from Doan street to Haven street, and thence along Haven street northward to the south line of plaintiff's property.

The contract provided, as already indicated, that the street improvements were "to be started as soon as possible in the spring of 1900; South Boulevard from Doan to Haven streets to be first improved and in all respects finished." This was not done, but, on the contrary, the defendant proceeded to open up and improve other streets in the allotment in such manner as to facilitate the sale of his own lands.

For three years scarcely anything was done to improve the east end of South Boulevard between Haven and Doan streets, nor has anything been done to this day upon Bowman's lands, excepting a little grading and the planting of some trees along the proposed line of North Boulevard.

During said three years plaintiff gave little personal attention to the defendant's management of the allotment, although he kept informed of its progress from time to time through defendant's engineer. Soon after the 1st of May, 1903, and about three and a quarter years after the making of the original agreement, plaintiff advised defendant that the time having arrived for the appraisal provided for therein, he had appointed as appraiser Daniel R. Taylor, and requested that defendant appoint

an appraiser also. The defendant replied that he had given the matter of an appraisal no thought and suggested an extension of the time therefor; whereupon both parties entered into the following supplemental agreement modifying the original contract:

"This is to certify that all the terms and conditions to be performed by Henry C. Bowman and Bernhard Schatzinger on May 1st, 1903, under the terms of a certain written contract between Bernhard Schatzinger and Henry C. Bowman, dated February 7, 1900, are by mutual consent to be performed on or before June 1st, 1903, to which time the performance of said terms and conditions are extended, without, however, invalidating or changing any other provision of said contract."

Nothing further was done by the parties until the later date agreed upon had come and gone. On the 9th of June, however, plaintiff served upon the defendant notice of cancellation of the entire agreement and demanded that defendant execute a quit-claim deed of plaintiff's part of the property, so that plaintiff's title might be relieved of the cloud which their agreement and the recording thereof cast upon it.

The defendant paid no attention to this notice and demand, but soon afterwards went forward with and completed the improvement of the east end of South Boulevard and the north end of Haven street nearly up to plaintiff's line. Not until defendant had completed all the street improvements with respect to which he was in default did plaintiff commence this action to enforce the rescission contemplated by his notice and demand of June 9, 1903. Except for the defendant's delay in fulfilling the agreements by him to be performed, plaintiff at the time he began his action had acquired nearly all of the access to and from his lands which he sought to gain under the agreement. During the pendency of the suit enough lots have been sold in defendant's part of the allotment to make it incumbent upon him, under the terms of the original agreement, to go forward now with the improving of North Boulevard, which, as already stated, practically bisects longitudinally plaintiff's larger tract, and which when improved, will open up the lots in said tract to immediate sale for building purposes.

The defendant offers two excuses for his failure to improve the east end of South Boulevard at the outset of the undertaking: First, he says that the agreement should be so construed as to qualify his obligation in this behalf and limit it by the words "and further improve said lands as, in his opinion, is wise and practicable." Secondly, he shows that because Doan street was not so improved when said agreement was entered into nor at any time within the next three years as to permit proper drainage from the east end of South Boulevard, it was not wise and practicable to improve that portion of South Boulevard during that period of time.

We do not regard either of these excuses as valid, for we do not construe the agreement as defendant construes it, nor do we find anything in the agreement to indicate that the covenant requiring South Boulevard from Doan to Haven streets to be first improved and in all respects finished, was in any sense dependent upon the action or non-action of the public authorities in sewering Doan street.

Were it not, therefore, for the supplemental agreement, already quoted, we should have no hesitation in holding that the plaintiff was entitled to rescind the contract for defendant's failure to perform the same. At the date when that supplemental agreement was entered into, the terms and conditions required by the original contract to be performed by defendant were essentially unperformed. The plaintiff, however, instead of standing upon this breach by defendant and refusing to be further bound by the contract, covenants with him "that all the terms and conditions to be performed by Henry C. Bowman and Bernhard Schatzinger on May 1st, 1903, under the terms of a certain written contract between Bernard Schatzinger and Henry C. Bowman, dated February 7th, 1900, are by mutual consent to be performed on or before June 1st, 1903, to which time the performance of said terms and conditions are extended, without, however, invalidating or changing any other provisions of said contract."

This amounts to nothing else, as we view it, than an agreement that whatever remained undone on May 1st, 1903, which should have been done on that date, was not to be accounted such a

breach of the contract as to authorize either party to repudiate it. It was, on the contrary, a covenant by both parties that they would treat the contract as in all respects in force, notwithstanding anything that might have happened prior to that time.

True, the extension contemplated by the supplemental agreement expired by its terms on June 1st, and it was not until after that date that plaintiff assumed to rescind the entire agreement. But plaintiff meanwhile took no new steps to secure an appraisal and it was certainly not in the contemplation of the parties that the improving of the east end of South Boulevard, which had theretofore been neglected, should all be done in the interval of twelve days, between May 20, 1903, when the supplemental agreement was actually executed, and the 1st of June next succeeding. It simply provided, as we read it, that the performance of all the terms and conditions which were to have been accomplished May 1, 1903, might be postponed until June 1, 1903, and that nothing which had theretofore failed of due performance should be fatal to the continuance of the contract. The right of rescission, for any breach of the original contract occurring before the execution of this supplementary contract, was effectually waived when the latter was executed, and it can not be said that there was any such breach intervening between that time and the 9th of June as to authorize a court of equity now to aid an attempted recission on that date, especially as the plaintiff waited two and one half years longer before bringing his suit.

The original agreement was then so far executed (and still more so now) as to make it utterly impracticable to restore the defendant to his former position. When, therefore, after the lapse of more than three years, and in spite of defendant's dereliction, the plaintiff expressly reaffirmed that agreement and consented to extend the time of its performance, he can not be heard to change such affirmance into disaffirmance before three weeks had elapsed and without any new cause intervening save mere inaction for that period. By such disaffirmance he seeks to retain all the realized advantage of his contract and to condemn defendant to all the disadvantage of its annulment. Whatever advantage or remedy at law may be available to plaintiff under the circumstances, he can not, after having entered into

the supplemental agreement and for cause theretofore arisen, successfully invoke the interposition of equity in furtherance of the result thus indicated. *Leeds* v. *Simpson and Knox*, 16 O. S., 321.

There are many other questions of fact in the voluminous transcript of testimony admitted in evidence before us here, but we think it unnecessary to examine them in view of the conclusions which we reach regarding the effect of the supplemental agreement, as we construe it.

The plaintiff is not, we think, entitled to the relief for which he prays, and he must be remitted to his remedy, if any, in damages, for the matter of which he complains.

The petition will be dismissed.

PROCEEDINGS IN AID OF EXECUTION.

Circuit Court of Lucas County.

FRANK HOPPER, DOING BUSINESS AS HOPPER & KULP,
v. SIREN GALLIER.

Decided, December 23, 1911.

Aid of Execution—Not Necessary that the Affidavit Allege the Making of a Preliminary Demand—Sections 10436 and 10272.

The requirement that a demand must be made in writing for the excess over and above ninety per cent. of the personal earnings of a debtor, has no application to a proceeding brought in aid of execution under Section 10436, General Code.

Marion W. Bacome, for plaintiff in error.
Frank I. Isbell, contra.

RICHARDS, J.; WILDMAN, J., and KINKADE, J., concur.

Error to the court of common pleas.

The original action out of which this proceeding in error grows, was brought in justice's court and was a proceeding in aid of execution. Upon motion filed by the defendant, the justice dismissed the proceeding. From this ruling, proceedings

in error were prosecuted in the court of common pleas, where the judgment of the justice of the peace was affirmed. A bill of exceptions was taken before the justice, but it does not purport to contain all of the evidence which was introduced.

The affidavit which was filed before the justice of the peace avers that upon July 26th, 1910, the plaintiff in an action then pending before said justice duly obtained a judgment against the aforesaid defendant in the sum of $30.27 and for costs therein taxed at $4, that the Northwestern Ohio Bottle Company is liable to the judgment debtor in a sum of money which is now due to said debtor, and that said money is not exempt from execution or attachment.

The motion, which was filed in the justice's court by the defendant to release the money said to have been reached in the proceedings, contains four grounds:

1. That the facts in the affidavit are false and that the affidavit is insufficient.

2. That the defendant is a married man and the support of a family resident in Ohio.

3. That no demand was made upon the defendant for ten per cent. of his personal earnings.

4. That no summons or copy of the order issued by the justice has been served upon the defendant, althought he is a resident of Lucas county, Ohio.

By reason of the fact that the bill of exceptions does not purport to contain all of the evidence which was introduced before the justice of the peace, we are not advised as to the basis of his decision, except as recited in his docket entries which are before us.

It appears from the docket entries that the motion filed by the defendant was sustained upon the grounds that the affidavit was insufficient in law and that no demand had been made upon the defendant for ten per cent. of his wages. It does not appear at any place in the record that the justice of the peace found the property sought to be reached by this proceeding to be the personal earnings of the defendant, exempt from execution.

The contention made before us relates to the question whether in the proceeding in aid of execution brought under General

Code, 10436, a preliminary demand must be made and the fact of such demand inserted in the affidavit. It will be noted that the section to which reference has just been made is found in Title 2, Chapter XI of the General Code, entitled "Proceedings in Aid of Execution." The statute providing for the preliminary demand is General Code, 10272, and the section is found in Title 2, Chapter II of the General Code, and under the subdivision headed "Attachment."

As we construe these sections the requirement that a demand must be made in writing for an excess over and above ninety per cent. of the personal earnings of a debtor has no application to a proceeding brought in aid of execution under General Code, 10436. The method of procedure contemplated in Chapter II is complete in and of itself, and no reason is apparent why the requirement for the preliminary demand which exists in certain cases where proceedings in attachment are brought, should have any application to the case at bar. The point has been so ruled by the court of common pleas of Columbiana county in *Ammon* v. *Delaney,* 21 Ohio Decisions, 251.

It appears from the facts contained in the case of *Duffy* v. *Reardon,* 70 O. S., 328, in which the Supreme Court affirmed the judgment of this court, that an affidavit in all respects similar to the one in the case at bar was held to be sufficient. The affidavit contains every requirement set forth in General Code, 10436, and in our opinion is entirely sufficient. We do not, of course, pass upon the question of whether the property reached is exempt from execution or attachment.

The judgments rendered by the common pleas court and the justice's court will be reversed and the case remanded for further proceedings in accordance with this opinion.

ACTION FOR DAMAGES FOR ASSAULT AND BATTERY.

Circuit Court of Hamilton County.

HAMILTON COUNTY AGRICULTURAL SOCIETY v. HARRY HELMANN.

Decided, February 10, 1912.

Pleading—Necessary Allegations as to Injuries Received and Expenses Incurred—Where the Action is for Assault and Battery.

In an action for damages on account of assault and battery, it is error to admit evidence as to the permanency of the injuries received or the impairment of earning capacity, where these grounds of damage were not specially pleaded.

Frank F. Dinsmore and *Stanley W. Merrell,* for the Agricultural Society.

W. W. Bellew, contra.

SMITH, P. J.; SWING, J., and JONES, J., concur.

This was an action in the court below to recover damages for assault and battery made upon defendant in error by a private policeman employed by plaintiff in error, who struck defendant in error upon the head with his mace while he was attending one of its "fairs" at Carthage, Ohio.

The allegation in the petition in respect to the act complained of is as follows:

"Plaintiff further avers that on said day aforesaid, he was sitting on the fence which encloses the race track on its ground, watching a balloon ascension which was then being given by said society, when the said Joseph Werbel aforesaid, private policeman, appointed by, and in the employ of said defendant's society, without warning, struck and knocked plaintiff in the head with his mace, inflicting a cut three inches in length and otherwise beat this plaintiff about the body and dragged this plaintiff from about the place where he had been sitting, through and over the grounds of said defendant's society, to an exit gate of said grounds a distance of at least 1000 feet, and ejected this plaintiff from the grounds, fair and exhibition of said society."

At the trial of the case evidence was allowed to be introduced as to the permanency of the injury received by the blow and of

the impairment of the earning capacity of defendant in error. To the admission of this evidence objection is made upon the ground that these grounds of damages were not specially pleaded.

In *2d Sedgwick on Damages*, page 607, general damages are held to be such as the law implies or presumes to have occurred from the wrong complained of. Special damages are such as really took place and are implied by law.

It is a well settled rule that in a civil action for assault and battery it is unnecessary to specifically allege such damages as are the necessary and usual consequences of the act complained of, and in an action to recover damages for assault and battery the plaintiff may recover such damages as are the natural result of his injury without specific averment. *Morgan* v. *Kendall*, 124 Ind., 454.

So in an action for assault and battery it is only necessary to set forth in the declaration such damages as the law will not presume to be the necessary or usual consequences of the injury complained of. *2 Ency. Plead. & Prac.*, 862.

It would seem, therefore, from the assault and battery as alleged in the petition, permanency of the injury and loss of time, or lack of earning capacity would not be the necessary and natural results thereof, and, therefore, to recover damages for the same they should be specially pleaded. In this regard they differ from humiliation, bodily pain and mental anguish, which would be the necessary and natural results of assault and battery and for which one might recover on a general plea of damage. The rule seems to be that only such damages as may be presumed necessarily to result immediately and directly from the blow or force inflicted, need not be particularly and specially set out in the declaration (*Birchard* v. *Booth*, 4 Wis., 67), and permanent mental disorder can not be said to be the ordinary results of an assault and battery and unless specially pleaded can not be proved. *Kuhn* v. *Freund*, 87 Mich., 545.

But the law infers bodily pain and suffering from personal injury and applies also to an injury to the feeling and mental anguish as results of personal injury. *Stewart* v. *Watson*, 133 Mo., 44.

Loss of time, labor and medical expense in such an action must be specially averred. *2 Bates Plead. & Prac.*, 967; *O'Leary* v. *Roawn*, 31 Mo., 117.

Under the evidence in the case we do not think that the consequences of permanent injury and impairment for work, necessarily flow from the act of assault and battery, and hold they should have been alleged in order to recover therefor.

We think the agency of the private policeman, who is alleged to have struck the blow, is sufficiently alleged in the complaint and we see no prejudicial error in the charge of the court in this regard. In our view of the case, therefore, we are of the opinion that the court committed error in submitting to the jury the special charge relative to the recovery of damages for loss of time and diminished earning capacity; nor do we think that the trial court, in whose mind it was doubtful whether evidence of such damages could be introduced, could cure this error by reducing the amount of the verdict by such sum as he thought the verdict had been increased by the admission of incompetent evidence.

The various elements going to make up the verdict by way of damages could not be separated, and in such event a new trial should have been granted, as the question of the amount of recovery is solely for the jury.

We find nothing further in the charge prejudicial, and for the above reasons the judgment of the court below is reversed and a new trial granted.

GROUND FOR REFUSAL OF ALIMONY TO WIFE.

Circuit Court of Cuyahoga County.

CAROLINE QUALLICH v. JOHN E. QUALLICH.*

Decided, March 28, 1905.

Alimony—Wife Living Apart from Her Husband—Not Entitled to Alimony, When—Section 5702.

An action for alimony by a wife who is living apart from her husband must be brought clearly within the statute, and where it appears

* Affirmed without opinion, *Quallich* v. *Quallich*, 72 Ohio State, 671.

from the evidence that the husband has offered her a suitable home and no reason appears why she should refuse the offer, the petition will be dismissed.

Myer & Mooney, for plaintiff.
Hart, Canfield & Croke, contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

This cause is here on appeal. It was begun by Caroline Quallich, who is here seeking alimony for her support while living apart from her husband. It is clear that a case must be made within the statute to permit the allowance of alimony without divorce (*Nelson on Divorce and Separation,* Section 1,000). None of the grounds for alimony without divorce, enumerated in Section 5702, Revised Statutes, has been proved. It is most certainly neither abandonment nor gross neglect of duty for a husband to refuse to support his wife while she is living elsewhere than in the home which he provides or tenders, if the home so offered her is a reasonable one under the circumstances.

In this case we find from the evidence that the husband has tendered to his wife a suitable home, and no reason appears why she should refuse this offer. The petition is dismissed.

SALE BY SHERIFF.

Circuit Court of Richland County.

C. F. ACKERMAN, RECEIVER, v. L. T. CORNELL ET AL.

Decided, January Term, 1912.

Judicial Sales—Foreclosure—Successful Bidder Entitled to Prosecute Error—Sale Will Not be Set Aside to Permit of Higher Bid—Option Obtained by One of the Appraisers from Successful Bidder.

1. A purchaser at a sheriff's sale, under a decree in foreclosure, is sufficiently a party to the action in which the sale is made to prosecute error to the circuit court to reverse the judgment of the court of common pleas, upon a motion sustained by said court in setting aside the sale of the real estate made by the sheriff.

2. In the absence of fraud, irregularity or misconduct affecting the validity of a judicial sale, such sale will not be set aside and confirmation refused in order to allow the bid of the purchaser to be advanced by another bidder.
3. The fact that one of the appraisers of the real estate did on the day of the sale obtain an option from the purchaser for a one-half interest in the premises, does not affect the regularity and validity of the sale, in the absence of any showing that said appraiser did in any wise prevent any one from being present or bidding at said sale.

C. H. Workman and *W. S. Kerr,* for Rollin H. Cockley.
R. V. Owen and *Cummings, McBride & Wolfe,* contra.

BY THE COURT.

This proceeding in error is prosecuted to reverse the judgment of the court of common pleas of this county, arising upon a motion sustained by said court in setting aside the sale of certain real estate made by the sheriff of said county.

It appears that after the sale of certain real estate was advertised by said sheriff, to be sold at public sale, that said real estate was so offered by said sheriff when one Rollin H. Cockley bid to pay for the same the sum of $4,000, which said sum was two-thirds of the appraised value of the same. That said Cockley thereupon paid to the said sheriff the sum of $100 to apply on said purchase price for said real estate, and by arrangement with said sheriff, and to his approval, he was to pay the balance of said purchase price two days later, to-wit, Monday, December 11th, 1911, said sale being on Saturday. That on said December 11th, 1911, the said Cockley tendered said balance of said purchase money to said sheriff when he refused to accept the same because of a motion filed in said court by the receiver of the Farmers & Merchants National Bank of Mt. Vernon, Ohio, to set aside said sale for reasons stated therein. That upon a hearing of said motion by said court, supported by affidavits and oral testimony, said court set aside said sale, from which finding and judgment of said court the said Rollin H. Cockley, the purchaser of said real estate at said sheriff's sale, prosecutes error to this court.

The first question presented is, whether said Cockley can prosecute this proceeding in error? Does he sustain such a relation to this proceeding as that he is a proper party thereto? We answer the question in the affirmative, for the courts hold:

"That a purchaser at a sheriff's sale, under a decree in chancery, is sufficiently a party to the action in which the sale is made, to move for confirmation thereof or to take any necessary steps therein to protect his rights in the premises." *6 Hun.*, 138; *2 Page,* 339; *Sugden on Venders,* Vol. 1, page 83.

But it is contended that one James Geiselman, one of the appraisers of said real estate, and the purchaser, Rollin H. Cockley, acted collusively if not fraudulently in the sale of said real estate; that said Cockley on the day of said sale, but after said sale, gave said Geiselman a written option to purchase a half interest in said real estate for two thousand dollars, that said real estate, if properly advertised could and would have been sold for a much larger sum for which the same was bid off, and that a deposit of $1,000 was made in said court by one Milton Wise as guarantee that said real estate if re-advertised and put up to sale again would be sold for at least $5,000. An examination of this record shows that said property was regularly and legally appraised and advertised for sale on the 9th day of December, 1911, by the sheriff of said county; that on said day said property was duly offered for sale by the sheriff of said county, at public auction, that there was only one bidder for the property, that said bidder was the said Rollin H. Cockley to whom said property was sold by said sheriff for the sum of $4,000, said sum being two-thirds of the appraised value of said property.

Said record further shows that while said Geiselman, one of the appraisers of said real estate, took a written option from said Cockley, after said sale, to purchase a one-half interest therein, it does not appear that said Geiselman in any wise prevented any one from being present or bidding at said sale, or that said sale was in any respect whatever irregular, and it further appears that said sale was regularly advertised and said Milton Wise had knowledge of the time of said sale, as evi-

denced by the testimony of witnesses introduced upon the hearing of said motion to set aside said sale.

Upon the facts found as hereinbefore stated, we are of the opinion that said court of common pleas erred in setting aside said sale, and for such error the judgment of said court is reversed.

And it appearing to the court from the return of the sheriff of the writ of execution issued herein with his report of his proceedings and sale of the land under said writ, that said proceedings and sale have been duly and legally made, and being satisfied that said sale has in all respects been made in conformity to the provisions of the statutes in such cases made and provided, and in all respects legal, the sale to R. H. Cockley is hereby approved and confirmed, and the sheriff of Richland county is ordered to make to the purchaser, R. H. Cockley, a deed according to law for the property so sold to him upon the full payment of the purchase price of said premises, to-wit, the sum of $4,000, and the said cause is remanded to the said court of common pleas for further proceedings according to law.

And it is ordered by the court that the deposit of $1,000 made with the sheriff by said Milton Wise be returned to him. Exceptions noted.

ALTERNATIVE REMEDY BARRED BY ELECTION.

Circuit Court of Cuyahoga County.

JOSEPH KESTING v. THE EAST SIDE BANK COMPANY.*

Decided, November 10, 1905.

Election of Remedy—Action to Vacate Judgment After Term—Barred by Election to Prosecute Error—Failure to Set up All Defenses—Sections 5305, 5309 and 5354, *Revised Statutes.*

An action to vacate a judgment after term will not lie where it appears that the petitioner had previously and without success prosecuted error to the same judgment, without then alleging as ground for a new trial the matters of complaint of which he was then aware and on which he now relies.

Blandin, Rice & Ginn, for plaintiff in error.

Shmurk & Thompson and *Hills, McGraw & Van Derveer,* contra.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Error to the court of common pleas.

The parties to this proceeding in error stand in the same relation as in the court below. That court dismissed plaintiff's petition, filed under favor of Section 5354, Revised Statutes, to vacate a judgment rendered against him at a previous term on a cognovit note for more, as he now claims, than was due. The failure of the court to vacate that judgment is the error here assigned.

The parties live in Toledo, and plaintiff was an accommodation maker of the cognovit note in controversy, to the East Side Bank as payee. He claims that at the time of the delivery of the note, the bank agreed with him that the same was to be amply secured by a chattel mortgage of the principal maker; that the plaintiff's name was required upon the note merely to comply with the bank's rules, and that he would never be re-

* Affirmed without opinion, *Kesting* v. *East Side Bank,* 76 Ohio State, 591.

quired to pay the same. He further claims that such a chattel mortgage was in fact given soon afterwards; but that the bank, at the instance of the principal maker of the note, omitted to file it, whereby the lien was lost; that the principal maker having meanwhile departed from the state leaving no property here, the bank, without notice to the plaintiff, procured judgment to be rendered against him in Cuyahoga county. The plaintiff further claims that he is ignorant of the residence of the principal maker of the note, and that on this state of facts he is entitled to have the judgment vacated.

On the trial below the defendant offered in evidence the record in the primary case, from which it appears that a proceeding in error was then unsuccessfully prosecuted in this court for alleged error consisting of misnomer of the defendant therein. But the points made in the present action were not litigated in that proceeding. No reason appears why the plaintiff might not have done so; for, when he became aware of the judgment, he was entitled, under Section 5309, Revised Statutes, and chapter 5, commencing with Section 5305, to apply for a new trial upon the ground of accident or irregularity. He chose not to take this course, preferring instead to rely wholly upon the alleged misnomer. No doubt Section 5354, which he now invokes, afforded a cumulative, or rather an alternative, remedy. That is to say, he was entitled to resort to it, in the first instance, rather than to Section 5309, if he desired to do so. But having prosecuted error to the former judgment, without first applying for a new trial upon the grounds then known to him, we think he is now debarred, by his election, from seeking anew the relief which was then available. *Becker* v. *Walworth*, 45 O. S., 169, 173; *Buell* v. *Cross*, 4 Ohio, 327, 330.

In *Pollock* v. *Cohen*, 32 Ohio State, 514, it was held that a second petition in error, upon the same record, but upon new grounds, known but not asserted before, will not be entertained.

In *Kunneke* v. *Mapel*, 60 Ohio St., 1, it was held that a party defending is bound to set up all matters which are strictly matters of defense, and if he fails to do so, he can not afterwards relitigate the controversy, upon the omitted issues. See also

Neugut, Trustee, v. *Brinkenhoff, Sr.,* 67 Ohio State, 472, and *Jenkins* v. *Easterly,* 24 Wis., 340, a case very like the one before us. It is true there is a contrary intimation in *Parker* v. *Haight,* 14 C. C., 548; but that was a mere dictum and not necessary or even pertinent to the decision.

Entertaining the view thus indicated, we find it unnecessary to discuss the sufficiency of the defense to the primary action as now offered; though it may be doubted whether the prayer of the petition to vacate should have been granted on its merits, in view of the seeming authority of *Shaul* v. *McCauley,* 34 B., 278, affirmed without report, 53 Ohio State, 676.

The judgment below is affirmed.

PUBLICATION OF COUNTY COMMISSIONERS' REPORT.

Circuit Court of Wood County.

STATE, EX REL THE SENTINEL COMPANY, v. COMMISSIONERS WOOD COUNTY.*

Decided, October 28, 1910.

Publication—Necessity of, in Case of Financial Report of County Commissioners—Competency of Newspaper May Be Determined in an Injunction Proceeding.

1. Injunction lies to determine the competency of a newspaper to publish the financial report of the county commissioners, required under Section 2508, General Code.
2. Necessity for the publication of such a report is not determined by the comparative amount of money involved in the report or by the cost of its publication.
3. A newspaper having a circulation of eight hundred in a county containing a population of fifty thousand distributed over twenty townships, and in fifteen of those townships containing a population of thirty-five thousand a circulation of only thirty-six, is a newspaper of general circulation within the meaning of the statute providing for the publication.

N. R. Harrington, McClelland & Bowman, for plaintiffs.

B. F. James and *William Dunipace,* contra.

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* Affirmed without opinion, 84 Ohio State, 447.

KINKADE, J. (orally); WILDMAN, J., concurs; PARKER, J., dissents in a separate opinion.

Appeal from common pleas court.

In the court below this was an action brought by the Sentinel Company, as a tax-payer of Wood county, after the statutory requirement (General Code, 2922) for requesting the prosecuting attorney of the county to bring the action had been complied with, to restrain the county commissioners and the county auditor from entering into a contract under General Code, 2508, to print the county commissioner's report in a paper known as the *Weekly Beacon,* published at North Baltimore.

The ground for the injunction set up in the petition is that the *Weekly Beacon* is not a paper of general circulation in Wood county. That is the only ground set up in the petition for this injunction, and it is said that because it is not a paper of general circulation in Wood county, that, therefore, the county commissioners and county auditor are unauthorized (as of course they would be if that is so) in making a contract with Mr. Wilkinson, the proprietor of the *Weekly Beacon,* to publish this report in that paper.

The position taken by the Sentinel Company is denied by Mr. Wilkinson. In the court of common pleas a temporary injunction was granted restraining the completion of the contract. A motion was made to dissolve that injunction, the motion overruled and the injunction continued in force until the final hearing in the court of common pleas, and it is stated by counsel, but not shown in the papers here though undoubtedly a fact, that the case passed on to final hearing in the court of common pleas and the injunction was made perpetual.

An appeal was taken to this court from the order of the court of common pleas refusing to dissolve the temporary injunction, and the question presented here is on a motion to dissolve this injunction, and the case is also on its merits here.

Several grounds are presented by the defendants raising questions of procedure in this case. It is said that the only proceeding that could be brought would be one in mandamus.

It is not admitted that such action may have been brought and maintained, neither is it contended by defendant that it

could have been maintained at all, but it is said that if the matter could have been interfered with in any way, it must have been by mandamus, not by injunction. We think that is not the case. We are unanimously of the opinion that the proceedings were correct in form. We call attention to the case of *Schloenbach* v. *State,* 53 Ohio St., 345. The opinion of the court, found on page 346, recognizes the correctness of the practice pursued in this case, and if any authority was necessary to show the correctness of the procedure here we think this particular decision of the Supreme Court covers that question.

We see no question in this case we have in controversy at all except the question as to whether the evidence in this case shows that the *Weekly Beacon* published at North Baltimore at the time this contract was attempted to be entered into, was a paper of general circulation in Wood county as provided by statute—a question of fact, which the court of common pleas held that it was not, the paper having, as shown by the evidence, some eight or nine hundred of circulation, going to many of the townships in Wood county in small numbers, it is true, and no affirmative showing that it went to five of these townships of the county—that papers went to these townships and may have been delivered in the townships we think the record fairly shows, but it is not shown affirmatively in the record that it had a circulation in every township in the county. It is shown that it had a circulation in fifteen of the twenty townships, of a limited circulation.

It is set up in the petition that the county commissioners advertised for bids for this work, but states that there was no requirement that they should advertise for bids. It is stated in the petition that the contract about to be let will involve an expenditure of about $50, and it is stated in argument that if the printing were allowed under the legal rates to the *Sentinel* it would amount to something like $350. It does not occur to us that the amount involved cuts any figure in the case either with reference to the *Sentinel* or *Weekly Beacon*—the sole question in issue in the case being, is this a paper of general circulation in Wood county with which the county commissioners may make this contract and comply with the statute? After examining the case fully it is the judgment of a majority of the court

that it was a paper of general circulation in Wood county, and that being true, the motion to dissolve the injunction will be granted, and the petition of the Sentinel Company will be dismissed.

PARKER, J., dissenting.

I find myself unable to concur in the conclusion of my associates. We have been furnished with a transcript of the able opinion of the judge of the common pleas court who decided this case, and it seems to me that his findings, reasonings and conclusions are sound and just, and conclusive against the defendant. I shall not attempt to add much to it. With respect to the circulation, as pointed out in that opinion and as shown by the testimony of Mr. Wilkinson, of the *Weekly Beacon,* the *bona fide* circulation of the *Beacon* in Wood county as nearly as he himself can state it, at the time this suit was instituted, was 636 copies. In addition to that he states there were somewhere in the neighborhood of ninety or one hundred sold from week to week at news stands, and there were other copies that went to Toledo and elsewhere outside of the county; but he gives in his testimony in detail the number going to actual subscribers in this county. For the townships of Milton, Liberty, Henry, Jackson and Bloom lying at the south side of the county, he says the circulation was 600. Those are five of the twenty townships of the county and they lie contiguous to one another. In the other fifteen townships of the county there were sent thirty-six copies according to the testimony of Mr. Wilkinson; that is, that many copies were sent to the post offices of those townships. Perrysburg township received at the post office three; Middleton, two; Washington, two; Grand Rapids, two; Weston, three; Plain, nine; Center, eight; Freedon, three; Portage, two; Montgomery, two. No papers were sent to the post offices in Ross, Lake, Troy, Webster or Perry townships, though, as has been stated in argument, it is quite probable that some of these papers sent to adjoining townships may have gone into those townships where there appears to have been an entire dearth of circulation. But assuming that that happened, it still remains true

that in those townships having a population of 35,457 according to the census of 1900 (probably 10 per cent. greater now) the thirty-six papers sent would amount to a paper to over 1,000 residents, or to a paper to about one-tenth of one per cent. of the population of those fifteen townships.

The population of the whole county in 1900 was 51,733 and this was (and the present population is) distributed over the whole county with substantial evenness. In the other five townships, 600 papers were sent, which was a little more than one paper for each 100, or for 1 per cent. of the population. Conceding that there is enough circulation in the five townships to amount to a general circulation, I am of the opinion that there is not enough circulation in the other fifteen townships to amount to a general circulation therein. My construction of this statute as to general circulation in a county is that it means a general circulation throughout the county. By that I do not mean that the paper must go into every township in the county, but that it ought to be a substantial circulation throughout the county.

Where the population is distributed evenly, as in Wood county, the circulation in numbers sufficient to make it general, should be distributed over more than one-fourth of the territory of the county.

The report to be published and to be paid for out of the public funds is a report of expenditures made by the county commissioners during the year for all the various things for which they may have expended public funds throughout the county, and the citizenship of the county at large is interested in reading this report.

The evident purpose (if there is any legitimate purpose at all) of the publication, is to give information throughout the county as to the proceedings of the county commissioners in this regard—what they are doing and what they are spending the public money for.

It seems to me that it can not be said that a paper has a general circulation throughout the county, if this circulation is substantially limited to a certain block of townships at one end of the county comprising one-fourth in territorial extent of the

county, and where the population amounts to substantially one-fourth of the population of the county; that to make it a general circulation, at least the greater part in territorial extent of the county should be supplied with the paper in some substantial numbers. But here we have a solid unbroken territory comprising three-fourths of the townships and containing three-fourths of the population of the county with a supply of papers so meager as to amount to no circulation amongst such population and throughout such territory.

It is, of course, impossible to lay down any hard and fast rule as to the number of papers that shall go out to constitute a general circulation; it must depend upon the population and upon the distribution of the population. There may be townships containing comparatively few inhabitants where it would be right and proper to say there would be a general circulation in such townships if but few papers were there, whereas there may be townships where it would seem to be proper that there should be a greater number of papers circulated to make the circulation general. I say it is impossible to lay down any hard and fast rule upon the subject, and yet if the circulation is confined substantially to one-fourth of the population and one-fourth of the territorial extent of the county, it is my opinion that that is such a preponderance of territorial extent and population unaffected by the circulation of the paper as to make it not a paper of general circulation in the county.

If the circulation might be confined to one-fourth of the county and still be a general circulation in the county, I can not see why it might not be confined to a smaller extent of territory and a smaller population. If you circumscribe the limits to five townships, why not four townships, or three townships, or two, or even one. Why not say of some obscure paper published in some little village or cross roads in some township that has a general circulation in that township, that it is a paper of general circulation in the county?

As has been said, this is really the only question that is presented in this case. The question of the price to be paid for printing this report is not involved in this case. The question

of the wisdom or unwisdom of the policy pursued by the county commissioners with respect to this matter, is not involved in this case. The question of whether or not the county commissioners may by competitive proceedings requiring bidding, or by other proceedings, obtain or require the publication of the report at a less figure than a dollar and a half per square, is not involved in this case. The question as to whether there may or may not be some other newspaper published in the county and of general circulation therein, is not involved in this case. For aught we know there may not be a newspaper published in the county of general circulation in the county. There may not be one entitled to make this publication and receive pay for it from the public fund. We have simply this one question as to whether the *Weekly Beacon* comes within the purview of the statute as to circulation. This is a mixed question of law and fact. In all other respects it is conceded that the *Beacon* meets the requirements of the statute. That it is a newspaper of general character and that it is a political paper and printed in the county is conceded.

We find very little authority bearing directly upon this question. We were cited to one criminal case in the reports of the Supreme Court of Nebraska in which a question somewhat like this was decided, and it was there said in a foot-note by the reporter that that was the first case in which any of the higher courts had ever attempted to define "general circulation." This appears to be a mistake, for I think the precise question has been settled by the Supreme Court of Ohio in the case to which we were cited and which we have examined, viz., *Craig* v. *Fox,* 16 Ohio, 564. This case I regard as being directly in point and conclusive, and if so it is an authority not only entitled to our respect, but it is an authority absolutely binding upon this and all inferior courts.

This was a case of a publication of a legal notice in a newspaper—the Sunday *Enquirer*—made under a statute which required that the notice be published in a newspaper of general circulation in the county. The requirements, so far as this question is concerned, are precisely the same. The notice was pub-

lished in the Daily *Enquirer* and also in the Weekly and Tri-Weekly *Enquirer*. The court found the fact to be that the Daily *Enquirer* did not circulate outside of the city of Cincinnati. None of these daily papers went out into the county beyond the limits of the city. The court also found that the notice had not been published a sufficient length of time in the Tri-Weekly or Weekly *Enquirer*, so that the publication therein could be considered to supplement or assist the publication in the Daily, and the publication in the Tri-Weekly and Weekly had to be disregarded. Coming to consider the publication of the Daily, which seems to have had a sufficient circulation within the city of Cincinnati to entitle it to be regarded as of general circulation there, the court held it was not a general circulation in the county, and therefore the publication was held to be invalid.

We know as a matter of general information—a thing that courts may take judicial notice of—that the population of the city of Cincinnati, even in that early day (1847) comprised a large part or a large majority of the population of the county; yet the circulation among that population was held to be insufficient. I can not see that that case fails to meet this one. It appears to me to meet the situation exactly; and if a publication of legal notice required to be published in the county, is not sufficient where it is published in a city like Cincinnati, having a majority of the population of the county, that it ought not to be held sufficient where the publication is substantially limited to five townships in one corner of a county containing but one-fourth of the territory and one-fourth of the population of the county. That decision has stood as the law of the state since 1847. We can not find by searching authorities or digests that it has ever been qualified or criticized. The court there regarded the requirement that the publication should be a general circulation in the county as having some reference to the territorial conditions and held that the territorial idea was involved; that the circulation should be substantial throughout the county. Now, it seems to me that this statute is even clearer in support of the contention that the territorial idea as well as the population idea is involved. It is held in a number of

cases where the question was raised, that general circulation was used as contradistinguished from special circulation; that a circulation among those of a certain profession or among certain tradesmen, or members of a certain religious body, would be special, and that general means it must not be of that character, but it must be a publication that contains general news and that goes out generally to the people.

Here the requirement is that it must be a newspaper, and a political newspaper, and in addition to that, it shall have a general circulation in the county. Now, in the same section of the statute (and I read from the old statutes—R. S., 917) upon the subject of publishing in a German newspaper, that idea appears to be emphasized—*i. e.*, the idea that the population of a territory ought to be considered in determining whether or not the paper has a general circulation (reads):

"And in addition to the publication therein required, be published in one newspaper printed in the German language and having a *bona fide* circulation of not less than 600, if there be such paper printed and in general circulation among the inhabitants speaking that language in the county," etc. There the terms "general circulation" are used in the same section of the statute and used as it seems to me, with this idea in mind. It is not necessarily sufficient if it is a circulation of 600, it must have a circulation of not less than 600 (it does not imply that such circulation in a population of 100,000 for instance, would be sufficient) and in addition to that number it must have a general circulation. And this 600, or whatever number the court may find, would be sufficient in point of numbers, must be a general circulation in the county. The general code changes the phraseology somewhat, but it seems to contain and enforce the same idea.

For these reasons, I am of the opinion that the injunction ought to be made perpetual; that the *Beacon* is not a paper of general circulation within the purview of the statute.

INJURY TO EMPLOYE IN UNGUARDED MACHINERY.

Circuit Court of Cuyahoga County.

ROBERT R. LEE v. STANDARD TOOL CO.*

Decided, June 8, 1908.

Negligence—Master and Servant—Doctrine of Assumed Risk Abolished by the Act Relating to Unguarded Machinery—Limitation of Liability—Application of Section 1027, General Code, Relating to the Safe-Guarding of Machinery—Section 6243.

1. The effect of Section 6243, General Code, providing that the risk of unguarded machinery shall be assumed by the employer, is to abolish the doctrine of assumption of risk by employes who continue in the service with knowledge, express or implied, of dangers in consequence of which they may suffer injury, if the sufferance of the source of danger amounts to a violation by the employer of a penal statute, state or national; and it follows that a petition by an injured employe, which alleges that he was without means of knowledge of the danger, but fails to allege that he was without equal means with the defendant of knowing the source of danger, or by the exercise of ordinary care would have known thereof, is not defective in a cause of action arising under said section.
2. Inasmuch as the limitation to $3,000 of damages for wrongful death resulting from failure to guard or protect machinery, creates no new cause of action, but may be invoked in any action involving employer's liability for injury to an employe, a petition praying for $10,000 is not an election not to invoke the limited liability contemplated by this act when the right of recovery depends solely upon its provisions.
3. The provision of Section 1027 as to the safe-guarding of machinery applies to a space of eighteen inches, on one side of which cog-wheels are revolving at the height of a man's coat; and although such space was not intended for nor used as a passage-way, an employe passing through such a space at the direction of the foreman comes within the protection of the statute.

McGrath & Stern, for plaintiff in error.
Hoyt, Dustin, Kelley, McKeehan & Andrews, contra.

* Affirmed without opinion, *Standard Tool Co.* v. *Lee*, 83 Ohio State, 501.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Error to common pleas court.

This was a personal injury damage case wherein a verdict for defendant was directed by the court. It is complained here that this action was taken by the court before plaintiff had rested, but an examination of the bill discloses the fact that plaintiff announced the conclusion of his evidence bearing upon the cause and maner of the accident before this action of the trial court was taken, and we find no error in this behalf.

The facts are as follows:

Plaintiff was an experienced employe in defendant's shop, and on October 4, 1906, he went into a room or department where many lathes were in operation and where he had been only once or twice before. He was in search of a certain tool, which, after some delay, he caught sight of and started to go by a passageway, around certain moving machinery, to get it. His foreman thereupon accosted him and ascertaining what he wanted, told him to go directly between certain lathes which stood fifteen or eighteen inches apart, and get the tool in question. In doing so his coat was caught in cogs that were revolving at the end of one of said lathes and he was severely injured.

The conversation with the foreman is not set up in the petition, but is alleged in the reply. Thus it has no bearing upon plaintiff's cause of action, but bears only upon the defense of contributory negligence set up in the answer. The petition, moreover, fails to allege that plaintiff was without equal means with the defendant of knowing the source of danger from which he suffered his injury, or that by the exercise of ordinary care he would not have known of the same, although it does allege that he was without knowledge thereof.

It is claimed, however, that notwithstanding this omission the petition states a cause of action under R. S., 4364-89*c* (General Code, 1027) and R. S. 4238*o*-1 (General Code, 6243, 6244). The former section requires, under penalty, that owners and operators of factories and workshops provide for "the enclosure of all exposed cog-wheels," and the latter section provides that:

"In any action brought by an employe, or his legal representative, against his employer, to recover for personal injuries, when it shall appear that the injury was caused in whole or in part by the negligent omission of such employer to guard or protect his machinery or appliances, or the premises or place where said employe was employed, in the manner required by any penal statute of the state or United States in force at the date of the passage of this act, the fact that such employe continued in said employment with knowledge of such omission, shall not operate as a defense; and in such action, if the jury find for the plaintiff, it may award such damages not exceeding, for injuries resulting in death, the sum of five thousand dollars, and for injuries not so resulting, the sum of three thousand dollars, as it may find proportioned to the pecuniary damages resulting from said injuries."

The effect of the section last quoted is in all cases to which it applies, to abolish the doctrine of the assumption of risk by employes who continue in the service with knowledge, express or implied, of dangers, in consequence of which they suffer injury, where the sufferance of such source of danger amounts to a violation by the employer of any penal statute, state or national; and in any such case the rule of pleading prescribed in *Chicago & Ohio Coal & Car Co.* v. *Norman*, 49 Ohio St., 598, can have no application.

If the cause of action pleaded and proved in the court below falls within the purview of these statutes, and there was no contributory negligence on the part of the plaintiff, the action of the court below in directing a verdict for defendant was erroneous and the judgment should be reversed.

It is said, however, that R. S., 4238*o*-1 does not apply to the case before us for two reasons: First, because plaintiff has elected not to invoke the limited liability contemplated thereby in praying for $10,000 damages instead of confining the amount demanded to the sum of $3,000 as in said section provided. Secondly, the petition alleges that he had no knowledge of the exposed cog-wheels, whereas said section contemplates only cases in which the employe continues in the employment "with knowledge" of the omission to comply with the statute in any such particular.

We are unable to accept this construction of the statute in question. It does not purport to create any new cause of action, but instead its provisions are applicable by its express terms "in any action brought by an employe * * * to recover for personal injuries," etc. The amount of recovery in such cases is indeed limited to $3,000 for one having knowledge of the absence of statutory safeguards, but the fact that plaintiff has prayed for more than, under this statute, he can recover, does not, we think, render a petition demurrable, when the right of recovery depends solely upon this section. Inasmuch as this section may be invoked "in any action" of employer's liability for injuries to his employe, there is no opportunity for election between the common law and a so-called statutory action. In many states where employer's liability codes have been enacted, such right of election is specifically reserved to the plaintiff, and it is undoubtedly true in all cases where a new right of action is created by statute to exist in addition to and parallel with similar common law actions, the plaintiff must elect between them, and having elected, be held to pursue his rights accordingly. But such is not the case here.

It is objected further that the evidence in the case before us clearly shows that there were "no exposed cog-wheels," within the meaning of R. S., 4364-89c. It is urged that if cog-wheels are left uncovered at some point near the ceiling of a room, where employes can not in the ordinary course of things come in contact with them, or when they are revolving elsewhere than upon the exterior of any machine, or indeed in any place where employes will not, in the due course of their employment be apt to come in contact with them, the statute does not apply. This contention is no doubt correct, but we are not able to say from the evidence adduced in this case, and we think the court below could not properly say, that such was the state of facts here. Of course a space fifteen or eighteen inches wide, on one side of which cog-wheels were revolving at the height of a man's coat, can hardly be said to be intended for a passageway, and the evidence introduced or offered here does not tend to show that prior to the happening of this accident this space

in fact was used as a passageway for employes; but it is in evidence that both plaintiff and his foreman thought proper for him to use it as such, and if the cogs had not been exposed, it is not unreasonable to suppose that a space fifteen or eighteen inches wide might safely be used as such. To say that the revolving cog-wheels were in themselves a warning that the space was not intended for the purpose and must not be used by employes to walk through, is but to beg the question. If anyone did go through there, the cog-wheels were manifestly exposed as to him. Plaintiff says that he did not know that there were any exposed cog-wheels there, and if so, he did not know that this bar to the use of the space in question, as a passageway, to walk through, existed.

It remains, therefore, only to determine whether the court was justified in directing a verdict upon the theory that the plaintiff was, as a matter of law, guilty of contributory negligence. We think, in view of his testimony that the foreman directed him to go through that space and that he had no knowledge of the uncovered cog-wheels, the conclusion can not be drawn as a mere a matter of law, that he was wanting in the exercise of ordinary care in taking this route. It was rather a question of fact for the jury to determine.

We hold that the court below erred in directing the jury to return a verdict for the defendant, and the judgment of the court of common pleas is reversed and the cause remanded.

RECOVERY FOR SERVICES FOR NURSING AND ATTENDANCE.

Circuit Court of Stark County.

SAMUEL RUDY v. LETITIA RUDY.

Decided, February, 1912.

Statutes of Limitations—Applied to a Contract for Labor and Services —Charge of Court as to Proof Required to Establish Agreement to Pay for the Services.

1. Under a contract wherein the defendant is alleged to have made an express agreement to pay plaintiff for services theretofore performed and thereafter to be rendered and performed, the statute of limitations does not begin to run until the contract is terminated by breach or otherwise.
2. In such a case, the record disclosing no blood relationship between the parties, it is only incumbent upon the plaintiff to establish the contract by a fair preponderance of the evidence; and where the jury were instructed that the contract must be established by clear and unequivocal proof, error can not be predicated on a refusal to give a written instruction before argument to the effect that the burden was on the plaintiff to prove the existence of the contract by fair and satisfactory evidence.
3. A request to charge the jury in such a case that "if you find from the evidence that it is more probable the plaintiff rendered the services described in the petition as acts of kindness than with the expectation of being paid for the same, she can not recover in this action," was properly refused.

Craine & Snyder, for plaintiff in error.
A. M. McCarty and *L. C. Wise,* contra.

SHIELDS, J.; VOORHEES, J., and POWELL, J., concur.

This proceeding in error is prosecuted to reverse the judgment of the court of common pleas in an action wherein the defendant in error, plaintiff below, sought to recover of the plaintiff in error, defendant below, a judgment for a breach of an express contract for services rendered by the defendant in error to the plaintiff in error.

In the petition filed in the court below by Letitia Rudy, plaintiff below, she sets up that Samuel Rudy, defendant below, is indebted to her in the sum of $9,830, with interest thereon

from January 10, 1911, for work done and services performed by her for the defendant, at his request, from the 16th of February, 1892, or about said date, continuously until on or about the 10th day of January, 1911, in caring for his room and bed, washing his bed and clothing, cooking his meals, sewing and mending for him, nursing, caring for and attending him when sick and feeding him when he was unable to feed himself by reason of sickness and injuries received by him, keeping and caring for his promissory notes, bonds, deeds, securities and other valuable papers, attending and accompanying him at times when away from home, aiding and providing fuel, heat and light, and entertaining him and looking after his comfort and well being, and for furniture, bed clothing and supplies furnished by her for his use during said period, which said services she says are reasonably worth said sum of $9,830, no part of which has been paid.

In said petition she further says that in the spring of the year 1893, the exact date of which the plaintiff can not state, the defendant made an express promise and agreement with plaintiff to pay her for said work and services theretofore rendered and performed by her for him, and for such work and services as she should thereafter do and perform for him, but no time for payment nor amount of payment was at any time agreed upon, nor was there at any time any agreement as to how long the performance of said work and services should continue, and she prays judgment against the defendant for said sum of $9,830, with interest thereon from January 10, 1911.

To the plaintiff's petition the defendant filed an answer in which, for a first ground of defense, he denies each and all of the allegations contained in said petition.

For a second ground of defense, the defendant avers that all of the claim of the plaintiff for things done by her for the defendant, as set forth in the petition, prior to January 10, 1905, did not accrue within six years next before this action was begun and is barred by the statute of limitations, there being no written agreement between plaintiff and defendant concerning the things set forth in plaintiff's petition.

To the defendant's answer the plaintiff filed a reply to the second ground of defense thereof in which she admits that there is

no written agreement between the plaintiff and defendant concerning the things set forth in her said petition, but denies each and every allegation in said second ground of defense not therein admitted to be true.

With the issues thus made up, said cause was submitted to a jury, under instructions of said court, resulting in a verdict in favor of the plaintiff for the sum of $3,500. A motion for a new trial was filed by the defendant, which was overruled, and judgment was entered upon said verdict. A bill of exceptions was prepared and tendered embodying all the evidence taken upon said trial including said court's charge to the jury, and error is prosecuted in this court to reverse the judgment of said common pleas court. The petition in error filed contains the following assignments of alleged error as grounds for such reversal:

(1) Said court erred in overruling the motion of the plaintiff in error for a new trial.

(2) Said court erred in its charge to the jury on the trial of said action.

(3) Said court erred in refusing to give the charges, and each of them, asked for by the plaintiff in error, before the commencement of the arguments.

(4) The facts set forth in the petition are not sufficient in law to maintain said action against plaintiff in error.

(5) Said court erred in the admission of the evidence offered by the defendant in error, to which the plaintiff in error objected and excepted.

(6) Said court erred in ruling out the evidence offered by the plaintiff in error, to which the plaintiff in error excepted.

(7) Said judgment was given for the defendant in error when it should have been given for the plaintiff in error.

As claimed by counsel in argument, the main question raised upon this record is not solved by any adjudicated case in the courts of this state, at least no such case is cited, but we find that like questions have been adjudicated in other jurisdictions, and we are therefore not without aid in applying recognized rules of construction to the claim made by the defendant below, under the contract between the parties hereto, in respect to the statute of limitations.

The contract in question is denied by the plaintiff in error, but he insists that if made, as alleged in said petition, it does not limit the time for the termination of the services rendered, or fix any time therein for their payment, or specify the prices to be charged and to be paid for said services, and therefore the plaintiff's right of recovery is limited to six years immediately preceding the commencement of the action. In this contention we agree with counsel, if the action is based upon a running account for a period beyond six years, for under the holding of our courts, each item of an account is barred in six years after the right of action accrues thereon, unless there has been a part payment of the account or an acknowledgment of liability thereon, or a promise to pay the same in writing signed by the party to be charged thereby within six years before the action is commenced (*Courson's Exrs.* v. *Courson,* 19 O. S., p. 454). Every item of an account carries with it an implied promise of payment, each sale, if made at different times, being a completed and independent contract, and subjects each item thereof to the rule imposed by the statute of limitations, but the question here made is not one on an open account, or on an account stated, but arises upon contract—upon an account for services furnished under a contract. The petition recites:

"That in the spring of the year 1893, the exact date whereof the plaintiff can not state, the defendant made an express promise and agreement to pay her for said work and services theretofore rendered and performed by her for him, and for such work and services as she should thereafter do and perform for him, but no time for payment nor amount of payment was at any time agreed upon, nor was there at any time any agreement as to how long the performance of such work and services should continue."

Said services having been rendered under a contract, nothing being specified therein as to what time payment therefor should be made, or how long such labor should continue or be performed, the question arises as to when the statute of limitations begins to run? As before stated, the plaintiff in error insists that all but six years of the claim of the plaintiff below, before suit was brought, is barred by the statute of limitations, and in connection with authorities cited he also cites Section 11222, General Code, which provides that an action upon a contract not in writ-

ing, either express or implied, is limited to six years. Is this contention supported by the decisions of courts where the question here presented has been squarely met and passed on, or is said contract to be construed as a continuous contract where the statute of limitations begins to run at the close of the services rendered?

In the case of *Carter* v. *Carter,* 36 Mich., 207, it is held that:

"Where a person goes into the service of another upon an indefinite promise of payment for the same, and no price or no period is fixed, the bargain and service are alike continuous, and the statute of limitations does not begin to run against the claim until the service is concluded; the right of action at the close of the service is an entire right and applies to the entire service, and the employe is entitled to claim for the whole amount of all unpaid wages for all the service rendered under the agreement."

In *Hall* v. *Wood,* 9 Gray (Mass.), p. 60, it is held that:

"An account for work and labor, with a bill of particulars, some items of which bear date more than six years before the commencement of the action, may be maintained for the full amount, notwithstanding the statute of limitations, if the whole work was done under an entire contract."

In the 25 Cyc., p. 1076, it is held that:

"As against a cause of action to recover compensation for services rendered under an entire, indivisible contract, the statute begins to run when work is completed, although the work may consist of numerous parts or items, and although the contract provides that the compensation shall be made at stated intervals or in installments. This rule applies where the employer prevents further rendition of services, as by discharging the employe, or renouncing the contract; the employe's action being to recover the value of the services actually rendered."

In *Schoch's Administrator* v. *Garrett,* 69 Penna. State, 144, it is held that:

"On the death of his wife, a father asked his daughter, the wife of the plaintiff, to keep his house, take care of him, etc., saying she should be well paid. The daughter kept the house for eleven years, until the father's death. In an action against his administrator by the husband for the wife's services, the court charged, that if the jury found it to be an entire contract not

completed till the father's death, the statute of limitations would not bar any part of the claim till six years after the death."

In *Littler* v. *Smiley,* 9 Ind., 116, it is held that:

"Services rendered under an agreement which does not state the time of payment or when the contract shall terminate, are under an entire continuous contract, and the statute of limitations does not begin to run until the service ceases."

In *O'Brien* v. *Sexton,* 140 Ill., 517-524, it is held that:

"Where there is no special contract, the law will imply an agreement to pay for the materials as delivered and the work as done; but when one continuous piece of work, consisting of a number of parts or items, is to be performed, the statute of limitations does not begin to run upon the completion of each separate part or item, but upon the completion of the whole. If the several items are merely parts of one transaction, the statute begins to run from the date of the last item."

In the case of *Morrissey* v. *Faucett,* 28 Washington, p. 52, it is held that:

"Where services are rendered under a contract for an indefinite time, with no period of payment specified, the employment is a continuous one and the statute of limitations will not begin to run against an action to recover compensation until the services are ended." Case of *Ah How* v. *Furth,* 13 Wash., 550, also cited.

In the case of *Shorick, Guardian,* v. *Bruce,* 21 Iowa, p. 305, it is held that:

"When labor is performed under one entire contract running through several months, the statute of limitations commences to run from the completion of the work."

The same holding has likewise been made by courts in other states, but we do not deem it necessary to give citations from them.

In *Page on Contracts,* Volume 3, at Section 1655, the principle is also recognized that:

"Limitations do not run against a continuing contract, as between the sheriff or his deputy or a contract to work for compensation, no time being specified either for payment or for the termination of the contract until the end thereof."

In *Wood on Limitations,* at page 348, the principle is also recognized that:

"In a contract for services, if the work is done under a continuous contract, and no time for payment is fixed, a right of action does not accrue until the work is completed."

True, as contended by plaintiff in error, a contrary doctrine seems to prevail in New York, and possibly elsewhere; but the general current of authority, under a contract such as we have been considering, fixes the time for the commencement of the statute of limitations to run at the termination or close of the services which, in this case, is January 10, 1911, when the breach of the contract occurred, and before which time the plaintiff below could not have maintained her action.

We hold, therefore, that this exception to the charge of the court below affords no ground of error.

Plaintiff in error also insists that the court erred in charging the jury that it might consider the claim of the plaintiff below for services rendered from February 19, 1892, to the time when said contract was made. It is claimed that there is no consideration supporting such promise for services already rendered. We think it clearly appears that the contract is entire, and if any part of it is valid and enforcible for the recovery of services rendered, the entire contract is valid and enforcible. The language of the contract is:

"That the defendant made an express promise and agreement to pay her for said work and services theretofore rendered and performed by her for him and for such work and services as she should thereafter do and perform for him."

This part of the contract, we think, is to be construed together, and in the instruction of the court to the jury in this respect we find no error.

Plaintiff in error also urges upon our attention that the court below erred in refusing to give to the jury the following written requests, before argument:

(1) Before you can render a verdict for the plaintiff you must find by clear and satisfactory evidence that plaintiff and defendant entered into the contract set forth in the petition, and the burden of proving said contract is on the plaintiff.

(2) If you find from the evidence that it is more probable that the plaintiff rendered the services described in the petition as acts of kindness, than with the expectation of being paid for the same, then she can not recover in this action.

(3) If you find that the plaintiff and the defendant entered into the contract set forth in the petition then you can only allow the reasonable value of the wages rendered by plaintiff to the defendant under said contract, during the six years immediately preceding the 21st day of April, 1911, the time of the commencement of this action.

Sub. 5 of Section 5190, R. S. provides that:

"When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given or rejected by the court before the argument to the jury is commenced."

Does request No. 1, present a proposition of sound law as applied to the case at bar? If it does, said request should have been given, but if not, it was properly refused. Contracts ordinarily are established by a preponderance of proof, except in cases where family relationship obtains and where a higher degree of proof is required to overcome the natural presumption arising out of such relationship. The record in this case discloses no such relationship between the parties to the contract in question, and the right of the plaintiff below to recover on her claim set up in said petition is therefore unaffected by considerations of the character mentioned. This action being one on contract, it is incumbent on the plaintiff below to make proof of said contract by a fair preponderance of proof, but it appears that the court below even went further, and in its general charge instructed the jury that in order to entitle the plaintiff to recover, the contract must be established by clear and unequivocal proof. We think, therefore, that said request No. 1 was properly refused, and in the refusal of the court to give said request there is no error.

Request No. 2 we hold was properly refused. Of course had the jury found that the services rendered were so rendered without any expectation of being paid for, no recovery could be had therefor, but an instruction to the jury that if they should find from the evidence that it is more probable that such services were

rendered as acts of kindness than with the expectation of being paid for the same, is, in our judgment, a marked departure from the well recognized rules of law governing courts in their instructions to juries in respect to their duties in civil cases, and we therefore hold that request Number 2 was properly refused, and in the refusal of the court to give said request there is no error.

Request No. 3 we hold was properly refused for the reasons already stated.

Not overlooking the importance of this case to the parties hereto, we have read the record herein with no little care and find no substantial or prejudicial error to the plaintiff in error in the admission or rejection of evidence upon the trial, to which exceptions were taken by the plaintiff in error, and upon the whole record we find no error committed by the court prejudicial to the legal rights of the plaintiff in error, and the judgment of the court of common pleas is therefore affirmed, with costs, but without penalty. Exceptions noted.

IMPERFECTLY EXECUTED DEED HELD ENFORCIBLE.

Circuit Court of Cuyahoga County.

JOSEPH UEBBING v. MARTIN KOESTER, TRUSTEE, ET AL.*

Decided, June 1, 1908.

Trusts—Improperly Executed Quit-Claim Deed—Absolute in Form but Admitted by All to Have Been in Trust—Will Made for Purpose of Carrying Out Agreement—Testatrix Dies and Action Brought to Enforce the Trust.

In furtherance of an effort by a mother to make an equitable distribution of her estate among her children, an improperly attested quit-claim deed, made under an agreement wherein the children all joined for the purpose of carrying out the distribution undertaken by the mother and upon which a parol trust was limited, may be perfected and enforced in accordance with the agreement.

Hamilton & Smith, for plaintiff.

Dawley & Meals and *L. I. Litzler,* contra.

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* Affirmed without opinion, *Uebbing, Trustee,* v. *Koester, Trustee, et al,* 81 Ohio State, 564.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Appeal by Martin Koester.

This appeal presents the question of the enforceability of an alleged trust relative to a family arrangement of property interests, and the case is before us on exceptions to the report of the master heretofore appointed by this court. The evidence reported by the master shows the facts to be as follows:

Alida Bauman was survived by her third husband and by one child of her first marriage; six by her second and three by her third marriage. There were four parcels of land, valued at $11,900, of which she owned one, she and her third husband jointly another, and the remaining two parcels were owed in common by her and the six children of her second marriage, who, however, allowed her to possess all the property as long as she lived. In her last sickness she employed an attorney to devise and carry out a plan by which all her children should share all the property equally after her death, save that her third husband should have the life use of one-third, and two of the children by her second marriage should each have $200 more than the others. The plan adopted was awkwardly conceived and imperfectly executed. She and all the children together with their husbands and wives became parties to a quit-claim deed of all the property, wherein two of her sons, one by the first marriage and one by the second marriage, were the grantees. This deed, though absolute in form, is admitted by all concerned to have been made in trust. It is, moreover, though perfect in form, admittedly defective in fact, because one of the two signatures purporting to be those of witnesses was written by one who was not actually a witness to its execution. The terms of the intended trust are in dispute, and the master who took the testimony reports that he is unable to find whether any, and if any, what trusts were declared at that time. Some of the children, including one of the trustees, assert that the trust was created simply to hold the property during the mother's life and to facilitate its disposition and the distribution of proceeds after her death according to the legal rights of the parties. The other trustee and the other children say that it was not only for

these purposes, but also to carry out their mother's wish as above described and as embodied in a will exhibited and explained in advance to all parties to the deed and subsequently executed by her. The will purports to devise to her husband and children in this manner all of her property, which, as the will declares, is all "included" in the deed to her two sons as trustees.

It will be observed that if the deed were good, the testator had no property left to devise. The will in that case could at most amount to nothing but an exercise of her power to appoint the stipulated trusts upon which the deed was given. That power of appointment rested in parol if it was conferred upon her at all. We think, contrary to the master's conclusion, that such power was at least intended and agreed to be so conferred upon her.

But the deed, being defective, conveyed no legal estate to the trustees. Can this imperfectly executed deed of conveyance whereon this parol trust was limited, be perfected and enforced as a conveyance in trust for the uses intended?

The six children of the second marriage had already acquired title in their own right to nearly one-half of the entire property. If, in addition thereto, they can acquire under their mother's will, as her heirs at law, their distributive shares of the other half which she owned, they will fare much better than the children of her first and third marriages. She might have so devised her property, having regard to what each of the children already had, as to bring about the desired equality among them without the intervention of any trust. Shall her manifest intention be defeated merely because the means actually employed by her, under the advice of counsel, were not only awkwardly adapted but imperfectly executed for the accomplishment of the purpose which she had in view? She died supposing undoubtedly that the accomplishment of that purpose was assured. Had she been apprised of the improper attestation of the deed and properly advised in the premises, she could, and no doubt would, have so altered her will as to make the accomplishment of her purposes sure. Her will was made by her in pursuance of an

agreement with her children, and the consideration moving to her in that agreement was the expected attainment of her object, namely, the equal distribution among them all of the entire property, theirs and hers alike. That will is now made irrevocable by her death and it has become effective by reason of its subsequent admission to probate. If it should turn out that it disposes only of the property which was hers, it creates inequality instead of the equality which she intended and which she supposed was accomplished. The consideration supporting the agreement in obedience to which the will was executed would thereby fail, for the object which she expected to gain would be lost. To overturn the trust and uphold the will would be to defraud the testatrix. We have, of course, no jurisdiction over the will or the disposition which it makes of her property, except to consider its effect in connection with the entire transaction.

The question was put from the bench on the hearing, whether the will should not be construed and administered to effect such a disposition of the testatrix's own property as to make, together with the other property which is contemplated by its provisions and which some of the children already owned, an equal apportionment of the aggregate property among them all. If that be accomplished, it is quite immaterial whether the trust shall be upheld or not. But we do not assume to answer the question thus raised. Neither can we assume the will to be a testamentary disposition of the mother's property in exactly the same manner as the law would distribute it, had she died intestate, so that if the trust fails the parties will be left in precisely the status which they would have occupied if neither deed nor will had been made. The will's provisions deviate in some degree at least from those of our statutes of descent and distribution. The distribution effected by the will, however construed, is essentially a testamentary distribution and not the mere equivalent of intestacy or non-action on her part.

We hold, therefore, that the agreement between the mother and her children to put all their property in trust, for the purpose already described, was made upon consideration executed by her when she made her will.

Equity therefore requires that the trust thus supported by an executed consideration, be perfected according to the agreement, and that as so perfected, it be enforced.

A decree may be taken sustaining the exceptions to the master's report in the particulars indicated, and defining and enforcing the trust in accordance with this opinion.

DESCENT AND DISTRIBUTION.

Circuit Court of Licking County.

WM. H. GOFF ET AL v. LEMUEL R. DISBENNET ET AL.

Decided, September Term, 1911.

Course of Descent—Where Property has Descended to a Class of Heirs —Degree of Consanguinity, and Whether Lineal or Collateral, Immaterial—Partition—Section 8581.

Where an intestate leaves property acquired by purchase, with no heirs except nephews and nieces, title is cast upon such nephews and nieces as a class, and they therefore take *per capita* and not *per stirpes.*

Crum, Raymond & Hedges and *Fulton & Fulton,* for plaintiffs in error.

Kibler & Kibler, contra.

BY THE COURT (VOORHEES, SHIELDS and POWELL, JJ.).

Error is prosecuted in this court by the plaintiffs in error to reverse the judgment of the court of common pleas in an order of distribution of the proceeds of the sale of lands in partition.

The question arises under the construction of Section 4159, Revised Statutes, or 8574, General Code, relating to the descent of real estate which came to the intestate by purchase.

The action was for the partition of the lands of one Samuel Goff who died intestate, never having married and who had no brothers or sisters living at the time of his death, but who had had six brothers and sisters all of whom had died before his own death leaving children surviving them, to whom the lands men-

tioned and described in the petition descended by virtue of said statutes.

It is claimed on the part of plaintiffs in error that these lands descended to the children of his brothers and sisters as legal representatives of such brothers and sisters, and that the lands should be divided not as though the children were, themselves, the next of kin of said Samuel Goff and inherit the same direct from him upon his death, but that it should be divided as though the brothers and sisters were living; and they contend that such construction is sustained by the Supreme Court in the case of *Dutoit* v. *Doyle,* 16 O. S., at page 400.

In that case the intestate left surviving several children and also issue of the two other children who were then deceased. One left three children and the other five. The Supreme Court held that the children of the deceased children of the intestate took such share of said estate as their parents would have taken had they been living at the death of the intestate. In other words, the estate was divided equally among all the children of the intestate living at his death, and including such as had died before that time leaving children surviving them, the grandchildren receiving such share of the estate as their parents would have received had they been living. That is, the share of the deceased child who left three children was divided into three portions and the share of the deceased child who left five children was divided into five portions. It is claimed that this decision justifies the contention of plaintiffs in error under this section of the said statutes. We think this question has been settled otherwise by the Supreme Court in the 9 O. S., at page 327, and followed and fully sustained by the 52 O. S., at page 470.

In the 9 O. S., it is held that by the provisions of the tenth section of the act regulating descents, passed February 24, 1831, when an estate descended to nephews and nieces, legal representatives of brothers and sisters, no brother nor sister of the intestate surviving, the nephews and nieces took *per capita;* and if a nephew or niece had died before the intestate, leaving children, such children took *per stripes* the share of the deceased parent.

Section 10 of that act provided, that "when any of the before mentioned children, brothers, sisters, or their legal representa-

tives, in the the same degree of consanguinity or kindred, came into partition of any real estate, they shall take *per capita;* but where one or more of them are dead, and one or more of them are living, the issue of those dead shall have a right to partition; and such issue, in such case, shall take *per stirpes.*"

Under this provision, the parties in this case would be included as legal representatives of the brothers and sisters of the intestate. They are in the same degree of consanguinity or kindred—all either living nephews and nieces of the intestate, or children of a nephew or niece deceased; the former would take *per capita,* the latter *per stirpes.*

Section 8581, General Code, reads as follows:

"When all the descendents of an intestate, in a direct line of descent, are of an equal degree of consanguinity to the intestate, whether children, grandchildren, or great-grandchildren, or of a more remote degree of consanguinity to such intestate, the estate shall pass to such persons of equal degree of consanguinity to such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be."

It is claimed that this section does not apply to the case now under discussion for the reason that it applies only to lineal descendants and not collateral descendants. The Supreme Court, however, in the case decided in the 9 O. S., have disposed of this contention. It is said at page 330:

"It might, upon a first inspection of that section, be supposed that the 'descendants' to which it refers, were the lineal descendants only of the intestate, such as grandchildren and great-grandchildren; but a more careful examination shows the contrary. It will be seen that in Section 6, children as well as grandchildren and great-grandchildren are named, which, if the lineal descendants of the intestate alone are intended, would have been unnecessary, the children of the intestate having been provided for in Section 5. The concluding language of that section also shows, that descendants, in the sense of those to whom the estate descends, were in the contemplation of the Legislature. Its provisions are to apply 'so that the estate shall pass to such persons of equal degree of consanguinity to such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be.'

"Our conclusion is that the Legislature, instead of limiting the rule as provided in Section 10 of the act of 1831, intended to extend and apply it to every case, in which an estate was to be divided among a class of descendants, whether their consanguinity to the intestate be lineal or collateral."

This construction is also followed and commented upon by the Supreme Court in the 52 O. S., page 470. On page 485, the court say:

"The section was under consideration in *Dutoit* v. *Doyle et al,* 16 Ohio St., 400, where the principle of representation was recognized, and made the basis of the conclusion, that in cases of this character, grandchildren take *per stirpes,* and not *per capita.* To the representative character with which they are thus clearly invested, representative rights are appropriate; and full effect should be given to the provision which defines their inheritance, and limits it to 'that portion of the estate to which such deceased child would be entitled if such deceased child were living.'"

And this applies in cases of this kind after those who are heirs to such estate have been ascertained, in case any such heirs shall have died leaving children or other issue surviving them. That is, the nearest of kin of an intestate under this section of the statute became his heir at law and took the estate *per capita,* but if any such nearest of kin have died leaving children or other issue they shall take by representation only such share of the estate of the intestate as their parents would have taken if living, or *per stirpes.*

We think the court of common pleas did not err in making its order of distribution in this case and that its judgment should be affirmed.

It appears that some of the plaintiffs in error have accepted the amounts awarded them in the order of distribution made in the court of common pleas, and an answer to the petition in error has been filed setting forth this fact and claiming the same to be a waiver of any error that may have occurred in said proceedings in the court below.

We do not so hold, since the amounts received by them have never been in dispute, but the same have been conceded by all parties to belong to such plaintiffs in error as have received them.

The answer to the petition in error will be dismissed. Exceptions.

WORK OF MUNICIPAL PLATTING COMMISSIONS.

Circuit Court of Erie County.

C. L. WAGNER v. FRANK FITZ ET AL.

Decided, 1908.

Dedication—Plats—Municipal Corporations—Private Proprietors Can Not Plat Lands in such a Manner as to Interfere with the Work of the Municipal Platting Commission—Amendment Can Only be Made by Resubmission to Commission—When Other Streets May be Laid Out—Steps Essential to Dedication of Additional Streets.

1. A municipal platting commission, for which provision is made by Section 2629, Revised Statutes (General Code, 4347, *et seq.*), in defining and locating the streets and alleys of a municipality, is required to secure uniformity and regularity therein, to eliminate jogs, twists, turns, pockets and haphazard contrivances against public interest; and having performed this important work and adopted plats, private proprietors of lands within a platted territory can not interfere therewith even with the consent and cooperation of the municipal council.
2. A plat, adopted by a municipal platting commission, goes upon record without being submitted to the municipal council. Having been so adopted, amendment may be had only by resubmission to a regularly constituted platting commission as provided by Section 2636, Revised Statutes (General Code, 4355). It is not subject to amendment by a council nor otherwise than upon regular statutory proceedings to vacate streets and alleys.
3. Under Section 2601, Revised Statutes (General Code, 3584) streets other than those laid down by a municipal platting commission may be laid out and established in the city notwithstanding Section 2633, Revised Statutes (General Code, 4351) provides that no streets, except those laid down in such plat should be laid out; but such additional streets must not interfere with streets and alleys laid out by such commission.
4. To lay out streets additional to those adopted by a municipal platting commission, the plat must show by the certificate of the municipal engineer that the proposed streets do not interfere with those laid down by the municipal platting commission, and the plat must have the approval of the municipal council.

John Ray and *George Blackford*, for plaintiff.

J. F. McCrystal, *W. L. Fiesinger* and *Henry Hart*, contra.

PARKER, J.; WILDMAN, J., and KINKADE, J., concur.

It is set forth in the petition in this case, and it has been made to appear to us, that in the year 1900 Charles L. Wagner and Chester L. DeWitt were owners of a certain tract of land in the city of Sandusky, which they caused to be surveyed and subdivided into city lots with a street running through it; that they acknowledged the plat in due form; that a certain certificate of the engineer was written upon it; that it was accepted by the city council by a city ordinance, and then it was recorded in the plat record of the county. It further appears that prior to the time of making and recording said plat the city of Sandusky had duly and regularly appointed a platting commission, which commission had adopted plats and plans for the location and opening of streets, avenues, roadways, etc.; that such commission adopted a plat or plan providing for a uniform system of proposed streets, alleys and avenues in the city of Sandusky, and that said plat and plans were duly recorded in the office of the city civil engineer of the city of Sandusky and in the recorder's office of Erie county, according to law. The plaintiffs in their plat designate a street running through this property as "Lockwood avenue." It is a street lying nearly midway between two streets that had been laid out by the platting commission. To the eastward of it was a street called Erie street laid out by the platting commission; and to the westward of Lockwood avenue was a street laid out by the platting commission called Anderson street. A part of this lot of land subdivided by the plaintiffs extended over into this part of Erie street which had been laid out by the platting commission. Erie street was laid out fifty feet wide, and the plaintiffs' land extended into Erie street forty-two feet; the other eight feet of what was laid out there as a part of Erie street belonged to another proprietor, to a man by the name of Fitz; that is to say, the easterly part. The easterly twelve feet of plaintiffs' property was laid out as an alley, running parallel with Lockwood avenue, and running north from First street, and laid, as it will be observed, within the limits of that part of Erie street as platted by the platting commission. In-lots in this subdivision

were laid out by the plaintiffs; those lying upon the east side of Lockwood avenue extended through from Lockwood avenue to this alley, excepting three lots at the southerly side which faced upon First street. One of these three lots, the easterly of the three, was therefore (it being thirty-three feet wide) almost entirely in Erie street as laid out by the platting commission—all but three feet of it; and thirty feet of the rear end of all of the other lots north of that, in that tier of lots—that is to say, the tier on the east side of Lockwood avenue—extended into that part of Erie street as laid out by the platting commission, north of First street.

Notwithstanding the conflict between the platting as done by the platting commission and that as done by the plaintiffs, as I have said, the plat was accepted by the city council, the dedication of the street as there platted was accepted, and the plat was then recorded.

On June 10, 1903, Mr. Fitz, the proprietor upon the east, eight feet of whose land would be taken by the northerly extension of Erie street, brought an action in the common pleas court of this county to have this plat made by the plaintiff vacated, in so far as it did not conform to the plat made by the platting commission, and to enjoin the city from expending funds, as it was said the city was threatening to do, in the improving of Lockwood avenue and this twelve foot alley. Plaintiffs were not made parties, though they were then the owners of this tract of land, and, of course, would (if parties) be affected by the proceedings. They were not brought into court by publication or otherwise. The decree of the court in that case was in accordance with the prayer.

Now, the plaintiffs come and set up all these facts and pray that that decree may be set aside and vacated. Amongst their allegations as to the regularity of the action of the platting commission, which is very fully alleged by the plaintiffs, it is averred in the petition that the streets and alleys as laid out by the platting commission have not been altered or otherwise affected by this subsequent platting or by other proceeding. It is contended by the plaintiffs that in thus platting their land

they have acted within the limit of their rights defined by statute, and that they have not violated any provision of the law respecting the regard that is to be had for the work of the platting commission.

Without undertaking to read extensively from the statutes, I will say that our view of the statutory law upon this subject is, that the work of a platting commission in defining and locating the streets, alleys and avenues of a city or village may not be interfered with by private proprietors of lands within the same territory, even with the consent and co-operation of the city council. The work of the platting commission is naturally and necessarily very important. Its purpose is to provide uniformity and regularity in streets and alleys, so that they may not be narrow in one place and wide in another; so that they may be free from jogs, twists and turns; so that they may be open at either end, and not in the nature of pockets and all those miserable contrivances we find in villages that are built up haphazard to please the notion or to subserve the particular interests of the proprietors of little blocks of ground within the village who may desire to lay them out so as to get the greatest number of lots or the most money, without regard to the general interest.

The "plans" adopted by the platting commission in Section 2636, R. S. (General Code, 4355) "can be amended after adoption, by like proceedings by which they were originally adopted"; which means that they can be amended by the action of a regularly constituted platting commission. When a platting commission does its work, it is not required to submit it to the council; it at once goes upon record. It is not subject to amendment by the council, except that there are certain forms of proceeding which are authorized whereby the courts or the council may vacate streets and alleys under certain circumstances, none of which proceedings were followed so as to vacate the streets involved in this controversy. In other words, none of which proceedings were followed by the council so as to vacate this northern part of Erie street as laid out by the platting commission.

Plaintiffs assume that they had a right to plat their lands, laying out a lot within the limits of this northern extension of Erie street, and laying out other lots extending thirty feet over into Erie street, without regard to the previous action of the platting commission; and the city council apparently assumed they had the right, and permitted them to do it, and endorsed and approved their action. We do not think they had that right.

With respect to the plans of the platting commission, after they have done their work and advertised it for six weeks so that objections may be made and heard, amendments made, etc., Section 2633, Revised Statutes (General Code, 4356) provides as follows:

"At the end of the time aforesaid, the commission shall cause copies of the plat, as finally adopted, to be prepared, and such monuments or marks as it may thnk proper to be placed on the grounds, and shall deposit one copy, certified to by it, in the office of the county recorder, and another in the office of the city engineer, and such plan shall be deemed and taken to be the regularly adopted plan for streets and alleys in such territory; and no streets or alleys, except those laid down on such plan, shall subsequently be in any way accepted as public streets or alleys by the municipal corporation, nor shall any of the public funds be expended in the improvement or repair of streets or alleys subsequently laid out, and not on such plat; provided, however, that nothing herein shall be construed to prevent any municipal corporation from exercising the power of condemnation, in any of the cases where it is now or may be hereafter by law authorized to condemn and appropriate property to public use, although it be not shown as a street on such plat."

There seems to be some inconsistency in the provisions of that section—one part providing distinctly that there shall be no streets or alleys except such as are laid out by the platting commission, and the other providing there may be other streets acquired by condemnation proceedings. The provision that there shall be no streets, except those laid out by or on such plans, we think was put in with a view of declaring distinctly, that the municipality should not be deemed to have accepted, or to be bound for, the repair of, or in any way made responsible

for streets and alleys not appearing upon such plan, unless such as might be otherwise regularly adopted. We think the qualification that there may be other streets regularly adopted, must be read into that statute in view of the provision of Section 2601, Revised Statutes (General Code, 3584).

It is under this last mentioned section that the plaintiffs have undertaken to proceed. That section reads:

"A proprietor of lots or grounds in a municipal corporation, who subdivides or lays the same out for sale, shall cause to be made an accurate map or plat of such subdivision, describing with certainty all grounds laid out or granted for streets, alleys, ways, commons, or other public uses; also, all lots sold, or intended for sale, by progressive numbers, or by the squares in which they are situated, and the precise length and width of each lot sold, or intended for sale; which map or plat shall be subscribed by such proprietor, or his agent, duly authorized by writing, acknowledged before an officer authorized to take the acknowledgment of deeds, who shall certify the acknowledgment of the instrument, and recorded in the office of the recorder of the county; and thereupon the map or plat so recorded shall be deemed a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons or other public uses, to be held in the corporate name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended; provided, that no such map or plat of any addition within the limits of any municipal corporation, when there are" (the word "no" is printed here, but it is pointed out that that is a typographical error; it should be "on") "on record plats adopted by a platting commission or board of public works, shall be recorded until the engineer of the municipal corporation certifies that the streets, as laid down on the plats of such addition, correspond with those laid down on the recorded plats of the platting commission or board of public works, and when there are streets laid down in addition to those adopted by a platting commission or board of public works, or in any municipal corporation where no platting commission is or has been in existence, no such plat shall be recorded until the same shall have been approved by the council of such municipal corporation."

Now, it is very apparent from the reading of that statute that streets other than those laid down by the platting commission are contemplated, but these *other streets* must not interfere with the

plans of the platting commission. Streets may be laid through blocks, additional streets may be laid through the city, so long as they do not destroy or interfere with the streets as laid out by the platting commission. The certificate of the city engineer must show that this is true when the plat is presented. That was not done in this case; no such certificate appears upon that plat and no such certificate could have been made. The absence of such certificate may be unimportant here, but the important fact is that the certificate could not have been truthfully made as required by law.

When additional streets are laid out to those provided for by the platting commission, then the requirements are precisely the same as in a case where there has been no plattnig commission, namely, that the plat shall be accepted by the council. So that the plat we have under consideration, the plat of the plaintiffs, providing for streets, requires two things, to-wit, it shall have the certificate of the city engineer that the streets and alleys as laid out upon the plat do not interfere with the work of the platting commission, and it shall also have the approval of the city council because of the new streets laid out. But that action is all the time subject to the qualification that the city council may not authorize such platting—may not do so regularly and legally—if it interferes with the work done by the plating commission.

From the foregoing, it follows that there was irregularity in the making, adoption and recording of this plat. It does not follow, we think, that all of the work was necessarily so irregular or illegal as to be utterly void and of no effect.

Certain penalties are imposed by the statutes, Sections 2602, 2603, 2605, 2606. Revised Statutes (General Code, 3587, 3588, 3590, 3591), for platting lands in this way, recording the plat and selling the lots. It is quite apparent that it would breed great confusion in titles. Indeed, where a plat is not regularly adopted so that the numbering of the lots is authorized, it not only breeds confusion in title, but in matters of taxation also. And, therefore, penalties are imposed for attempting that kind of work, or doing that which would result in that kind of confusion.

Unplatted land must be described by metes and bounds, or otherwise, to get a pertinent description to convey anything. Lands lawfully and legally platted may be described by numbers. The law requires that the lots sold, or intended for sale, shall have progressive numbers, and that the precise length and width of each lot sold, or intended for sale, shall be set down. And, of course, that is quite important where platted lands are sold by numbers instead of by metes and bounds. In so far as this plat does not affect lands extending eastward from the east line of this extension of Erie street, of course there can be no objection to it; but in so far as it undertakes to plat land lying within the limits of this proposed extension of Erie street as defined upon the plat of the platting commission, we think it is utterly ineffective and must be regarded as void and of no effect. And the whole matter having been brought before the court, and all the facts laid before the court, we think it devolves upon this court as a court of equity to enter such a decree as will preserve the rights of the parties and the rights of the public as far as we may be able to do so.

Some of these lots in this eastern tier of lots have been sold and houses have been built upon the lots; one of the lots, the easterly lot of those fronting upon First street, has been sold and a house has been built upon it. This lot with the house on it fronts on First street and, with the exception of three feet, stands entirely within this proposed extension of Erie street. The eastern extension of the other lots comes into this proposed extension of Erie street also. To be sure, the proprietor of these lots has a legal right to sell them so long as they are not required by the city for public streets. The proprietor's right is not taken away by the delineation of streets upon them by the platting commission. The plaintiffs in this case have not parted to the city and the public with their interest in these lots. They have a right to sell them, lease them, build upon them, or do with them as they please, subject to the right of the city (by condemnation proceedings) to acquire the property for the extension of the street; but they have no right to plat it and sell the property by lot numbers. They may plat up to the middle of the west side of this proposed extension of Erie street, and they

may sell what remains outside the limits of the proposed extension of Erie street, by metes and bounds, or other pertinent description, but not as a part of these platted lots. And since the precise length and width of each lot sold, or intended for sale must be delineated upon the plat, we think that the plaintiffs before they sell any more lots should be required to furnish an amended plat, one in accordance with the statute, one to which the city engineer may truthfully and properly certify, and upon which he shall certify, that it conforms to the plans laid down by the platting commission; and that they shall do so will be a part of this court's decree.

The city has accepted this street, Lockwood avenue, and the proprietors have dedicated it, and we think the proprietors and the city should be bound by that action, both as to the public and as to persons who have bought lots of these proprietors, and we should not interfere with that; but the amended plat should be filed. They should not be allowed to sell lots delineated upon this plat. What the rights of those who have bought lots under this plat may be against the proprietors who sold them, we are not called upon to say; they are not parties to this action.

In view of the mistakes that have been made from the beginning to the end of this controversy, both by the proprietors and by the city, we have concluded that the costs should be divided equally; half of the costs will be adjudged against the plaintiffs, and half against the city.

Mr. Hart: What is the court's holding as to Lockwood avenue being a legal street or not?

The Court: We hold that it is a legal street. It has been properly dedicated and accepted by the council; but both the proprietors and city council went too far in undertaking to accept the plat for the extension of lots over into Erie street. That part of their action is null and void.

It follows, of course, that the city will not be enjoined from improving Lockwood avenue.

WILL OF A HELPLESS VICTIM OF LOCOMOTOR ATAXIA SUSTAINED.

Circuit Court of Licking County.

ALLEN B. GREGG ET AL v. SAMUEL F. MOORE ET AL.

Decided, March Term, 1911.

Wills—Incapacity Not Shown by Physical Helplessness—Change in Will Does Not Support a Contention of Undue Influence, When—Propounding Hypothetical Questions to Non-expert Witnesses—Charge of Court.

1. In an action to contest a will it is error to admit the testimony of non-expert witnesses, whose opinions are not based on facts and observations within their own knowledge, but on a state of facts submitted to them by hypothetical questions.
2. The fact that the testator was afflicted with progressive locomotor ataxia and was for a number of years before his death physically unable to perform any task or to help himself in any way, is not sufficient ground for setting the will aside, where it appears that during all that time he directed in detail the operations on farms aggregating over three hundred acres, and with reference to the management of his said lands did all that could have been done by a person of a sound and active mind; and the only testimony tending to show mental incapacity was slight forgetfulness on certain occasions and failure to include in his will certain legacies which he had declared he intended to make.
3. The making of a change in a will, which there is reason to believe was done for reasons satisfactory to the testator, is not, where standing alone, a sufficient reason for setting the instrument aside on the ground of undue influence, notwithstanding the will as so changed did not, in the opinion of some, make a fair and reasonable distribution of the estate of the testator.
4. It is erroneous to charge a jury that "it is coercion produced by importunity, or by a silent, resistless power, which the strong will often exercises over the weak and infirm, so that the motive was tantamount to force or fear."

Fitzgibbon & Montgomery, for plaintiff in error.
A. A. Stasel and *Norpell, Norpell & Martin*, contra.

POWELL, J.; VOORHEES, J., and SHIELDS, J., concur.

This is a petition in error to reverse the judgment of the court of common pleas, in a proceeding brought by Samuel F. Moore et al, defendants in error, against the plaintiffs in error, to set aside the will of one Ensley Finney Haas, who died on the 13th day of October, 1908.

The petition sets out the relationship of the various defendants, whether legatees or heirs at law of the said decedent, and avers that the paper writing purporting to be the last will and testament of the said decedent was not his will for the reason that, at the date of its execution, the testator was not of sound mind and memory, by reason of age and protracted disease, and that he was mentally incapacitated from making a will, or a proper distribution of his property; and, further, that he was influenced and coerced into making and signing said paper by the undue influence of the defendant, Allen B. Gregg, who was named as executor of said will, and of others conspiring with the said Gregg; and, by reason of such influence of the said Gregg and others, and at their suggestion, the said decedent was so influenced and prejudiciced that the paper writing, purporting to be his will, executed at that time, was not the valid and subsisting will of the said Ensley Finney Haas.

They prayed that an issue be made up, which was done by answer of various defendants. The case was submitted to a jury, and a verdict returned setting aside said will.

The contest of said will was based upon two grounds, viz.:

That by reason of age, disease and other causes, the said Ensley Finney Haas was incompetent to do or to understand ordinary business transactions, or to understand and appreciate what he was doing when the said will was signed; that he was then of unsound mind and memory, and was without sufficient mental capacity to know or to understand the extent of his estate, and the persons who would naturally be the objects of his bounty; and, second, that the will was procured to be executed by the defendant, Allen B. Gregg, with others conspiring with him to influence and persuade the said testator; and, by reason thereof, an undue influence was exercised over him by the

said defendants at and before the time of the execution of said will.

After the death of the said Ensley Finney Haas, said will was admitted to probate and record by the probate court of this county; and this action was brought to set the same aside.

The said will, after making certain bequests, amounting to about the sum of $5,000, by item three, devised and bequeathed absolutely to the defendant, Allen B. Gregg, all the rest and residue of the property, real, personal and mixed, of the said testator, the same consisting, in part, of a farm of 135 acres, besides other property, real and personal.

By the terms of the will, all the legacies were made a charge and a lien upon the real estate of the said decedent. The said Allen B. Gregg was named as executor in said will, which was executed on the 21st of April, 1908.

It appears by the evidence offered that the said decedent, Ensley Finney Haas, was, for a number of years prior to his death, afflicted with what is known as progressive locomotor ataxia, and that, by reason of such disease, he was, for some years prior to his death, physically unable to walk or to help himself in any way; that he was paralyzed from his waist down, and that he had to be carried whenever he moved from one place to another; that, by reason of his affliction, he was a great charge, having to be cared for continually by persons employed for that purpose.

It also appears that he lived with his sister, Martha Goff, a widow, who took care of him and performed many of the services required by him on account of his condition, up until the day of her death, which occurred on the —— day of June, 1907; that after her death, he had for a housekeeper, Harriett Hughes, who lived with him under a contract of employment until his death; that he also had in his employ, as a sort of body servant, to take care of him personally, one William Watson, who lived with him in that capacity until his death; that upon the death of his sister, he became the owner of the undivided half of a farm of 135 acres, he being already the owner of the other undivided half. He also had an estate for life, by the terms of her will, in another farm of 160 acres, besides being the

owner of a large amount of personal property. At his death he had property, real and personal, of a value of between thirty and thirty-five thousand dollars.

The evidence discloses that during the whole time in which he had charge of this property, he transacted all the necessary business in looking after the same, and in carrying on the business of farming said lands; that while he was physically incapacitated from doing any manual labor, he made all the contracts necessary for conducting the business of the farm; that he bought all necessary materials and sold the products thereof, and that he directed all the farming operations that were carried on on said land; what fields should be plowed, and what crops should be planted when plowed, and generally did all that could be done by a person of sound mind, who was in his physical condition, in the carrying on and the conduct of said business.

The things relied upon as showing that the said decedent was not of sound mind appear to be but few, as shown by this record. It seems that, on the day after the execution of the will, as is shown by the testimony of William Watson, who was his body servant and attendant, on awakening he told him to hitch up the horse, that he had to go to the city of Newark on account of some important business that he wanted to have done. Watson told him that he was there yesterday, and that the business that he wanted to have done had been done at that time.

It appears from the evidence that, on the day the will was made, the decedent, Ensley Finney Haas, got some intoxicating liquor; that he drank some of it and took part of it home; that he no doubt was under the influence of liquor during the night after his return home. But there is no evidence that at the time he made the will he was under the influence of liquor; but he directed what he wanted done, how his property should be disposed of, and gave directions for the making of the will, without prompting or assistance from Mr. Kibler, who wrote the will, or any one else.

Some eight months prior to this time he had visited Mr. Kibler's office, and had executed a former will. When he returned to make the will in question, he brought back to the office said former will and stated to Mr. Kibler that he desired

to make some changes in his will; directed what they were, and the will was written accordingly.

Without going further into details, or reviewing the vast volume of testimony which was offered in this case, *pro* and *con*, touching the capacity of the decedent to make a will at the time when the will in question was made, we have no hesitancy in saying and finding that, so far as his mental capacity was concerned, he was competent to make a will; and that the testimony offered in support of his mental capacity to make a will is clearer, stronger and more direct upon that issue than the testimony of the contestants as to the want of capacity.

There was much of the testimony that was offered on behalf of the contestants that was the testimony of non-expert witnesses, who gave their opinions, not based upon facts and observations which had come to their own knowledge, but from a state of facts submitted to them by hypothetical questions. We think there was error in permitting non-expert witnesses to so testify. The rule as to non-expert witnesses giving an opinion upon an issue of this sort is that the opinion must be based upon facts given by the witness upon which the opinion is based. *Clark* v. *State*, 12 Ohio Reports, page 483.

Another reason why the asking of these hypothetical questions was improper and the answers thereto incompetent is that, in a number of them, after reciting the facts as to the condition of the decedent, it was assumed in the question that his disease had progressed into paresis—an affection of the mind, which the record fails to disclose had ever existed.

The only other transactions which we have been able to find upon which the plaintiffs below relied, as showing want of capacity, were the fact that, at one time within a year prior to his death, he had borrowed money of a brother of his sister's former husband; that he had executed his note therefor, but told a number of persons that Gill Goff—the person from whom he had borrowed it—had made him a present of $500.

As a third circumstance, it is claimed that he told a large number of people that he intended to remember them in his will and to give them a legacy, which was not done.

We do not think that these circumstances are sufficient in themselves to overcome not only the presumption as to his capacity, but the decided weight of the testimony sustaining such capacity. So, upon the first issue, viz, want of mental capacity, we think that the verdict of the jury is decidedly against the weight of the evidence.

Second. As to the ground of undue influence: To establish undue influence, the burden is upon the contestants, and the evidence appearing in the record in this case, in our judgment, fails to establish this issue in favor of the contestants.

It is true, as claimed, that the will is not such as, perhaps, some others would have made. It is contended by the contestants that it is unreasonable and unfair. We do not think that the law sustains this theory. The contention as to undue influence upon the part of the beneficiary in procuring the will in question, has its principal support in the theory that as he was a stranger in blood to the decedent, it would raise a presumption of undue influence exercised upon the testator.

It is further contended that the change in the will is evidence tending to show undue influence. A change of testamentary intention, bearing upon the question of undue influence in procuring a will, is sometimes an important circumstance; but its force depends mainly upon its connection with associated facts. If made for a reason satisfactory to the testator, although it may seem inadequate to a court investigating the question of undue influence, it furnishes of itself no ground for setting aside the will. A testator has a right to dispose of his estate in any way he may deem best. He is not required to make an equitable will; and he may, if he chooses, exclude his relatives; he may even exclude his children, if he have any; and he may divide his estate unequally.

The question in all such cases is: Was the will the free act of a competent testator?

The reasons for a change of intention in this case do not very satisfactorily appear, but the testimony shows that the change was made at the instance and direction of the testator himself. Courts of equity will not vacate a deed or set aside a will on the ground of influence or importunity, unless it has been unduly or

improperly exercised. Fair argument and persuasion, or appeals to the conscience or sense of duty of the testator, if fairly made, lay no foundation for setting aside the will.

Upon the issue of undue influence as well as that of want of mental capacity, we think that the weight of the testimony is against the contention of the contestants and against the verdict of the jury.

We think also there was error in the charge of the court in this, to-wit, in defining what constitutes undue influence. The court said:

"It is coercion produced by importunity, or by a silent, resistless power, which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear."

This definition could be applied in every case of a will, and any influence that would induce a testator to give a legacy or bequest to any person whatever might be said to be *undue influence* under this definition; and the charge in this regard was misleading and erroneous.

It seems that the verdict in this case is the result either of a misapprehension of the testimony and the weight of the same, or was the result of bias and prejudice in favor of the contestants. The jury must have been influenced by that spirit which sometimes gets into the jury-box, that the will is not such as they would have made if they were disposing of the property that is involved in the will in controversy, and that the will in question was different from what they would have made under the same or like circumstances.

Upon the whole record, the court, is of the opinion that there was such a disregard of the weight of the testimony that the verdict of the jury and the judgment thereon should be reversed, set aside, and held for naught.

The cause is remanded to the common pleas court for further trial and proceedings according to law. Exceptions are noted.

AUTHORITY OF COUNTY COMMISSIONERS TO BUILD A HIGH LEVEL VIADUCT WITHIN A MUNICIPALITY.

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL WILLIAM HOWELL, A TAX-PAYER, v. W. F. EIRICK ET AL, COMMISSIONERS OF CUYAHOGA COUNTY, AND JOHN J. FITZGERALD, ET AL, AS THE BOARD OF DEPUTY STATE SUPERVISORS.*

Decided, February 27, 1911.

Bridges and Viaducts—Authority of County Commissioners to Build, where Located Wholly within a Municipality—Persistence of a County Road, Notwithstanding Travel Deserts it for Other Routes —Bridges Sites—Sections 2421 and 7557.

1. The authority vested in county commissioners by Section 7557, General Code, to build bridges in certain cases, includes authority to construct a viaduct or high level bridge in a proper case.
2. The fact that a part of a county road was for a time under the exclusive jurisdiction of a plank road company, and has since been *de facto* under the exclusive jurisdiction of the municipality within which it is now embraced, does not in law amount to an abandonment of the road, but its existence persists and the county commissioners have authority to construct and maintain bridges thereon.
3. The question of a site for a bridge is made by the statutes incidental to the main question of authority to erect the bridge, and where its erection has been authorized the county commissioners have the authority to appropriate whatever property may be necessary for the site.
4. Where the termini of a proposed high level bridge or viaduct are located substantially within the limits of a county road, the fact that it follows a straight line, instead of the circuitous route made necessary by the descent to the bottom of the valley as the road was originally surveyed, is a matter of no importance so far as authority to construct the bridge is concerned.

William Howell and *Burton & Dake*, for plaintiff.
Walter D. Meals and *John A. Cline*, contra.

* Affirmed without opinion, *State, ex rel*, v. *Eirick*, 84 Ohio State, 503.

HENRY, J.; MARVIN, J., and WINCH, J., concur.

Appeal by plaintiff.

This action, commenced in the common pleas and appealed to this court, is a tax-payer's action to enjoin the building by the county commissioners of Cuyahoga county of "a county high level bridge over the Cuyahoga river upon the Cleveland-Milan road between Detroit and Superior avenues in the city of Cleveland; said Cleveland-Milan road being a state road," according to the language of the preliminary resolution adopted by the county commissioners July 13. 1910.

Pending the action the question of building such a bridge has been submitted to and approved by the electors of said county, as involving an expense far in excess of the statutory limitation of $18,000, and hence requiring such approval by the electors.

The amended and supplemental petition alleges "that the Cuyahoga river valley at the point referred to in said resolution is about one-half mile in width, occupied by numerous streets of the city of Cleveland, railroad tracks, and buildings, and that on either side of said valley the banks rise to a height of from 75 to 100 feet to the general level of the land on either side of said valley; that the Cuyahoga river occupies a channel in said valley about 200 feet in width," and that said high level bridge is "to extend the entire distance across said river valley, and to be carried on arches or trestle work, so as to connect the level land at the top of the banks on either side of said valley, and to span the railroad tracks, public streets of the city of Cleveland, buildings, said river channel, and all intervening space between the banks of said valley, so as to connect Detroit avenue on the westerly bank of said valley, with Superior avenue on the easterly bank, and form a practically level elevated roadway across said entire valley."

The petition further alleges "that there is not at the place of said proposed structure any state or county road, free turnpike, improved road, abandoned turnpike, or plank road, and no such road in common use at or near the place of said proposed structure." The petition also alleges, "That there is at the place aforesaid a viaduct spanning said river valley connecting Detroit and Superior avenues in the city of Cleveland and forming an

elevated and level roadway about 50 or 60 feet in width and about one-half mile in length, which viaduct was built and erected by the city of Cleveland about the year 1874, at great expense," etc.

The petition contains other allegations tending to show that the proposed high level bridge will so interfere with said existing viaduct as to constitute an unlawful invasion by the county commissioners of the exclusive jurisdiction of the city over the present route of travel; that the original county road in and as a part of which said high level bridge is proposed to be erected, has long since ceased to extend, if indeed it ever did extend, across the Cuyahoga river; that the existing viaduct affords a convenient route of travel, which has long been the exclusive route across said Cuyahoga river valley and that the high level bridge proposed to be erected departs not only from the existing, but also and more widely from the ancient route of travel, in such wise as to touch said route or routes only at the termini of the proposed improvement, and there only approximately. Relator denies that the improvement is a bridge, properly so called; denies that it is necessary, and denies that its location is on any county road of which the county commissioners have jurisdiction, or which is in common public use; all of which the answer puts in issue.

The county commissioners derive their authority, if any, in the premises, from General Code, Sections 2421 and 7557, as follows:

"Section 2421. The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

"Section 7557. The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such village or city."

The evidence, including the agreed statement of facts, shows that the Cleveland and Milan road was laid out in 1827, "beginning at the east end of Superior lane at the center thereof, in Cleveland, and running—south 72 degrees west 14 chains 65 links to a post on the west bank of Cuyahoga river, bearing south 41 degrees east of the south corner of Alonzo Carter's red house, and occupied by Joseph Mason, distant 90 links; thence south 57 degrees, west 1 chain 16 links; south 20 degrees west 13 chains 00 links; south 33 degrees 15 minutes W. 15 chains 50 links to the top of Cuyahoga Hill," and so on to Milan in Huron county. The map which is put in evidence to show the locations of the road thus laid out, of the existing viaduct, and of the proposed high level bridge, discloses that the termini of the proposed improvement are substantially within the limits of the original highway, but that the new structure, as a whole, will span the valley in an air line, and stand to the route of the ancient highway in the relation, roughly speaking, of the cord to the curve of an arc. The existing viaduct runs at a somewhat lower level between the two.

Paragraphs 3 and 4 of the agreed statements of facts are as follows:

(3) "That Superior avenue is a public street of the city of Cleveland, with the westerly terminus at the east line of Water street in said city, and connects at said point with Superior lane, being the point of beginning of the Cleveland and Milan road, as set forth in the report above referred to."

(4) "That the Cleveland and Milan road above referred to, from Pearl street westerly to Rocky river, followed the line of what is now called Detroit avenue. That about 1848, the Rockport Plank Road Company was chartered under Ohio Laws (46

Ohio Laws, 152). Said corporation duly organized and took possession of and constructed a plank road over said Detroit street from Pearl street as far west as Rocky river, a distance of 5 or 6 miles; and said Plank Road Company erected and maintained toll gates thereon, and in 1869, the said limits of the city of Cleveland having been extended so as to embrace so much of said road as lies between Pearl street and Gordon avenue, the said Plank Road Company, by agreement with the city of Cleveland, and in consideration of $900 paid by said city of Cleveland, executed and delivered to said city of Cleveland a conveyance of that portion of its road between Bordon avenue and Pearl street; a copy of said deed is hereto attached as Exhibit A."

The first contention of the relator is that the proposed structure is not a bridge within the meaning of the sections above quoted, but is, in contradistinction thereto, a viaduct. It is pointed out that the Legislature has itself recognized this distinction in Section 10 of the municipal code, where the language "construct or repair viaducts, bridges and culverts" is used. To the same point the case of *Board of Commissioners of Carroll County* v. *Bailey*, 122 Ind., 46, is cited, the syllabus of which is as follows:

"A structure, or culvert, over a ravine, made by filling in the depression with earth and gravel, there being in the center under the highway an archway of stone masonry covered by a parapet, which was erected for the purpose merely of draining surface water off the public highway, is not a bridge within the meaning of the statute, which requires the board of commissioners of each county to cause all the bridges therein to be kept in repair.

"The term 'bridge,' in its common-law meaning, the sense employed by the statute, denotes a structure erected over a river, creek, pond, lake, or stream of water flowing in a channel, between banks more or less defined, although such channel may be occasionally dry, in order to facilitate public passage over the same."

In the opinion of the court, at page 49, it is pointed out, however, that the Legislature of Indiana had in terms "restricted the authority of the county commissioners to the erection and repair of bridges over streams or water courses," and that no such stream or water-course existed in that case.

In *Matter of Freeholders of Irondequoit,* 68 New York, 376, which is also cited, the first paragraph of the syllabus discloses a similar basis of distinction, as follows:

"The act of 1857 (Chap. 639, Laws of 1857) providing for the building and repairing of bridges over streams dividing adjoining towns, confers no authority as to bridges over bays, lakes or other bodies of water not 'streams,' or as to causeways or bridges over marshes between two towns."

There are, indeed, some authorities which seem somewhat to limit the broad meaning of the term bridge, but our own Legislature has often used the word in the widest sense, notably in acts providing for overhead bridges across the Mahoning river, considered in *State, ex rel,* v. *Davis,* 55 Ohio State, 15, though these acts were there held to be unconstitutional because they were special legislation. So, also, our Supreme Court has expressly declined to narrow the significance of the term, in *Smith Bridge Co.* v. *Bowman,* 41 Ohio State, 37, holding that a railroad bridge is within the meaning of the word as used in the mechanic's lien statute. The dissenting opinion in that case is based upon an attempt to narrow the construction of the term. The word, as defined in 1 Bouvier's Law Dictionary, 265, is as follows:

"A bridge is a structure erected over a river, creek, stream, ditch, ravine or other place to facilitate the passage thereof, including by the term both arches and abutments."

That the term "bridge" includes viaduct is expressly held in *City of Argentine* v. *Atchison, T. & S. F. Railway Co.,* 55 Kansas, 730; *State* v. *Inhabitants of Gorham,* 37 Maine, 461; *Whitelaw* v. *Freeholder of Gloucester County,* 40 New Jersey Law, 302; *Funk* v. *St. Paul City Railroad Co.,* 61 Minn., 435.

In *State, ex rel,* v. *Commissioners,* 49 Ohio State, 301, it was sought to mandamus the county commissioners of Hamilton county to erect a structure similar to the one proposed in the case at bar, under the authority of Section 4938, Revised Statutes, now General Code, Section 7557, above quoted, and though the court declined to interfere with the administrative discretion of the county commissioners, it is nowhere suggested in the

opinion that the commissioners were without authority, under this section, should they choose to avail themselves of it, to build the structure in question. We have, therefore, no doubt that the sections of the General Code above cited authorize the construction of a high level bridge or viaduct in proper cases.

The relator contends secondly, that the power of the commissioners does not extend to building bridges within the limits of a city upon which general power has been conferred for that purpose. But it is expressly held in *Lewis et al* v. *Laylin et al*, 46 Ohio State, 663, that county commissioners have authority to improve a state, county or township road, although the improvement embraces that part of the highway which lies within the limits of a municipal corporation. It is moreover distinctly intimated in *City of Piqua* v. *Geist, a Minor*, 59 Ohio State, 163, that the same rule applies to the erection of county bridges within the limits of municipalities.

Whatever ambiguity may have existed in the sections of the Revised Statutes, corresponding to the sections of the General Code, above quoted, is here immaterial, because the proceedings looking to the improvement now proposed have been taken since the present codification of the statutes came into force. It may be true that the exception embraced in General Code, Section 2421, namely "except only such bridges as are wholly in cities and villages having by law the right to demand and do demand and receive part of the bridge fund levied upon property therein," is deprived of its force because of the circumstance that the only laws providing for such division of funds are apparently special laws and therefore unconstitutional; yet the fact remains that the same section now expressly provides that, "if they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages," which are otherwise within their jurisdiction.

The relator further contends that, if the proposed structure is properly a bridge and the commissioners have authority to build in cities, "they can not build in the location decided upon, because there is no state road or other road in common public use on which to build it, and it is not necessary."

The diversion of the route of travel over the lines of the original highway to the present viaduct has not operated a discontinuance of the county road as such. Any disused portion of the highway, if utterly abandoned, is no doubt vacated by operation of law; but the county road, as such, persists, despite the new route of travel (*Steubenville* v. *King*, 23 Ohio State, 610; *Silverthorne et al* v. *Parsons et al*, 60 Ohio State, 331). It continues, in the language of the statutes, to be a road "in common public use," or "of general public utility." Nor do we think the extinguishment of the county road is implied by the interest or action of the Rockport Plank Road Company either before or when it gave its deed to the city of Cleveland September 4, 1869, and did thereby "absolutely dispose of, release and abandon to the said city for the purpose of a public street all of that part of the plank road of said company which lies within the limits of said city and all the right and title of the said company therein and thereunto."

In *Plank Road Co.* v. *King*, 2 Ohio State, 419, it was held that:

"The interest of the public in such roads consisting of a perpetual *easement* in the land covered by them, for all actual uses and purposes of public travel, may, at the discretion of the General Assembly, be transferred without any pecuniary equivalent, to a plank road company; such plank road still remaining a public highway, and subject to the same uses and purposes as before."

Although this part of the Cleveland and Milan road was for a time under the exclusive jurisdiction of a plank road company, and although it has since been *de facto* under the exclusive jurisdiction of the city of Cleveland, the county road, within the meaning of the statutes here relied upon, continues to exist.

As to the necessity of the new bridge, we can not, as a matter of law say that the existing viaduct, which was deemed adequate at the time of its construction in 1874, and which still continues to be the main route of public travel upon this road, is now, after the lapse of more than a third of a century, adequate and convenient to the use of the vastly increased population in the midst of which it is located. That question lies wholly within the dis-

cretion of the county commissioners, so long as that discretion is not abused. *State, ex rel,* v. *Commissioners*, 49 Ohio State, 301.

It is further contended that "The proposed structure, as located by the commissioners, is not on the Cleveland and Milan road, and no authority has been voted to expend the public funds for a site for a bridge there." Whatever may have been the meaning of Revised Statutes, 2825, that section was superseded, prior to the commencement of the proceedings of the commissioners for the proposed improvement, by General Code, Section 5628, which imposes no limitation upon the county commissioners in respect to levying a tax for a bridge site. The section does make specific mention of sites for county buildings, but in connection with the buildings of county bridges, the subject of sites is ignored. The county commissioners have ample power, under the statutes, to appropriate whatever property may be necessary for the purpose in question, and to expend money in that behalf, without a vote of the electors, except as such authority may be required and given by the vote upon the question of erecting the bridge itself, and the question of site is left by the Legislature incident to the main question of erecting the bridge.

As already indicated, the agreed facts in this case show that the termini of the proposed improvement are located substantially within the limits of the Cleveland and Milan road. That the roadway, as elevated above the valley by the proposed improvement, is not in a vertical line above the old roadway, is of no importance. The obvious and proper way to erect a high level bridge across a valley is to erect it in a straight line. This necessarily involves a departure from the circuitous roadway required for the descent to the bottom of the valley as the highway was originally surveyed. The same condition obtained with regard to the Rocky river bridge. *Silverthorne et al* v. *Parsons et al,* 60 Ohio State, 331.

We have examined all the points made by the plaintiff in argument and in his brief without finding any sufficient reason to enjoin the proposed improvement as being beyond the authority of the county commissioners to make, or as involving any such irregularity of procedure as to render the expenditure of money therefor illegal.

Our Brother Winch has refrained from participating in our deliberations, and the other members of the court have independently reached the conclusions thus indicated. He is a resident and property owner in a part of the city which will receive a material advantage from the proposed improvement, and he wishes it to be understood that his personal opinion has in nowise contributed to the conclusions reached.

The petition will be dismissed.

WOMAN STRUCK BY AUTOMOBILE AS SHE WAS LEAVING STREET CAR.

Circuit Court of Hamilton County.

SAMUEL KLEIN v. DANIEL GOLDSTEIN.*

Decided, March 9, 1912.

Negligence—On the Part of Automobile Driver or Pedestrian—Woman Passing Around Rear End of Car from Which She had Alighted—Struck by an Automobile Running on Left Side of Street—Charge of Court as to Degree of Care Required of Each.

1. In an action for damages from being struck by an automobile, the use in the general charge of the phrase "in the place" in which the automobile was running will not be construed on review as implying that the machine was unlawfully in that place, but as directing the attention of the jury to one of the conditions which go to indicate the degree of care which should have been used by the chauffeur on that particular occasion.
2. It is not error in such a case to refuse to give a special charge to the effect that the injured woman was bound to look to the south for automobiles which might pass to the left of the car from which she was alighting, as well as to the north for vehicles which under the rules of the road ordinarily pass on that side of a thoroughfare.

Worthington & Strong and *Frank Seinheimer*, for the plaintiff in error.

Henry Bentley and *Horace A. Reeve*, for Goldstein.

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*Affirming *Goldstein* v. *Klein*, 11 N.P.(N.S.), 1.

JONES, J.; SMITH, P. J., and SWING, J., concur.

The issue joined by the pleadings and submitted to the jury was whether the negligence of the chauffeur or of Mrs. Goldstein caused her injuries. There is no allegation of contributory negligence in the answer. The verdict was not against the weight of the evidence; the question was one of fact for the jury, and consequently there was no error in failing to instruct a verdict for defendant. Having so determined, three grounds urged by plaintiff in error remain for our consideration: Did the trial court err—

First. In refusing to give the eight special charges or any of them requested by defendant?

Second. In the general charge?

Third. In refusing to submit the interrogatories, requested by defendant, to the jury?

In our opinion the first special charge was properly refused, for the reason that there was no evidence to support the last statement, namely: "He was not violating any law or the city ordinance in so doing."

We do not know whether there is any city ordinance forbidding his driving the automobile as he did. No one testified that there was no such ordinance. For aught that appears in the evidence, there may be an ordinance requiring him to stay to the right of the center line of the street. The charge was objectionable, too, for the reason that plaintiff does not allege that the chauffeur was negligent in regard to the place where he was driving, but only as to his manner of driving. The question of the legality of the place where he drove was injected into the case by the effort of defendant to show that by ordinance he was required to drive where he did.

The second special charge in question was refused, and properly so. An ordinance of the city was introduced in evidence by defendant in an attempt to show, and from which he argued that in passing to the left of the street car the chauffeur was only complying with the requirements of said ordinance. We do not agree with such construction of the ordinance. In our opinion it does not mean that automobiles must pass street cars to their left, but only applies to such vehicles the drivers of which have a

choice as to where to drive and whose driving can and should exercise said choice with a mutual and reciprocal regard for the safety and convenience of all and with a desire to carry out the spirit and letter of the regulation therein contained. Such a choice motormen do not have. All that can be asked of them in this respect is to keep their cars on the tracks. To give the second charge after the ordinance had been read to the jury would have been in effect to charge that the driver of the automobile did what he was positively required by law to do in turning to the left. In this view of the matter the second charge was erroneous, especially in the absence of any reference to the degree of care required of each party under all the circumstances.

The third special charge would require the court to say to the jury that a pedestrian in crossing a street should look north and south, or rather, that in this particular case Mrs. Goldstein should look south as well as north. The jury should always be left free to determine from their experience and judgment whether the person injured did what could reasonably be expected of a person of average prudence under similiar surroundings and conditions. It is more than probable that, exercising such judgment, the jury in this case thought Mrs. Goldstein did the natural and proper thing in first looking to the north.

The law applicable to this special charge is well stated in the case of *L. S. & M. S. Ry.* v. *Fisher,* 4 C.C.(N.S.), 593, affirmed in 51 O. S., 574. The court there said:

"We think it can not be said as an absolute rule of law that the plaintiff must look ahead under all circumstances. It is his duty to be cautious or careful, but whether he must look ahead or behind or to one side or down or up depends upon the particular situation in which he may be placed at the time."

In special charge No. 4 the court was asked to instruct the jury that "she was bound to look south for vehicles approaching from that direction as well as to the north." She was required to exercise her senses in order to protect herself from injury, and it was not for the court to say that she was under the duty to look in one direction as well as another, and hence this charge is subject to the same objection as No. 3.

Special charges Nos. 5 and 6 are objectionable for the same reason, namely, that they place emphasis upon the duty of Mrs. Goldstein to look in a particular direction.

Special charge No. 7 is erroneous. as we think the question for determination was one of fact and not of law.

Special charge No. 8 was properly excluded, for the reasons assigned with reference to special charges Nos. 1 and 2.

We come now to the second question, namely, was there error in the general charge? The main contention of plaintiff in error's counsel in this respect is that the court erred in referring in his general charge to the "place" in which the defendant's chauffeur was driving his machine. There is nothing in the language used by the court throughout the trial which would indicate that the trial court entertained the opinion that the ordinance introduced in evidence did not authorize the chauffeur to drive his car to the left of the street car. We think, therefore, that it is putting a forced construction upon the language of the court to say a reference to "in the place" where the automobile was going implied that it was unlawfully in such place. We not only do not think the language will bear any such construction. but believe that an omission to use that or similar language would have been error. The degree of care required of a person is always controlled by and depends upon the place, circumstances, conditions and surroundings. There is no arbitrary or fixed rule. But whether a person has exercised such care as ordinary prudence requires is always a question to be determined by the jury. We find no error in the insertion of this phrase in the general charge nor do we find any other error therein.

As to the interrogatories submitted by counsel for the defendant below, we think the court exercised a proper discretion in refusing to propound them to the jury.

Interrogatory No. 2 is doubtless irrelevant and improper, because it is addressed to the doctrine of the "last clear chance." There was no such issue in this case.

Interrogatories Nos. 3, 4 and 5 again display the manifest intent of defendant's counsel to place too great an emphasis upon the duty of the plaintiff's wife to look to the south. Any answers to these questions could not have in any manner affected

the verdict rendered by the jury, and hence the refusal to submit such interrogatories could not have been prejudicial. It does not appear that the interrogatories were requested separately, and hence they must all stand or fall together.

We have not discovered, in an examination of the record, any error, and the judgment below will, therefore, be affirmed.

IMMUNITY IN THE SALE OF PLUMAGE OF THE WHITE HERON.

Circuit Court of Cuyahoga County.

THE STATE OF OHIO v. A. M. SOLOMON, and THE STATE OF OHIO v. THE BAILEY COMPANY.

Decided, January 12, 1912.

Game Birds—Purpose of the Statute to Protect Native Birds and Migratory Birds Finding a Home in the State during Certain Seasons—White Heron Not of Either Class.

The white heron is not included within the protection of Section 1412, General Code, and a criminal prosecution does not lie against one offering the plumage of this bird for sale.

T. S. Hogan and *Morgan & Litzler*, for plaintiff in error.
Hidy, Klein & Harris, contra.

MARVIN, J.; WINCH, J., and NIMAN, J., concur.

Error to the court of common pleas.

These two cases are exactly alike so far as the law points are involved. Each of the defendants was prosecuted for having in possession and offering for sale the plume of a bird known as the white heron. Speaking in the singular. as though there was but one case, the facts are, that the defendant had the plume in possession and exposed for sale at the time charged. The prosecution was before a justice of the peace; the defendant was found guilty and sentenced. On error prosecuted in the common pleas court, this judgment was reversed and the defendant discharged.

We are called upon, by proper proceedings in error, to determine whether or not there was error in this judgment of reversal.

Several grounds of errors on the part of the justice were claimed, any one of which justified the judgment of reversal. The offense, if there was an offense, was because of a violation of Section 1409 of the General Code. Among the grounds urged was that the prohibition contained in this section did not include the white heron; another was that if it did include the white heron, the act was unconstitutional, it being the taking of private property without due process of law.

This last proposition we do not feel called upon to discuss, other than to say that we are not impressed with the views expressed by the court of common pleas in its opinion in the case. However, as we view the case, it is not necessary that this question be passed upon.

A similar prosecution was instituted in Stark county, in 1908, against one Abt [9 N.P.(N.S.), 311]. The result in that case was a conviction before the justice of the peace, a reversal of that conviction by the court of common pleas; that judgment of reversal was affirmed by the circuit court, which last named judgment was affirmed by the Supreme Court. See 83 Ohio State, 451. No opinion is reported, so that it may have been for the reasons given by the court of common pleas or for those given in the circuit court, or both.

The opinion of the common pleas court reversing the judgment of the justice is reported in 9 N.P.(N.S.), at page 311. The opinion of Judge Harter, of the common pleas court, in this case is based upon the proposition that the white heron is or may be a game bird, and that there is no protection for such birds in the statute. This reason does not now exist, because of General Code, Section 1412, which gives an enumeration of birds, does not include the white heron, and the section closes with the words: "The birds named in this section shall be known and classed as game birds, in contradistinction to all other birds."

However, there still remains the question of whether the white heron is included within the prohibition of Section 1409. In that section a large number of kinds of birds, forty-two in all, are enumerated as those whose plumage, etc., shall not be exposed for sale, and the enumeration ends with the words: "or any wild bird other than a game bird." It being so settled by statute that the white heron is not a game bird (Section 1412), we have the question of whether these words include the white heron.

The evidence shows in this case exactly as it showed in the case against Abt and is expressed in the language of the opinion announced in the circuit court in the Abt case. The following is a quotation from that opinion:

"It also fully appears from the evidence in this case that the snowy heron is not a native bird of Ohio; that it is a habitant of southern waters, and is never seen in a wild state in Ohio except very rarely. So that if it is found in the state at all it is only as a vagrant individual of a species, and is not a native bird. We think these statutes are designed to protect the native birds and migratory birds that find a home in this state during certain seasons of the year, as well as other migratory birds that cross the state at regular intervals of each year; and not merely a transient or vagrant individual of a class whose habits are not to migrate either to this state or across it."

I have refreshed my recollection in reference to this case by talking with the clerk of the court of Stark county since this case was heard, and I find, what on the hearing I thought to be true, that the circuit court was composed of Judges Donahue, Taggart and myself. Judge Donahue, as is well known, is now a judge of the Supreme Court of this state; Judge Taggart was recently chief justice of the circuit courts, both of whom are well known and were recognized; at the time this opinion was announced, as among the ablest judges in the state. This opinion was concurred in by all of us who sat in the case, and my recollection is (however, of this I am not certain) that the opinion was prepared by Judge Donahue. No court, so far as we know, in the state of Ohio, has dissented from the proposition

announced in this opinion since it was delivered; and, following that opinion, and for the reasons stated in that part of it which is hereinbefore quoted, the judgment of the court of common pleas in this case is affirmed.

ENFORCEMENT OF UNDERLYING MINERAL RIGHTS BY INJUNCTION.

Circuit Court of Perry County.

CHARTIERS OIL COMPANY v. PETER CURTISS ET AL.

Decided, November Term, 1911.

Mines and Mining—Rights of Surface and Sub-surface Owners—Implied Right of Ingress and Egress in Prospecting for or Removing Underlying Minerals—Maintenance of Derricks and Machinery in Drilling for Oil—Privilege of Storage—Damages to the Surface from Such Operations.

1. The estates represented by ownership of the surface and of underlying mineral rights are mutually dominant and servient, and in a conveyance of the surface there is an implied reservation of right of access to the estate below, and this right may be enforced by injunction.
2. The owner of underlying oil and gas rights is entitled to the use of the surface for ingress and egress in drilling a reasonable number of wells and may maintain thereon derricks and other necessary machinery; but storage rights will be limited to such as are incidental to the immediate production and marketing of the oil, and the question of damage to the surface from such operations will be left open for future determination.

D. N. Postlewaite, C. A. Donahue and *Leo A. Weil*, for plaintiff.
Booth, Keating, Peters & Pomerene, contra.

POWELL, J.; VOORHEIS, J., and SHIELDS, J., concur.

On and prior to the 25th day of August, 1888, the Columbus & Hocking Iron and Coal Company was the owner in fee simple of a tract of land in this county, known and described as out-lot number one (1) in the village of New Straitsville, Ohio, and containing between four and five acres of land. On that date the

said the Columbus & Hocking Iron and Coal Company executed its deed of conveyance to Thomas Curtiss, conveying to him the surface of said premises. The description of the property conveyed, as contained in the granting clause of said deed, is as follows:

"All of the surface except the timber on the tract of land described as follows: out-lot No. one (1) of the village of New Straitsville, Ohio, as the same is known and designated on the recorded plat of said village, recorded in the recorder's office of Perry county, Ohio."

Afterwards the rights of Thomas Curtiss in said lands were conveyed by him to the defendant, Peter Curtiss, who was the owner thereof at the commencement of this action. A few days after the petition had been filed, the defendant, N. L. C. Kachelmacher, purchased the interest of the defendant, Peter Curtiss, in said lands and on his motion was made a party defendant to this action.

The plaintiff, Chartiers Oil Company, is the owner by proper conveyance from the Columbus & Hocking Coal and Iron Company, of the oil and gas underlying said tract, and brought this action for a mandatory injunction to compel the defendants to permit it to enter upon the surface of said out-lot No. 1 to explore for oil and gas that may exist under the surface, and to give it, the said plaintiff, the right to do whatever may be necessary to produce and market any oil and gas that may be found to underlie said lands.

It is the settled law of Ohio that different estates may exist in the same real estate. The surface may belong to one owner, and the minerals underlying it may belong to other and different owners. *Burgner* v. *Humphrey*, 41 O. S., 340; *Gill* v. *Fletcher*, 74 O. S., 295: *20 Am. & Eng. Ency. Law* (2d Ed.), 771-3, and authorities there cited.

The question here presented is whether or not the owner of the surface *only* can be required to permit access to such surface by the owner of a lower stratum, for the purpose of producing and marketing the minerals that may be found in such lower stratum.

There is no reservation in the deed or grant to Thomas Curtiss of any right to enter upon the surface and explore for gas or oil, nor of access through the surface to any minerals that may lie below. In such circumstances, can the owner of the surface be compelled by a court of equity to permit the owner or owners of the underlying strata to penetrate or drill through the surface for the purpose of developing or mining the minerals that may be found to exist in such underlying strata?

It is settled in Ohio that the surface of lands lying above a stratum that can be mined out, is entitled to subjacent support. That is, the coal or other mineral underlying lands can not be mined out and removed without leaving sufficient support below to prevent the caving in or subsidence of the upper stratum. This right of support is a property right belonging to the surface and passes by a conveyance of such surface without an express grant to that effect. It is not an easement merely but a property right attaching to such surface, without either a grant or a reservation to that effect, and the same is a servitude on the lower estate, which can be enforced by the surface owner. This being true, does not the upper stratum or surface owe a reciprocal duty or servitude of access to the lower strata? The doctrine of mining rights would imply as much, and our own Supreme Court has granted similar relief to that sought in this action, where the subject of the controversy was gypsum or plaster instead of oil or gas, and where there was no reservation of a right of access except such as might be implied by a mining right. *Gill* v. *Fletcher,* 74 Ohio St., 295.

But it is said mining rights are peculiar and exist by reason of necessity. What greater necessity can exist in the case of a mine, than exists in a case like this? There is no other way known by which the oil or gas under the earth's surface can be reached and produced for use or market except by drilling directly down through the earth's surface into the oil and gas bearing stratum. It is the opinion of the court that a right of access to the lower strata of the earth's crust is a property right attaching to such strata and passes by a conveyance of the same without an express grant to that effect, and is reserved by im-

plication in a conveyance of the upper strata without an express reservation to that effect. It is not an easement merely but a property right in the estate itself, and is a reciprocal servitude to the right of support that attaches to the surface. It is analalagous in principle to the way by necessity on the earth's surface, and to the doctrine of mining rights above referred to. In fact oil and gas in place are held to be mineral, so that mining rights might well attach to them for the benefit of the owner of the same. These rights of necessity are, however, subject to such various modifications as may be necessary for the complete enjoyment of the different estates conveyed. The law implies a single way of necessity upon the earth's surface, where such necessity exists, yet a right of access to underlying minerals would only be restricted in number to so many as would be necessary for a reasonable development of the territory where such right of access exists. The rule of necessity for a reasonable development of the oil and gas territory is the rule that would prevail.

"The owner of the surface can not bore where he pleases or as often as he pleases. The right of designating the reasonable location of the one right of way by necessity, which the law recognizes, has always been held to be in the owner of the land. If he refuses to designate such way, then the owner of the right of way can designate it, or can apply to the court to have it located." *Chartiers Block Coal Co.* v. *Mellon,* 152 Pa. St., 286.

The language quoted applies with equal force to the owner of a lower stratum who has a right of access through the surface, with the additional right to have more than one way designated by the court where the same may be necessary for the reasonable development and production of the mineral owned.

These views are supported by numerous authorities, a few of which are the following: *Chartiers Block Coal Co.* v. *Mellon,* 152 Pa. St., 286; *Marvin* v. *Brewster Iron Min. Co.,* 55 N. Y., 538; *Henry* v. *Lowe,* 73 Mo., 96; *Williams* v. *Gibson,* 84 Ala., 228; *Gill* v. *Fletcher,* 74 O. S., 295; *Kelly* v. *Ohio Oil Co.,* 57 O. S., 317.

The deed to Thomas Curtiss conveying to him the surface of out-lot No. one (1), conveyed to him only so much of said land as could be used for agricultural or residential purposes. *Murray* v. *Allerd,* 100 Tenn., 100; *Stewart* v. *Chadwick,* 8 Iowa, 463; *27 Cyc.,* 540; *Lillibridge* v. *Coal Co.,* 143 Pa., 293; *Williams* v. *South Penn. Oil Co.,* 52 W. Va., 121; *Knight* v. *Ind. Coal & Iron Co.,* 47 Ind., 105.

This conveyance was a severance of the title to said lands, the grantee, Thomas Curtiss, obtaining title to the surface or upper stratum, while the grantor, the Columbus & Hocking Coal and Iron Company, retained all the right, title and ownership of the residue of said tract, and being all of the underlying strata of the same. By other conveyances the plaintiff became and now is the owner of the underlying oil and gas. These various estates are mutually dominant and servient. The conveyance of the surface to Curtiss reserved to the grantor a right of access to the estate below by an implied reservation. A servitude of access to the lower estate passed with such grant. The conveyance by which plaintiff derived title to the oil and gas carried with it by an implied grant, if not in express terms, a right of access to such oil and gas.

A servitude having been established to the lower estate, can the same be enforced by a mandatory injunction, as is sought to be done in this action? The Supreme Court has in several instances recognized the right and authority to enforce and regulate servitudes growing out of mining rights, to which the rights sought to be enforced in this action are analogous. *Pomeroy* v. *Salt Co.,* 37 Ohio St., 520; *Gill* v. *Fletcher,* 74 Ohio St., 302.

It was said by Justice Williams of the Pennsylvania Supreme Court in a minority opinion, in a case involving practically the same question sought to be determined in this action:

"We do not hesitate to enforce the servitude for support, whether subjacent or adjacent, or to regulate the extent and manner in which it shall be rendered and enjoyed. With equal propriety and with equal ease we may enforce the servitude for access and regulate the extent and manner in which it shall be

rendered and enjoyed. The power of the chancellor would extend to all incidental subjects and enable him to impose terms as to the manner in which the owner of the lower estate should exercise his right of access, the precautions he should employ, and the compensation he should make for actual injury done." *Chartiers Block Coal Co.* v. *Mellon,* 152 Pa. St., 286.

This seems to us to be a correct statement of the principle that is decisive of the question to be determined in this action. It follows that the plaintiff has the right to drill for oil and gas upon the lands of the defendants described in the petition, together with such right of ingress and egress upon the surface of said lands as may be necessary for that purpose, and that the court has power to enforce such right in the manner sought to be done in this action. It would also have the right to a reasonable use of the surface on which to place derricks and other necessary machinery for drilling its wells. It ought not, however, have a right of storage upon this tract, other than as may be incidental to the immediate production and marketing of oil, as it has other adjacent lands on which such right of storage exists. It ought also to be limited in the number of wells it should be allowed to drill on said lands. The evidence discloses that two wells are now being drilled in on the same, and it ought to be permitted to complete these wells, and if it should be necessary for the more complete development of said territory, it should have the right to drill still another well on said tract, but not nearer than four hundred feet from the north or west boundary lines of the same. The injunction allowed in the court of common pleas was properly allowed, and the motion to dissolve the same will be overruled, and such injunction will be continued in force subject to such modifications as we have indicated in this opinion. The question of damages to the surface will be left open for future determination or settlement. We think, however, that the plaintiff should pay the costs of this proceeding.

A decree may be drawn and entered in conformity with the views expressed in this opinion.

ACCORD AND PROMISE TO PERFORM AS A DEFENSE.

Circuit Court of Cuyahoga County.

THE NEWBURG BRICK & CLAY COMPANY v. JOSEPH CHOJNICKI.*

Decided, July 14, 1909.

Evidence—Competency of, as to Executory Agreement to Settle—Evidence as to Previous Occurrences of the Character for which Damages are Sought.

1. It is not error to exclude evidence as to an oral executory agreement of settlement theretofore entered into between the parties.
2. In an action for damages for injuries to plaintiff from being struck, while standing on his own premises, by a stone thrown by a blast in a neighboring quarry, evidence of previous instances of stones being thrown upon the land of the plaintiff is competent, where admitted for the single purpose of showing whence the stone came that struck plaintiff and the distance it might be thrown in that way.

HENRY, J.; MARVIN, J., and WINCH, J, concur.

Error to the court of common pleas.

The defendant in error recovered a verdict and judgment of $250 in the court of common pleas, for personal injuries received by him in consequence of being struck by a piece of stone flying upon his own premises by a blast in the quarry of the plaintiff in error.

The first error assigned is upon the exclusion of evidence of an oral executory agreement of settlement between the parties. This ruling was made upon the authority of *Frost* v. *Johnson*, 8 Ohio, 393, wherein the first paragraph of the syllabus is as follows:

"An accord with mutual promises to perform is not a good defense if there be no performance before action brought. A part performance is not sufficient to bar the pre-existing demand."

* Affirmed without opinion, *Newburg Brick & Clay Co.* v. *Chojnicki*, 83 Ohio State, 458.

It is urged here, however, that while this doctrine was true at common law of a technical accord without satisfaction, it is now no longer, under the reformed procedure, if it ever was true of an executory contract, in which the consideration on either side is the mutuality of promises between the contracting parties. Upon the hearing we were impressed with this view, but upon careful examination of *Frost* v. *Johnson*, and of the only other reported case in which it has since been cited by any reviewing court in this state, namely, *Conard* v. *Bare*, 8 C.C.(N.S.), 118, we conclude that the trial court was right.

The second assignment of error is upon the admission of testimony of previous instances of stone thrown upon the land of plaintiff below by blasts from said quarry. The bill of exceptions discloses that one of the contentions made by the defendant below was, that stones could not be so thrown, and the evidence was admitted for the purpose of showing whence the stone came that struck the plaintiff, and how far such stones might be thrown. We hold that the evidence was admissible for these purposes merely.

The third and fourth assignments of error are respectively that the verdict is against the weight of the evidence and that it is excessive, but the evidence, as we have examined it, does not warrant us in interfering with the jury's findings.

The judgment is therefore affirmed.

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BRIDGES—

Collapse of an old wooden structure from decay, while a driver and his team were crossing it; constructive notice to municipality of its unsafe condition. 343.

A railway company is not liable for the cost of a bridge over an artificial water-course, constructed after the building of the railway. 344.

A bridge or culvert which forms part of a city street is under the control of the city council rather than the county commissioners, and the municipality is responsible for maintaining guard-rails thereon. 417.

Authority of county commissioners to build a high level bridge or viaduct located wholly within a municipality. 577.

Where the termini of a bridge or viaduct are located substantially within the limits of a county road, the fact that the new structure follows a straight line, instead of the circuitous route of the old road through the depression, is a matter of no importance so far as authority to build the structure is concerned. 577.

The question of the site for a bridge is made by the statutes incidental to the question of authority to erect it, and where its erection has been authorized the county commissioners have authority to appropriate whatever property may be necessary for the site. 577.

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Prosecution of, for embezzlement in converting bonds to their own use. 497.

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CANALS—

Nature of the title acquired by the state to lands occupied by canals, feeders, reservoirs, dikes, locks and dams; title after abandonment of the land for canal purposes; extent of the strip of land acquired for the bank of a reservoir; the Licking reservoir having been made a public park and pleasure resort for the people of the state generally, the state board of public works is without authority to lease its banks for building purposes that will interfere with the free use thereof by the people and the agents of the state. 129.

CARRIERS—

See RAILWAYS.

A shipper by express, who signs a contract limiting the liability of the company to six months in so far as the commencement of an action for damages is concerned, is barred from maintaining such an action begun more than six months after the shipment was made, notwithstanding his allegation that he signed the contract hurriedly supposing it was a bill of lading. 125.

Negligence in permitting apples to freeze while in transit. 225.

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With reference to the duty of a motorman to keep a lookout for licensees who may be on the track ahead of his car. 49.

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As to burden of proof where the testimony for the plaintiff raises a presumption of contributory negligence which must be removed. 209.

Where a charge of court, taken in its entirety, is such that it is evident the jury understood it and were able to correctly apply the law, it will not be held erroneous even though it contains some statements that are not strictly clear or proper. 257.

Proper use of the words "unprecedented rainfall" in charge to jury. 396.

Use of the word "peculiar" for "pecuniary" in charging a jury is not necessarily or presumably prejudicial, where the word "pecuniary" was correctly used in other parts of the charge. 441.

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With reference to contributory negligence on the part of one operating a buzz saw. 449.

With reference to the necessity of giving a warning signal as a street car is about to pass over a street crossing. 506.

It is not error to refuse to give a written instruction before argument to the effect that the burden is on the plaintiff to prove the existence of a contract for labor and services by fair and satisfactory evidence, where the jury were instructed that the contract must be established by clear and unequivocal proof. 545.

In an action on an alleged contract for labor and services; degree of proof required to establish contract; not error to refuse a charge to the effect that if the evi-

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With reference to coercion exercised over a testator by the silent resistless power which the strong sometimes exercise over the weak. 570.

As to the degree of care required of a passenger alighting from a street car, and also of an automobile running on the side of the street upon which vehicles going in the opposite direction usually run. 586.

CHATTEL MORTGAGES—

Constitutionality of the act relating to the refiling of chattel mortgages; lengthening of life of a mortgage not an impairment of contract. 232.

A conditional sales contract, withheld from record for several months, but filed for record a few minutes before the filing of a chattel mortgage on the same property, is sufficient to preserve the lien under the sales contract in the absence of any statutory provision as to when such contracts shall be filed. 236.

CLASSIFICATION—

Of subjects and uniformity of operation. 113.

CONDITIONAL SALES—

A conditional sales contract, withheld from record for several months but filed a few minutes before the filing of a chattel mortgage on the same property, preserves the lien in the absence of any statutory provision as to when such contracts shall be filed. 236.

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The right to redeem property sold for taxes does not cease until confirmation of the sale. 333.

CONSANGUINITY—

Degree of, and whether lineal or collateral, immaterial where property descends to a class. 557.

CONSENTS—

A municipality may act in the double capacity of grantor of a street railway franchise and as consenting in the capacity of abutting owner to the building of the line. 478.

CONSTITUTIONAL LAW—

Section 11466, providing when a jury shall be deemed to have been waived pertains to a subject of a general nature, and is rendered invalid by reason of the fact that by its terms it applies to Hamilton and Cuyahoga counties only. 95.

Section 1249 *et seq.*, General Code, authorizing the state board of health to require the purification of sewage and public water supplies and to protect streams against pollution, lacks uniformity of operation by reason of the exception which is made of Ohio river cities under certain conditions; and the invalidity of the exception is of such a character as to affect the entire act and bring it within the inhibition of Section 26 of Article II of the Constitution. 113.

Moreover the penalty clause, directed at members of council for failure to take the steps required to carry out the orders of the state board of health, is open to the constitutional objection that it is directed against a legislative body and is destructive of the fundamental theory of government, in that it substitutes to that extent the state board of health as the governing board in the place of council. 113.

Section 8565 of the General Code, as amended, is not unconstitutional because an impairment of the obligation of contracts, nor retroactive as affecting the rights of creditors, but applies to chattel mortgages then on file, and the lien created thereby will be continued if the mortgage is refiled within thirty days next preceding

the expiration of three years from the time the mortgage was originally filed. 232.

It is within the province of the General Assembly to exempt from jury service such classes of persons as it deems best, and Section 5211, exempting contributing members of the Ohio militia from such service, is a valid enactment. 329.

The provision of Section 3677, providing for the acquisition of a fee simple title by a municipality in lands held by lease for park purposes, is constitutional. 369.

Section 12603, providing a penalty for operating a motor vehicle at unreasonable speed, and Section 12604 providing maximum speeds for different localities, are constitutional. 368.

CONTRACTS—

Action against a surety on a bond for performance of a contract; notice of default; slight deviations from the terms of the contract; evidence as to market value. 59.

Release of a railway company from obligation to maintain a ditch in consideration of right-of way granted, effected by consent on the part of the property owner to the building of a county ditch which carried an increased amount of water to that locality. 97.

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The lengthening of the life of a chattel mortgage, as provided by Section 8565, is not an impairment of the obligation of contracts, nor retroactive as affecting the rights of creditors. 232.

Interpretation of an agreement forming the basis of a land syndicate. 228.

A contract for work to be delivered free from all claims, liens or other charges does not permit of suit for recovery thereon for performance while there is in force a mechanic's lien in favor of a subcontractor. 271.

For attorney fees on a percentage basis for recovery of alimony not enforcible where the recovery consists of a trust which the husband creates for the benefit of the wife. 337.

There can be no breach of contract to purchase where an offer to purchase in accordance with a proposition previously submitted, was not accepted by the seller. 341.

The rates fixed by a municipality for water must be equal as to all takers of a given class, and the municipality can not be bound by contracts for a series of years with individual takers. 364.

As to whether a proposition attached to a contract should be treated as a part of the instrument. 443.

Construction of an agreement for an allotment and improvement of lands. 513.

Breach of performance waived by entering into a supplementary agreement, and action for cancellation of the contract does not lie. 513.

Application of the statute of limitations to a contract for labor and services. 545.

In a suit on a contract for labor and services, it is only incumbent upon the plaintiff to establish the contract by a fair preponderance of the evidence, where the record discloses no blood relationship between the parties. 545.

CORPUS DELICTI—

Order of proof as to, in a prosecution for arson. 31.

COUNTY—

A county is not liable for the cost of election booths constructed for use in a municipality located in that county. 475.

COUNTY COMMISSIONERS—

Are not entitled to additional compensation for services as mem-

bers of the board of equalization. 381.

The necessity for the publication of the annual report of the county commissioners is not to be determined by the comparative amount of money involved in the report or by the cost of its publication. 531.

Injunction lies to determine the competency of a newspaper to publish the financial report of the county commissioners. 531.

Authority is vested in a board of county commissioners, under Section 7557, to build bridges in certain cases, including a high level viaduct in a proper case, although located entirely within a municipality. 577.

COURTS—

A probate judge can not be compelled by mandamus to certify to the common pleas a contested election over which he claims to have jurisdiction. 33.

The voluntary dismissal by a first mortgagee of his action in a foreclosure proceeding does not oust the jurisdiction of a court of equity to grant relief to a subsequent mortgagee. 51.

Basis for calculating extra compensation to certain common pleas judges. 219.

Statements made by a trial judge during the progress of the case and within hearing of the jury are of the same effect as though embodied in the charge to the jury; such statements constitute prejudicial error where they indicate bias on the part of the judge against either party to the case or an opinion as to the facts of the case. 483.

COVENANTS—

Covenant against re-leasing, with a provision for liquidated damages in the event of re-leasing; remedy of lessor in the event of a breach. 414.

CRIMINAL LAW—

As to the necessity of establishing the *corpus delicti* in a prosecution for arson before evidence tending to incriminate the defendant was introduced. 31.

In the trial of one charged with having burglars' tools in his possession with intent to use them burglariously, it is not necessary that the state prove the time and place at which the defendant proposed to use the tools, or even that he proposed to use them within the jurisdiction where the arrest was made and the trial held; but it is sufficient if the evidence convinces the jury of his intention to use the tools in the commission of a burglary. 138.

Prosecution of members of a mob for homicide; aiding and procuring the commission of crime; prejudice of jurors in cases involving the liquor interest; riot not embraced in Section 13692; evidence upon which a verdict of guilty may be based. 145.

As to the trial together of several cases of the same character. 177.

A plea in abatement which sets up matter constituting no more than a plea of not guilty should be overruled. 177.

Evidence of payment by a retail liquor dealer of the U. S. Government tax as a retail dealer is competent in the trial of said dealer for violation of the local option law. 205.

Procedure; election between indictments; motions to quash; discretion of trial judge with reference to; extent to which judicial discretion in such a matter may be controlled by mandamus. 247.

Where a prosecuting attorney has elected upon which of two indictments he desires to proceed, it is the imperative duty of the trial judge to enter the election upon the minutes of the court, without waiting to pass upon pending motions to quash. 247.

Construction of the statutory phrase "any opening of the body" as used in the statute relating to sodomy. 253.

One owning and conducting a house of ill-fame is guilty of contributing to the delinquency of a minor who visited the house, notwithstanding she was admitted by a servant; evidence as to character of the house admissible. 257.

Prosecution for aiding and abetting in the solicitation of a bribe; entrapment; sufficiency of indictment; competency of evidence; reference by prosecutor to defendant's failure to take the stand; coercion of jury. 289.

Serving liquor to two persons in "dry" territory at the same time is not a single offense. 334.

It is error to place on trial an accused person who has not been given an opportunity to plead to the indictment. 351.

The penalty provided for striking a human being with a motor vehicle which is being operated at unlawful speed will be upheld. 368.

Embezzlement by brokers of bonds placed in their hands. 497.

A prosecution does not lie against sale of the plumage of the white heron in Ohio. 590.

CROSSINGS—

Abolishment of grade crossings —see RAILWAYS.

Necessary care at a railway crossing when the tracks are obscured by smoke. 209.

CURTESY—

An estate in curtesy is entitled to the same protection as other estates, but there can be no tenancy by curtesy in remainder where there is an outstanding freehold estate in another; right of present possession is necessary. 157.

When an estate for life in a wife is not determined prior to her death no estate in curtesy rests in her husband, but such an estate is extinguished by her death. 157.

DAMAGES—

Stipulation binding a lessee to pay liquidated damages in the specified amount in the event of a breach of a covenant against releasing. 414.

A judgment of $1,000 is not excessive for the wrongful death of a six-year-old girl who is bright and active and of assistance in the family. 441.

Failure of a provision for liquidated damages, inserted by a municipality in a contract for fire engines which were to be delivered prior to a certain date, and were not delivered until long after. 443.

Indefinite provisions as to liquidated damages; reasonableness of the amount fixed; tests to be applied. 443.

Measure of damages to an adjacent owner whose lands were injured by the raising of the grade of a public road to prevent overflow. 198.

A municipality is liable for damages where shade trees have been destroyed or injured by a city contractor, when. 193.

Judgment for, against a municipality on account of the collapse of an old wooden bridge while a driver and his team were crossing it. 343.

An abutting owner can recover damages for a substantial change in the grade of the street where the city engineer had previously fixed the grade at which the abutter should lay his sidewalk. 465.

Necessary allegations in an action for damages for assault and battery. 522.

DANGEROUS MACHINERY—

Action on account of the injury of an employe in a buzz saw; pleading; evidence as to defective guard; knowledge of employe as to absence of guard; remaining at work not contributory negligence, when. 449.

Application of the act providing that the risk of unguarded machinery shall be assumed by the employer; limitation of employer's liability. 540.

DECEDENT'S ESTATE—

An allowance to a widow made in a proceeding to sell realty belonging to her deceased husband to pay his debts, to which no appeal was taken or error prosecuted, can not be collaterally attacked by exception to her account as administratrix of the estate. 463.

DECREES—

Finality of a decree of divorce. 269.

DEDICATION—

What steps are necessary in order to dedicate additional streets after a municipal platting commission has completed its work. 561.

DEED—

An improperly attested quitclaim deed, made for the purpose of effecting an equitable distribution of her property by a mother under an agreement in which the children all joined, may be perfected and enforced in carrying out a parol trust. 553.

As between an uncle who is advanced in years and a nephew who is young no presumption of inequality exists, and whether or not the uncle made a conveyance to the nephew as a result of undue influence is a question of fact to be determined from the circumstances of the case. 305.

Fair argument or persuasion, or appeals to conscience or the sense of justice of a grantor, especially where made by one having a claim upon his bounty or justice, do not when fairly made afford ground for setting a deed aside. 305.

The burden of proof is upon one alleging incapacity to execute a deed, where the conveyance was itself reasonable and proper. 305.

Deed executed by an aged man held to be valid. 305.

DEFENSES—

An act of God can not be interposed as a defense unless pleaded. 225.

Previous action not a defense where present plaintiffs were not parties. 385.

Assumption of risk is not a defense to an action for injury to an employe in an unguarded buzz saw. 449.

Defense of a subsequent adjudication in bankruptcy not available to a defendant in attachment. 509.

DELINQUENCY OF MINOR—

A person owning and conducting a house of ill-fame is guilty of contributing to the delinquency of a minor, where it is shown that the minor was admitted by one apparently acting as a servant who made no inquiry as to the age of the minor. 257.

Evidence is competent as to the reputation of the house to which a girl under seventeen years of age was taken, where the defendant is charged with contributing to her delinquency. 257.

DELIVERY—

Failure to make delivery to a prospective donee before the death of the donor renders the gift incomplete, and title to the article is in the administrator. 331.

DEMAND—

It is not necessary that the affidavit allege the making of a preliminary demand in a proceeding in aid of execution under Section 10436. 519.

DESCENT—

See CURTESY.

Course of, where all the descendants are of equal degree of consanguinity. 557.

Where an intestate leaves property acquired by purchase, with no heirs except nephews and nieces, title is cast upon such nephews and nieces as a class, and they therefore take *per capita* and not *per stripes*. 557.

DISCRETION—

Control of discretion of a trial judge with reference to procedure in a criminal case. 247.

DISMISSAL—

The voluntary dismissal of his action by a plaintiff mortgagee asking to have his mortgage foreclosed does not oust the jurisdiction of a court in equity to grant relief to a second mortgagee. 51.

It is error to dismiss an answer and cross-petition on the ground that it is improperly verified. 218.

DISTRIBUTION—

When an action on the bond of an assignee, for failure to pay the assignor his homestead exemption, will lie on an order for distribution. 65.

DITCHES—

Railway company not liable for construction and maintenance of a ditch in consideration of grant of a right-of-way by the abutting property owner, when. 97.

A railway company is not liable for the cost of a culvert or bridge over an artificial water-course, contructed after the company acquired its right-of-way at its own expense. 344.

A land owner is not entitled to relief from an assessment for an out-let ditch, where it appears that the assessment is only one dollar per acre, and his claim for relief is based upon natural drainage, but water flowing down from these lands now finds its way into the out-let ditch whereas it was formerly cast upon lower lands belonging to the plaintiff and adjoining owners. 405.

DIVORCE AND ALIMONY—

A decree of divorce granted to a husband by an Ohio court, which was without jurisdiction over the wife or over certain property standing in the name of the husband, does not determine the rights of the wife to either alimony or dower in said property. 24.

The rendering of a decree of divorce fixes the status of the parties *co instanti*, and the marital relation thus severed can be restored only by consent of the parties and their remarriage. 269.

Not only does no appeal lie to the granting of a divorce, but a motion for a new trial can not be entertained. 269.

Fees to attorney of wife for recovering alimony, where the husband, subsequent to the agreement between the attorney and the wife, created a trust for her benefit. 337.

A petition for divorce states sufficient grounds for divorce against an insane defendant, where drunkenness and extreme cruelty are charged as continuing for more than three years prior to the adjudication of the defendant as insane and his commitment to an asylum for the insane. 437.

Appeal, but not error, lies to an order vacating the appointment of a trustee for an insane defendant in a divorce proceeding and dismissing, without hearing on the merits, a petition which charges statutory grounds for divorce which accrued prior to the adjudging of the defendant as insane. 437.

An action for alimony by a wife living apart from her husband must be brought clearly within the statute; and where it appears that the husband has offered her a suitable home and no reason appears for her refusing the offer, the petition will be dismissed. 524.

DOG—

Action for injuries from bite of; not necessary to allege that the dog was vicious, or that its vicious disposition was known to the owner, and it is not error to admit evidence as to the character of the dog with reference to his being vicious or otherwise. 511.

DOWER—

Rights of a divorced wife in property of her husband, where the decree of divorce was granted by a court without jurisdiction over either herself or the property. 24.

DYNAMITE—

Use of, in the street by a city contractor in connection with a public improvement; question of negligence as to the amount used and the effect produced by the explosion upon surrounding buildings, and particularly that of the plaintiff seeking damages, should be submitted to the jury. 19.

EASEMENTS—

One who uses a way as a means of ingress and egress to his own land, without let or hindrance over the lands of another and without obstruction for a period of twenty-one years, acquires a right by prescription to its use as an incident to his land, and the right to such use will pass by devise or conveyance. 183.

Such a right is not lost by reason of the shift of a stream, along the bank of which the road runs and of necessity has suffered a like shift. 183.

Acquirement of, for park purposes and subsequent acquisition of full title for railway purposes. 369.

ELECTION (Between Indictments)—

Where a prosecuting attorney has elected upon which of two indictments he desires to proceed, it is the imperative duty of the trial judge to enter the election upon the minutes of the court, without waiting to pass upon motions which are pending to quash. 247.

ELECTION (of Remedy)—

An action to vacate a judgment after term will not lie, where it appears that no motion was made by the defendant for a new trial upon grounds then known to him and upon which he now wishes to rely, but upon the contrary he elected to prosecute error which proved unsuccessful. 529.

ELECTION (Political)—

In a contested election under the Rose local option law, the court may go behind the fact of the returns and inquire into the facts and correct mistakes. 33.

Where there are conflicting certificates signed by the same officers of election, parol evidence may be received to impeach the accuracy of the tally sheets and to explain errors therein or in the certificates relating thereto. 33.

A probate judge can not be compelled by mandamus to certify to the common pleas a contested election under the Rose law over which he claims to have jurisdiction. 33.

A county is not liable for the cost of election booths constructed for use within a municipality located in that county. 475.

EMBEZZLEMENT—

Where the agreement between a railway company and brokers handling the bonds of the company provides that the right of the brokers to retain the bonds should accrue contemporaneously with actual payment therefor, an indictment for embezzlement will lie for the pledging of bonds by the brokers for loans prior to a call by the company for funds and the conversion of the proceeds from the loans to their own use. 497.

EMINENT DOMAIN—

In fixing the value of property in a condemnation suit, the jury in considering the evidence before them may also apply their own sound judgment as to the value, and where it does not appear that the jury acted on any wrong basis their verdict will not be set aside except for prejudicial error. 85.

Use of land by the state for a canal feeder amounts to an appropriation of the land, the fee simple title passing to the state regardless of failure on the part of the land owner to make application for compensation therefor; title remains in the state after abandonment of the land for canal purposes; continued use by the land owner of the banks of a reservoir to the water's

edge is not a matter of right but of suffrance on the part of the state; state board of public works without authority to lease the banks of the Licking reservoir. 129.

An appropriation by a municipality of lands on the shore of Lake Erie for park purposes gives the municipality an easement for park uses together with the riparian rights appurtenant thereto, together with the right to wharf out and make land to the limit of navigability, unless prevented by the state; and such made land is affected by the same easement for park purposes, as are also piers built out in front of such made land. 369.

A fee simple title absolute to lands so appropriated for park purposes may be acquired by the municipality by compensation to those owning the underlying rights, and an appropriation of the underlying rights carries the right in the municipality to sell, lease or exchange such lands to railway companies for railway use. 369.

Constitutionality of the act authorizing the acquirement of underlying rights; undisclosed intention of councilmen in that connection does not vitiate the councilmanic proceedings. 369.

A lease of piers entered into with a navigation company prior to the completion of the title by the municipality may be enjoined by a tax-payer or owner of the underlying right of property. 369.

ENTRAPMENT—

The entrapment complained of in this case, held not to have been of such a character as to bar prosecution for the offense alleged. 289.

EQUITY—

The filing in an action at law for money of an answer which is no more than a defense to the petition does not change the action to one in equity. 95.

Where two or more persons are severally claiming ownership of the same debt or property, and the debtor or person holding the property does not know to which claimant he should pay the debt or deliver the property, he is entitled to the protection of a court of equity; equitable cognizance, notwithstanding the stakeholder by filing an answer has tendered issue. 100.

ERROR—

Failure to take an exception to the competency of evidence precludes consideration of its admissibility on review. 31.

The giving of a charge to the jury which was too broad, held not to have been prejudicial. 49.

Only prejudicial error will be considered on review of an action brought for condemnation of property. 85.

It is error to refuse a demand for the trial of an issue of fact to a jury, where there was no other reason for the refusal than that the demand was not made until the trial had begun and was apparently made for purpose of delay. 95.

In taking a case from the jury where an issue of fact had been presented. 97.

It is prejudicial error to overrule objections to questions and answers which involved the very issue to be determined by the jury and constituted the only evidence upon which a verdict for the plaintiff could be based. 143.

Presumption as to regularity and correctness of judgment. 177.

In refusing to direct a verdict for railway company, where a team, driven upon a railway crossing while the tracks were obscured by smoke, was struck by a backing engine. 209.

The dismissal of an answer and cross-petition for improper verification constitutes reversible error. 218.

A charge of court will not be held erroneous, even though it was not strictly clear or proper, if it is evident that the jury understood it and were able to correctly apply the law. 257.

In directing a verdict for the defendant. 298.

In excluding in a will contest evidence as to contradictory statements made by a subscribing witness as to his knowledge that the paper writing was subscribed and acknowledged by the testator as his will. 273.

To place on trial an accused person without having given him an opportunity to plead to the indictment constitutes reversible error. 351.

Does not lie to the vacating of an order appointing a trustee for an insane defendant in a divorce proceeding. 437.

It is not prejudicial error to allude in a charge to the jury in an action on account of a wrongful death to the next of kin as beneficiaries with the parents. 441.

Relating to one issue only is not ground for setting aside a general judgment where there were two aspects under which the claim of the plaintiff might have been established. 493.

Statements made by a trial judge within hearing of the jury are of the same effect as though embodied in the charge to the jury, and where such remarks indicate a bias on the part of the judge against either party to the case or an opinion on his part as to the facts of the case or credibility of witnesses, prejudicial error results. 483.

It is error to charge a jury that it is the duty of a street railway company to sound a gong as a car is about to pass over a street crossing; all that is necessary is that a warning be given as a car approaches a crossing, and this duty arises only when an ordinarily prudent person would give such a warning under similar circumstances. 506.

A purchaser at a judicial sale may prosecute error to reverse the judgment setting the sale aside. 525.

An action to prosecute error bars an action to vacate the judgment after term, when. 529.

In an action to contest a will it is error to admit the testimony of non-expert witnesses, whose opinions are not based on facts or observations within their own knowledge, but on a state of facts submitted to them by hypothetical questions. 570.

ESTATES—

In curtesy—see CURTESY.

ESTOPPEL—

Against an abutting owner from objecting to the assessment for a street improvement. 48.

Against contest of a will by a devisee who has gone into possession of the land devised and has collected rents therefrom. 72.

Is available notwithstanding an express allegation of, where the facts are all on the face of the record. 509.

A defendant in a suit in attachment, who filed a bond for release of the property attached and thereafter gave bond for appeal is estopped from subsequently setting up a discharge in bankruptcy, where the attachment proceeding and giving of bond was prior to the proceedings in bankruptcy. 509.

EVIDENCE—

The question of the competency of evidence will not be considered, where no exception was taken to its admissibility. 31.

A judgment will not be reversed on the weight of, where based on testimony of the character in this case. 49.

The admission of evidence as to market value at other nearby points of the articles forming the subject of a contract, under which there has been default in delivery, is not prejudicial to the surety on the bond for performance of the contract, in the absence of evidence as to market value at the place of delivery. 59.

As to newly-discovered evidence which is cumulative only. 79.

Weight which may be given to evidence as to prior accidents which occurred on the same sidewalk as that complained of. 81.

Where a question of negligence is raised which is peculiarly within the province of the jury, and the testimony tends to support the claim of the plaintiff, a determination by the jury in his favor will not be set aside on the weight of the evidence. 87.

Weight of, as to intention. 138.

Weight of, as to participation by the defendant in a lynching. 145.

The state may impeach the reputation of a physician charged with issuing prescriptions for intoxicoting liquors in dry territory. 177.

The provision in the Bill of Rights that an accused person shall be entitled to meet the witnesses face to face, applies to parol testimony only, and does not bar the introduction of public records or other instruments in writing competent in the trial of a criminal case. 205.

Exemplified copy of record in the Internal Revenue Department of payment by the defendant of the retail liquor tax is competent in the trial of said dealer for violation of the local option law. 205.

Of some physical weakness or slight forgetfullness not sufficient upon which to base a judgment setting aside a will. 241.

Evidence showing purpose of testator is competent in a will contest. 264.

In a prosecution for contributing to the delinquency of a minor, evidence is competent as to the reputation of the house to which the girl was taken. 257.

Where a witness has denied the authenticity of a document, purporting to have been written and signed by him and containing statements material to the case, he may be required on cross-examination to write specimens of his handwriting for the purpose of comparison; but this rule does not apply to direct examination. 281.

In such a case where testimony has been given by another that the document is in the handwriting of the party, it may be offered for the purpose of impeachment; and if the witness be a party for the additional reason that it a declaration against interest. 281.

It is error in a will contest to exclude testimony tending to show that the witnesses thereto made contradictory statements at different times touching their knowledge that the paper writing signed by them as such witnesses was subscribed and acknowledged by the testator as his will. 273.

Where the character of a witness is attacked, the court is not bound to permit counsel to go into details on cross-examination as to the past life of the witness or as to the offense specifically stated to have been committed by him. 289.

Variance in the testimony of a plaintiff on direct and on cross-examination is not, taken alone, sufficient ground for a non-suit. 303.

Declarations by a decedent to her attorney as to an intended gift are not sufficient to create a trust in the proposed gift. 331.

Competency of evidence as to obstruction of the main outlet of a sewer in an action for damages to property resulting from the overflow of the water. 396.

Weight of, as to negligence with reference to persons on the sidewalk on the part of one engaged in cleaning the building by the sandblast process. 404.

Reversal on weight of evidence is not an adjudication which requires a directed verdict for the defendant. 417.

Weight of, as to negligence of of motorman in an action for wrongful death of a child. 441.

Of a defective guard over dan-

gerous machinery sustains an allegation of absence of a guard. 449.

Circumstantial evidence as to the cause of the bursting of an emery wheel. 487.

Weight of, in an action for injuries sustained at a railway crossing. 491.

In an action against brokers for embezzling bonds, evidence is competent which tends to show that the pledging of the bonds and use of the proceeds by the brokers was not due to an honest misunderstanding by them of their rights in the matter. 497.

In an action for injuries from the bite of a dog, it is not error to admit evidence as to the character of the dog with reference to his being vicious or otherwise. 511.

Degree of proof required to establish a contract for labor and services where no blood relationship exists between the parties. 545.

It is erroneous to propound hypothetical questions to non-expert witnesses, which are not based on facts and observations within their own knowledge. 570.

It is not error to exclude evidence as to an oral executory agreement theretofore entered into between the parties. 599.

In an action for damages for injuries to plaintiff from being struck, while standing on his own premises, by a stone thrown by a blast from a neighboring quarry, evidence of previous instances of stones being thrown upon the land of the plaintiff is competent for the sole purpose of showing whence the stone came which struck plaintiff and the distance it might be thrown in that way. 599.

EXECUTION—

An execution may be issued on a dormant judgment which has been properly revived. 348.

EXECUTOR—

See ADMINISTRATOR.

EXEMPTION—

For homestead exemption—see HOMESTEAD.

EXPRESS COMPANY—

Limitation of liability of—see CARRIERS.

FALSE IMPRISONMENT—

The expression to a police officer by one whose property has been stolen as to who may have committed the theft is privileged and can not be made the basis of an action for damages for false imprisonment. 288.

FINAL ORDER—

An order to an assignee for the benefit of creditors to pay to the assignor his homestead exemption in cash, is not a final order upon which suit may be brought on the bond of the assignee. 65.

FISH AND GAME—

A deputy sheriff may arrest on view persons found violating the fish and game act; in an action for damages for false arrest, the question whether the action of the officer was reasonable is one for the jury; the fact that the warrant of arrest was found defective on proceedings in error does not render the officer liable for false arrest, unless; not liable for making an arrest, in a proper manner, under a law subsequently declared to be unconstitutional. 353.

Where the arrest was not illegal and there was no false imprisonment, an attorney's fee can not be allowed as compensatory damages for services in setting aside proceedings had on a defective warrant. 353.

FORECLOSURE—

See MORTGAGE.

The purchaser at a sale in fore-

closure may prosecute error to the action of the court in setting the sale aside; a sale will not be set aside in order to permit the making of a higher bid, when; an appraiser may obtain an option from the purchaser on an interest in the property without invalidating the sale, when. 525.

GAS COMPANY—

Gas rates fixed by council are not binding on the company, when. 421.

GIFTS—

Where, one intending to make a gift to another, purchased United States money orders in the name of the prospective donee, but died before delivering them, the gift is incomplete and the administrator is entitled to the proceeds therefrom. 331.

GOVERNMENTAL POWERS—

A statute giving the state board of public health authority over council to a certain extent is to that extent violative of the fundamental theory of government. 113.

GRADE—

See STREETS.

HOMESTEAD—

An order to pay cash in lieu of homestead, out of the proceeds of sale, is not a final order upon which suit may be brought on the bond of the assignee; but an action on the bond of the assignee will lie on the order of distribution, when; the better and safer procedure. 65.

HUSBAND AND WIFE—

The rights of a wife in the property of her husband are not terminated by a decree of divorce granted against her by a court which was without jurisdiction over either herself or the property in which she is asserting her claim. 24.

Where a husband has offered his wife a suitable home and no sufficient reason appears why she should live apart from him, a court will not grant her alimony. 524.

IMPEACHMENT—

Of witnesses—see EVIDENCE.

IMPRISONMENT—

Officer not liable for, where procured under a warrant subsequently declared defective on proceedings in error. 353.

INDEMNITY—

The procurement of indemnity against loss from the threatened enforcement of a claim can not, of itself, be considered an admission, or in the nature of an admission, of liability on such claim. 433.

INDICTMENT—

Sufficiency of, where charging the aiding and abetting of one in soliciting and procuring a bribe. 289.

Failure to arraign one under indictment before placing him on trial constitutes reversible error. 351.

INGRESS AND EGRESS—

See MINES AND MINING.

INHERITANCE—

See DESCENT.

INJUNCTION—

Lies in the case of lands claimed by adverse possession. 161.

Will not lie on petition of an abutting property owner to restrain the placing of two steam railway tracks in street, when. 195.

Does not lie to restrain the raising of the grade of a public highway to prevent overflow. 198.

Will lie against the leasing to navigation companies of piers by the municipality before underlying rights had been secured by the municipality. 369.

Injunction will lie against the destruction of a telephone line by an abutting owner, whose grantor consented to the building of the line, and whose hostility thereto is due to the failure of the company to accede to his demand for compensation in a large sum on account of the increased burden placed upon his lands by the presence of the line. 468.

Lies in an action to determine the competency of a newspaper to publish the financial report of the county commissioners. 531.

Lies to enforce right of ingress and egress by the owner of a subsurface estate. 593.

INSANE—

Sufficient grounds for a divorce against an insane defendant, where the cause of action accrued before insanity intervened. 437.

INSTRUMENT IN WRITING—

In determining the authenticity of a disputed writing a witness who has denied that he wrote and signed it may be required on cross-examination to write specimens of his handwriting for the purpose of comparison; but this rule does not apply on direct examination. 281.

INSURANCE (Life)—

Action by a beneficiary under a policy of insurance which was written and assigned and is still held in another state; failure to bring in the assignee of the policy as a party to the action. 100.

Participating policy-holders may maintain an action in equity against the company to conserve for their benefit a surplus accumulated under the by-laws of the company for their benefit from earnings of participating policies. 385.

Previous action testing the right of the company to declare a dividend out of the surplus fund not a defense to action by policy-holders. 385.

INTENT AND SCIENTER—

Time and place where the accused intended to use burglars' tools need not be shown; weight of evidence as to intention. 138.

INTERPLEADER—

Procedure where claimants to a fund are not all before the court. 100.

It is not against public policy for a municipality to act in the dual capacity of grantor of a street railway franchise and as consenting in the capacity of an abutting owner to the building of the line. 478.

JOINDER OF PARTIES—

A traction company and a municipality are improperly joined as parties defendant, where the action is for injuries to the plaintiff sustained in stepping from a car into a hole in the street. 384.

JUDGES—

A judge of the court of common pleas in a judicial subdivision containing more than one county, whose term of office began before the adoption of the present code, is entitled under Section 1284*a*, Revised Statutes, to extra compensation calculated on the basis of the population of the subdivision, rather than on the basis of the county where he happens to reside. 219.

JUDGMENT—

Effect of conditional order of revivor; is in the nature of a summary process; will sustain an execution; protection to the debtor. 348.

Items eliminated from a former judgment because a right of action had not yet accrued as to such items, are not barred by reason of the former judgment. 475.

Error relating to one issue only is not ground for setting a judgment aside, where there were two or more aspects under which

plaintiff might have established his case. 493.

Action to vacate after term barred by election to prosecute error, when. 529.

JUDICIAL SALES—

Failure of the probate court to fix the lowest price at which corporate stock belonging to the estate of a decedent may be sold, does not render invalid a sale in all other respects in accordance with statutory requirements without collusion or fraud, and at the market price. 346.

A purchaser at a sheriff's sale may prosecute error to reverse a judgment setting the sale aside; in the absence of fraud or irregularity which affects the validity of the sale, it will not be set aside to permit a higher bid to be made; obtaining an option by an appraiser from the purchaser of an interest in the property does not invalidate the sale, when. 525.

JURISDICTION—

Failure to obtain, in an action for divorce against a wife prevents the decree from terminating her right to dower in property of the husband over which the court was also without jurisdiction. 24.

Of a court in equity as to a second mortgagee where the first mortgagee has dismissed his action. 51.

JURY—

Jurors in considering the evidence in a condemnation suit may also apply their own independent judgment as to the value of the land taken. 85.

A demand for a trial by jury is not waived, when; to refuse trial of an issue of fact to a jury, on the ground that the demand for a jury was not made until the trial had begun and apparently was made for purposes of delay, is error. 95.

Competency of jurors, who had participated recently in a local option election, to sit in a trial indirectly involving the liquor interests. 145.

Legality of a jury array, where several persons had been jointly indicted, and a copy of the venire, summoned in the case as against all the defendants, was served on the particular defendant brought to trial. 145.

A defendant charged with selling intoxicating liquor in dry territory is not entitled to a jury trial, when. 177.

As to alleged coercion of a jury in a criminal case by requiring them to continue their deliberations, with the result that a verdict was finally agreed upon. 289.

The act exempting contributing members of the Ohio militia from jury service is constitutional. 329.

KNOWLEDGE—

On the part of an employe of the absence of any guard over a buzz saw at which he was employed need not be pleaded in an action by the employe for injuries from the saw. 449.

On the part of an employe, fatally injured by the bursting of an emery wheel, as to the speed at which the wheel was running. 487.

In an action for injuries from the bite of a dog, knowledge on the part of the owner that the dog was vicious need not be alleged or proven. 511.

LACHES—

In making application for leave to amend an answer. 59.

LANDLORD AND TENANT—

The fact that a landlord joined with the general creditors of the tenant in an application that the assignee continue the business, does not save the assignee from paying the rent as part of the expense of administering the trust, when. 495.

LEASE—

A stipulation in the lease of a theater for payment of $5,000 to the lessor as a forfeiture in case of the re-leasing of the property, will not be regarded as a penalty, but will be treated as an agreement for liquidated damages in that amount; and in case of violation of the stipulation the lessor may elect whether he will sue for the sum named as liquidated damages or for a forfeiture. 414.

An agreement between a lessee and one to whom he has surrendered possession of the property, that the lessee is to be saved from all losses and is to receive rent from said third party who is to pay all bills, does not establish a partnership between them but constitutes a renting to said third party. 414.

LEGISLATIVE POWERS—

The provision of the act for the purification of sewage and protection of streams and the public water supply, which gives the state board of health authority over council to a certain extent, is destructive of the fundamental theory of government in that it substitutes this board as the governing power in the place of council to that extent. 113.

LEVEES—

Authority of county commisioners to construct. 198.

LIBEL AND SLANDER—

The expression of a suspicion, by the owner of property which has been stolen, as to who it was who committed the theft, is privileged when made to a police officer, and such an expression can not be made the basis of an action for slander or false arrest. 288.

LICENSES—

Persons selling products of their own raising or manfacture are not peddlers or hawkers against whom fees for licenses may be imposed. 165.

Exactions of licenses by municipalities in Ohio are justified in the exercise of police power rather than upon right to tax for revenue purposes. 165.

LIMITATION OF ACTIONS—

The statute of limitations can not be set running against tenants in common by the continued possession of one of their number and failure on his part to account to the others for rents and profits. 264.

The statute of limitations is not applicable to an action to enforce the lien for a street improvement, when. 312.

Where it is claimed that the defendant agreed to pay plaintiff for services performed and to be performed, the statute of limitations does not begin to run until the contract is terminated by breach or otherwise. 545.

LIQUOR LAWS—

Contest of election held under the Rose law; judges and clerks called to impeach the accuracy of their own certificates. 33.

The reputation of a physician who is charged with issuing prescriptions for intoxicating liquors in dry territory may be impeached by the state. 177.

Defendants charged with selling intoxicating liquor in dry territory are not entitled to trial by jury, when; proof as to number of sales; failure to require state to elect upon which sale it would rely; finding of error in a trial for illegal sales does not constitute a finding that no sales were made, or render it impossible that the defendant should be found guilty of keeping a place where such sales are made. 177.

Proof of payment of the U. S. Government liquor tax in a prosecution for violation of the local option law. 205.

Sale of intoxicating liquor to detectives in "dry" territory; serving liquor to two persons at the same time not a single offense. 334.

MACHINERY—

See DANGEROUS MACHINERY.

MANDAMUS—

Will not lie against a probate judge to compel him to certify to the common pleas a contested election over which he claims to have jurisdiction. 33.

Extent to which the discretion of a trial judge may be controlled by mandamus. 247.

MARKET VALUE—

In an action against a surety under a contract for goods, evidence as to market value at nearby points may be received in the absence of evidence of market value at the place of delivery. 59.

MASTER AND SERVANT—

Liability of a master for injury resulting to a servant through obedience to a specific order given to him by a superior; whether the servant exercised ordinary care in interpreting the order in the manner in which he did interpret it is a matter to be interpreted by the jury from all the surrounding circumstances. 298.

Where a portion of a factory is operated by a party who hires and pays the employes and has entire control over them, and the owner provides the material and the plant, the said party is not an independent contractor, and the owner of the factory is liable for injury to an employe. 425.

Liaoility of the master for injury to an employe under the act for guarding dangerous machinery; limitation of liability of master. 540.

As to liability for fatal injuries to an employe from the bursting of an emery wheel at which he was at work. 487.

MILITIA—

It is within the province of the General Assembly to exempt contributing members of the Ohio militia from jury service. 329.

MINES AND MINING—

The estates represented by ownership of the surface and of underlying mineral rights are mutually dominant and servient, and in conveyances of the surface there is an implied reservation of right of access to the estate below, and this right may be enforced by injunction. 593.

The owner of underlying gas and oil rights is entitled to the use of the surface for ingress and egress in drilling a reasonable number of wells and may maintain thereon derricks and other necessary machinery; but storage rights will be limited to such as are incidental to the immediate production and marketing of the oil, and the question of damage to the surface from such operations will be left open for future determination. 593.

MISCONDUCT—

The remark by a prosecuting attorney in his argument to the jury with reference to a certain statement that "the defense had an opportunity to deny it, and it stands uncontradicted," is not such misconduct as necessitates the setting aside of a verdict of guilty, when. 289.

Of a trial judge in exhibiting bias toward one of the parties in the presence of the jury. 483.

Whether the prosecuting attorney or the court was guilty of misconduct during the trial is a matter of little moment to the defendant if the evidence is such as to establish his guilt completely. 497.

Misconduct of counsel; how presented to a reviewing court. 511.

MORTGAGE—

The voluntary dismissal of a cause of action by a plaintiff mortgagee asking to have its mortgage foreclosed does not oust the jurisdiction of a court in equity to grant relief to a second mortgagee of part of the land, asking to have the cloud of the first mortgage removed by a sale of the land in parcels. 51.

A second or junior mortgagee may maintain an action to foreclose his mortgage without first paying off the debt of the first mortgage. 51.

A second mortgagee who has been brought into a foreclosure suit by a first mortgagee may be granted relief upon a cross-petition to have the cloud of the first mortgage removed from the property. 51.

MOTOR VEHICLES—

See AUTOMOBILE.

MUNICIPAL CORPORATIONS—

A municipality is liable for injury to a building from the explosion of dynamite in the street by a contractor engaged on city work, when. 19.

A municipal corporation is charged with only reasonable care in maintenance of sidewalks in safe condition; slight depressions create no liability, unless there be something in the condition of the depression specially calculated to cause injury. 81.

The licensing powers of council; discrimination between sellers of their own products and sellers of products which they purchased are reasonable; license issued by auditor upon application of mayor is valid; justification for licenses found in the police rather than the taxing power. 165.

A municipality is liable to an abutting property owner for the unnecessary destruction by municipal authority of shade trees standing within the street line. 191.

Municipality and contractor jointly liable for destruction or injury to shade trees by a contractor for a street or sidewalk improvement, when. 193.

Sewer assessments which are illegal for irregularity in the proceedings are enforcible to the extent expense has been incurred properly chargeable against the property, but not in excess of benefits. 238.

Gas rates fixed by council are not binding on gas company, when. 421.

As to liability of, for damages resulting from the collapse of an old wooden bridge. 343.

A board of water works trustees is without power to bind the municipality for a period of years by special contracts with individual consumers. 364.

Appropriation of lands bordering on navigable water for park purposes, and the subsequent acquisition of the full title and transfer of the property for railway use. 369.

A municipal corporation is not relieved from liability for damage to abutting property resulting from a defective public sewer by reason of the fact that the sewer was built with funds derived from taxation, and not by assessing the cost upon the property benefitted. 396.

As to the competency of evidence in an action for damages resulting from the flooding of a sanitary sewer. 396.

Charge of court as to the measure of municipal liability in such a case. 396.

An action will lie on behalf of a contractor against a municipality for recovery of the amount withheld on account of delay in delivery, notwithstanding a provision for liquidated damages, when. 443.

A municipality is liable to a consumer of water for damages sustained by reason of failure of

the water supply, where the failure occurs without excuse. 447.

A failure of water supply by reason of the fact that a municipal employe turned the wrong valve in an effort to stop a leak is without excuse and renders the municipality liable as for negligence, without regard to the question whether the contract between the city and the consumer guarantees or implies a continuous supply. 447.

As to the sufficiency of the mediums selected by council for the publication of ordinances. 401.

A culvert which forms a part of a city street is under the control of the city council, and the municipality rather than the county commissioners is responsible for maintaining guard-rails thereon. 417.

A municipality is liable for damages for change of grade of a street to a substantially different level where the city engineer had previously fixed the grade at which an abutting owner laid his sidewalk. 465.

Voting booths constructed for municipal use must be paid for by the municipality, and the county in which the municipality is situated is not liable therefor. 475.

Private proprietors can not plat their lands in such a manner as to interfere with the work of the municipal platting commission, even with the consent and co-operation of council; additional streets dedicated, how. 561.

Circumstances under which county commissioners may build ly within a municipality. 577.

MULTIPLICITY OF SUITS—

Forum of an action should be so selected as to avoid. 100.

NEGLIGENCE—

Under a contract for city work, where the specifications provide that "the work is to be commenced at such time after date of contract as the board of public service may order and be carried on in such places and such manner as the engineer or inspector may direct," the relation between the parties is not independent and the doctrine of *respondeat superior* applies. 19.

In an action for damages on account of injury to a building from the explosion of dynamite in the street, the question of negligence in the amount of dynamite used and the effect of its explosion upon surrounding buildings, and particularly that of the plaintiff, should be submitted to the jury. 19.

Where one at work on an interburan railway track caught his foot in a frog and was run down by a car. 49.

As to the liability of a traction company for damages on account of injuries resulting from the frightening of a horse by running of a snow sweeper through the street. 78.

Where a boy eight years of age was struck and killed by a traction car. 79.

A claim that the injuries complained of were due to the breaking of a chain which contained an open link, of which the defendant is alleged to have had no knowledge and supposed to have been repaired, raises a question of negligence which is peculiarly within the province of the jury, and where the evidence tends to support the claim a determination by the jury in favor of the plaintiff will not be set aside on the weight of the evidence. 87.

A locomotive engineer while fulfilling his duty of keeping a lookout on the track in front of his train, is not charged with the responsibility of watching the open railway grounds and right-of-way in the belief that persons on such grounds or right-of-way will attempt to cross the track in front of his train, and the company is not liable for striking a boy who attempted to cross the

track almost immediately in front of the train. 108.

Where the issue was as to whether the destruction of the property in question was due to the negligence of the defendant. 143.

Greater care and caution are imposed upon one about to pass over a railway crossing where the view is obscured by smoke. 209.

Where a team and wagon were struck at a railroad crossing by a backing engine which followed immediately behind a train, the smoke from which obscured the view. 209.

On the part of an Ohio river packet company in permitting applies to freeze while in transit. 225.

Pony cart in collision with a traction car; insufficient ground for a non-suit. 303.

If by a fair construction of an order given by a superior to a servant, a person acting with ordinary prudence and exercising ordinary care would, under the circumstances, have considered it an unequivocal specific order to do a certain thing, the master can not escape liability for the consequences by showing that the order was open to another construction. 298.

Whether the servant exercised ordinary care in interpreting the order in the manner in which he did interpret it, is a question for determination by the jury in the light of all the surrounding circumstances. 298.

Improper joinder of parties in an action for, where the torts complained of were concurrent and related but not joint. 384.

It is not negligence *per se* to clean the exterior of a building by the sand-blast process; ordinary care only required in operating the device. 404.

Whether one in the lawful use of that part of a city street intended for pedestrians was guilty of contributory negligence in turning out upon the gravel and rough stones, which caused her to trip over the side of a culvert not provided with a guard-rail, is a question for the jury, and can be reviewed only by a court having jurisdiction to weigh the testimony. 417.

Where there is evidence creating a presumption of negligence on the part of the master, and no evidence is offered in refutation therof, a judgment for damages in favor of the injured employe will not be set aside on the ground of weight of evidence. 425.

Child run over by traction car through alleged inattention of motorman to his duties. 441.

Municipality held liable as for negligence on account of damages sustained by a water consumer through failure of the water supply. 447.

Pleading of the statute relating to the guarding of machinery is not necessary to render the said statute available; evidence of a defective guard sustains an allegation of absence of a guard; assumption of risk not a defense; knowledge of absence of guard need not be pleaded; remaining at work not contributory negligence, when. 449.

Necessary allegations in an action for damages on account of fatal injuries to an employe from the bursting of an emery wheel; knowledge of speed at which wheel was running; assumption of risk; circumstantial evidence as to the cause of the wheel bursting. 487.

A judgment in favor of a plaintiff, suing a railway company for damages on account of an accident at a railway crossing, will be reversed where the evidence as to his own negligence and the care exhibited by the railway employes is of the character disclosed in this case. 491.

It is error to charge a jury that

it is the duty of a street car company to cause a gong to be rung as a car is about to cross a street; all that is necessary is that a warning be given as a car approaches a crossing, and this duty arises only when an ordinarily prudent person would give such a warning under similar circumstances. 506.

Doctrine of assumed risk abolished by the act relating to unguarded machinery. 540.

Limitation of liability to $3,000 for wrongful death in failing to guard or protect machinery creates no new cause of action, but may be invoked in any action involving employer's liability for injury to employe. 540.

The provision for the safeguarding of machinery applies to a space of eighteen inches on one side of which cog-wheels are a bridge or viaduct located entirerevolving at the height of a man's coat; employe passing through such space at the direction of the foreman comes within the protection of the statute. 540.

As between an automobile and a woman, who upon alighting from a car passed around the rear end and was struck by an automobile which was not running on the side of the road on which vehicles usually run when going in the direction in which it was going. 586.

Where a rock thrown by blast in a quarry struck and injured one standing on his own premises. 599.

NEWSPAPER—

See PUBLICATION.

Competency of, to publish the annual financial report of the county commissioners; circulation of eight hundred in county sufficient. 531.

NEXT OF KIN—

Not barred from recovery on account of a wrongful death by the fact that the decedent executed a release on account of said injuries. 431.

NOTICE—

To a municipality as to the unsafe condition of a very old wooden bridge. 343.

Failure to notify the surety on a bond for performance of a contract of the default of the principal as to part of the contract does not, in the absence of actual prejudice shown, release the surety as to defaults as to which notice was given. 59.

OFFICE AND OFFICER—

Method of calculating extra compensation to certain common pleas judges under the provisions of Section 1284*a*, Revised Statutes. 219.

County commissioners are not entitled to additional compensation for services as members of the board of equalization. 381.

De facto officers; identity of powers. 481.

OIL AND GAS—

In the conveyance of the surface there is an implied right of ingress and egress upon the part of the owner of underlying oil and gas rights, which may be enforced by injunction; storage privileges; damage to the surface resulting from operations by the owner of underlying estate will be reserved for future determination. 593.

OPTION—

The obtaining by one of the appraisers at a judicial sale of an option from the purchaser for an interest in the property sold, does not invalidate the sale, where the appraiser made no effort to prevent others from bidding. 525.

ORDINANCES—

The designation of a paper by council for the publication of ordinances creates no more than a presumption that the paper selected is a paper of general cir-

culation, and does not preclude a court from determining that fact for itself. 401.

PARKS—

Acquirement of easement by municipality for park purposes and subsequent acquirement of underlying rights and transfer of the property for railway uses. 369.

PARTIES—

To an action on a life insurance policy which was executed and subsequently assigned in another state, and the assured died in such other state, but the beneficiary who is a resident of Ohio brought suit here. 100.

Improper joinder of, in an action for negligence, where the torts were concurrent and related but not joint. 384.

A purchaser of property at a sheriff's sale is sufficiently a party to the action in which the sale is made to prosecute error to reverse the action of the court in setting the sale aside. 525.

PARTITION—

Construction of a will in an action for partition and accounting. 218.

PARTNERSHIP—

Determination as to whether one who contributed to the enterprise became a partner; mutual agency the final test. 186.

An agreement to make mutual contributions to an enterprise and to share the profits can not be accepted as establishing a partnership, where there is nothing else in the agreement which is at all characteristic of a partnership. 497.

PEDDLERS—

Persons selling products of their own raising or manufacture are not peddlers or hawkers. 165.

PHYSICIAN—

The reputation of a physician who is charged with issuing prescriptions for intoxicating liquors in dry territory may be impeached. 177.

PIERS—

Piers and made land in front of lands acquired for park purposes are covered by the same easement as the shore land. 369.

PLATTING COMMISSION—

Work of, under Section 4347; private proprietors can not interfere with, by platting their lands in accordance with a different plan, even with the co-operation and consent of the municipal council; amendments can only be made by resubmission to the commission; when other streets may be laid out; steps essential to dedication of additional streets. 561.

PLEADING—

The filing in an action at law for money of an answer which is no more than a defense to the petition does not change the action to one in equity. 95.

Failure to properly verify an answer and cross-petition should be cured by amendment; dismissal of such a pleading because not properly verified constitutes reversible error. 218.

An act of God must be pleaded in order to be interposed as a defense. 225.

Where the pleadings disclose all the facts, the hearing of testimony is unnecessary. 414.

In an action for injuries to an employe from unguarded machinery, the statute relating thereto is available although not pleaded. 449.

Necessary allegations in an action for fatal injuries to an employe from bursting of an emery wheel. 487.

In an action for injuries resulting from the bite of a dog, it is not necessary to allege that the dog was vicious, or that its vicious disposition was known to the owner, and it is not error to admit evidence as to the character

of the dog with reference to his being vicious or otherwise. 511.

Necessary allegations as to injuries received and expenses incurred, where the action is for damages for assault and battery. 522.

POLICE POWER—

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An action to quiet title can not be maintained by a husband not in possession and having no interest in remainder. 157.

RENTS AND PROFITS—

Failure of the one in possession to account to his tenants in common for rents and profits does not give him title by prescription or set the statute of limitations running against the other tenants in common. 264.

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An action in replevin, or an action for damages where the property is not taken, is not defeated by the fact that the defendant did not have actual possession of the property at the commencement of the action, when. 236.

Where an action in replevin is brought by the vendor under a conditional sales contract against a subsequent mortgagee of the property, a tender of money paid is unnecessary. 236.

RES ADJUDICATA—

An adjudication as to the validity of a street improvement assessment is *res adjudicata* as to other property affected by the same assessment. 312.

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A claim is not barred on the ground of *res adjudicata*, unless such claim has been adjudicated on its merits in the former case; so much of the record of the former trial as will aid in the deter-

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Extent of the strip of land acquired by the state for use for the banks of a reservoir. 129.

RESPONDEAT SUPERIOR—

The relation of *respondeat superior* obtains under a contract for city work, where the specifications provide that "the work is to be commenced at such time after date of the contract as the board of public service may order, and carried on in such places and in such manner as the engineer or inspector shall direct." 19.

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A judgment of reversal on the weight of the evidence is not an adjudication which requires a directed verdict for the defendant, when. 417.

REVIVOR—

Where a cause of action has been revived without objection against the administrator of a deceased defendant, and upon being served with summons he entered an appearance and filed a demurrer, nothing further appearing of record, the revivor must be regarded as sufficient. 428.

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Prosecution of members of a mob for homicide; aiding and procuring the commission of crime; riot not embraced in Section 13692. 145.

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The raising of the grade of a public highway, which is subject to overflow in times of flood, can not be enjoined by an adjacent property owner on the ground that the road was long ago improved to a fixed grade and no steps have been taken by the county commissioners to appropriate the land which will be damaged thereby or to make compensation to the owner. 198.

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Persistence of a county road, notwithstanding travel deserts it for other routes. 577.

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Offer to purchase distinguished from a contract to purchase; no breach of contract to purchase, where an offer to purchase in accordance with a proposition previously submitted was not sub-

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Invalidity of the act requiring purification of, upon order of the state board of health. 113.

Municipal liability for damages from the flooding of a defective sewer; municipality not saved by the fact that the sewer was built from funds derived from taxation, and not by assessing the cost against the property benefitted. 396.

SHADE TREES—

An abutting owner who has been injured by the destruction of shade trees by municipal authority where their removal was not necessary may recover damages from the municipality therefor. 191.

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Section 11378, G. C., providing how an issue of fact arises. 65.

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Section 11466, G. C., providing when a jury shall be deemed to have been waived. 95.

Section 5013, R. S., providing for the bringing in of additional parties when necessary. 100.

Section 5006, R. S., relating to the joinder of defendants. 100.

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Sections 1249 *et seq.*, G. C., relating to the protection of the public water supply from pollution. 113.

Section 12439, G. C., as to having burglars tools in possession. 138.

Section 3634, G. C., relating to the selling of goods and wares on the streets. 165.

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Section 4155-3, R. S., providing that the vendor of property conditionally sold may not retake possession without repaying a certain part of the price paid. 236.

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compensation to members of the board of equalization. 381.

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Section 3578, G. C., relating to the detachment of unplatted farm lands from a municipality. 429.

Section 3579, G. C., relating to the decree which shall be entered where unplatted farm lands are detached from a municipality. 429.

Section 10770, G. C., providing a right of action for causing death. 431.

Section 11397, G. C., relating to abatement by death of party. 431.

Section 12002, G. C., relating to appeal in a proceeding for divorce and alimony. 437.

Section 1027, G. C., relating to the safeguarding of machinery. 449.

Section 5242, G. C., relating to employer's liability for personal injury. 449.

Section 1536-185, R. S., relating to defraying the expenses of elections. 475.

Section 5207, R. S., providing that parties to a question which might become the subject of a civil action may submit the matter to any court which would have jurisdiction were an action brought. 475.

Section 3439, R. S., relating to proceedings for establishing a street railway line. 478.

Section 3439, R. S., providing that the written consent of owners of more than one-half of the feet front on a street in which it is proposed to build a street railway shall be necessary to give authority to grant a franchise. 478.

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Section 5309, R. S., providing how and when application may be made for a new trial after term. 529.

Section 5354, R. S., providing how and when the common pleas or circuit courts may vacate or modify judgment or orders after term. 529.

Section 2508, G. C., providing for publication of the annual financial report of the county commissioners. 531.

Section 1027, G. C., providing against injury to persons who use or come in contact with machinery. 540.

Section 6243, G. C., providing what shall constitute *prima facie* evidence of neglect on the part of an employer with reference to guarding machinery. 540.

Section 2421, C. C., relating to the construction and repair of bridges. 577.

Section 7557, G. C., providing that county commissioners must build certain bridges. 577.

Section 1412, G. C., relating to the open season for birds and animals. 590.

STREETS—

Improvement of, by petition;

abutting owner estopped from objecting to the assessment on the ground that the improvement was made in an improper and negligent manner, where it appears that he signed the petition and the improvement was made in the manner designated in the petition. 48.

Municipality liable to abutting owner for unnecessary removal of shade trees standing within the street line. 191.

The placing of two railway tracks in a street from thirty-six to forty feet wide does not amount to a destruction of the street or its exclusive occupation. 195.

Injunction against such use of the street will not lie upon the petition of an abutting property owner, where an action by the railway company is pending for condemnation of a right to so use the street. 195.

The designation by a city engineer of the grade of a sidewalk entitles the abutting owner to damages where the grade of the street is subsequently fixed at a substantially different level. 465.

Steps necessary to lay out additional streets after platting commission has completed its work. 561.

As to the question of negligence in use of the streets by automobiles. 586.

STREET RAILWAYS—

A municipality may act in the dual capacity of grantor of a street railway franchise and in its capacity of abutting owner as consenting to the building of the line, notwithstanding the frontage belonging to the municipality is necessary to give a majority. 478.

As to the duty of sounding a gong at street crossings. 506.

SUBDIVISIONS—

See PLATTING COMMISSION.

SURETIES—

See BONDS (Surety).

Failure to notify a surety on a bond for performance of a contract of the default of the principal as to a part of the contract does not, in the absence of prejudice shown, release the surety as to defaults as to which notice was duly given. 59.

A surety is not released by slight deviations as to the amount and time of delivery of goods contracted for, where the deviations were by request of the payee of the bond securing the contract and did not affect the period of liability. 59.

SYNDICATE—

Status of one of the parties to an agreement to unite in the purchase of land, who rendered services in lieu of advancing money for carrying out the enterprise; division of profits. 228.

TAXATION—

The auditor of Cuyahoga county was authorized to treat as clerical errors the changes which were made in the tax duplicate pursuant to the order of an illegal board of equalization and assessment. 481.

The owner of real estate, ordered sold in satisfaction of a lien for unpaid taxes or assessments, may redeem the property at any time before confirmation by payment of such taxes or assessments with penalty. 333.

TELEPHONE—

Where a telephone line has been erected along a highway by virtue of an express agreement with the grantor of the present abutting owner, injunction will lie against destruction of the line by the present abutting owner years afterward because of failure of the company to accede to his demand for a large sum as compensation for the increased burden upon his lands by reason of the presence of the line. 468.

Rights of the public in maintenance of an established telephone line. 468.

TENANTS IN COMMON—

Title to outstanding interests can not be acquired by prescription as against tenants in common, nor can the statute of limitations be set running against such tenants in common. 264.

Prescriptive rights do not pass to a grantee who bought a specified amount of land cut off from a large tract by accurate survey. 161.

TENDER—

Where an action in replevin is brought by a vendor under a conditional sales contract against a subsequent mortgagee of the property, a tender of the money paid is unnecessary. 236.

TITLE—

An action to contest a will can not take the place of a proceeding to quiet title under the laws of this state. 72.

Nature of the title acquired by the state to lands occupied by canals, and canal feeders, dikes, locks, reservoirs and dams; title after abandonment of the land for canal purposes. 129.

An action to quiet title does not lie where brought by a husband not in possession and having no interest in remainder in the lands involved in the action. 157.

Failure of an intending donor to deliver the gift before her death causes title therein to vest in her administrator. 331.

Where property acquired by purchase is left to nephews and nieces, title is cast upon them as a class, and they therefore take *per capita* and not *per stirpes*. 557.

TORTS—

A judgment for damages for shooting a trespasser will be sustained, when. 70.

Which are concurrent and related but not joint. 384.

TREES—

See SHADE TREES.

TRESPASS—

Upon lands bordering on fish ponds, etc., for the purpose of catching fish. 353.

A mere trespass on real estate does not justify the owner in the use of fire-arms in driving the trespassers from the premises, and where a jury has found from the testimony of the owner himself that he had no reason to fear the trespassers would do him great bodily harm, a judgment for damages in favor of one of the trespassers who was shot and injured will be sustained. 70.

TRIAL—

The right to a trial by jury is not waived, when; a refusal to grant a jury trial is error, where based upon the ground that the demand was not made until the trial was begun and was apparently made for purpose of delay. 95.

Section 11466, providing when a jury shall be deemed to have been waived, is rendered invalid by reason of the fact that it applies to Cuyahoga and Hamilton counties only. 95.

A number of cases of the same character may be tried together, but only such evidence as relates to a particular defendant shall be applicable to his case. 177.

Whether a servant acted with prudence and care in construing an order, in the execution of which he was injured, is a question for the jury. 298.

Where the pleadings disclose all the facts, the introduction of testimony is unnecessary; and a judgment will not be reversed for refusal of the trial court to hear testimony as to the circumstances surrounding the parties at the time the contract was made. 414.

TRUST—

Declarations by a decedent to her attorney as to her intention to make a gift, which she did not deliver before her death, does not constitute a trust in the prospective donee in the property which was to constitute the gift. 331.

A trust may be enforced where based upon an improperly executed quit-claim deed, absolute in form but admitted by all to have been in trust. 553.

UNFAIR COMPETITION—

Unfair competition is not established by proof of similarity in form, dimensions or general appearance, or where the features imitated were those shared with the trade generally and there is a failure to show that the public was deceived by the imitation of which complaint is made. 122.

Alleged unfair imitation of the markings of a brand of soap by means of tags. 122.

VALUE—

See MARKET VALUE.

VARIANCE—

In the testimony of a plaintiff on direct and cross-examination is not, taken alone, sufficient ground for a non-suit. 303.

VERDICT—

A verdict of $1,000 for wrongful death of a six-year-old child not excessive, when. 441.

VIADUCT—

Authority of county commissioners, under Section 7557, G. C., to build a high level viaduct located entirely within a municipality. 577.

WAIVER—

The entering into a supplemental agreement amounts to a waiver of breach of performance of the original contract and prevents an action lying for cancellation of the original contract. 513.

WATER AND WATER-COURSES

Invalidity of Section 1249 for the protection of streams and the public water supply from pollution. 113.

The shifting of a stream and consequent shifting of a roadway following its bank does not defeat the right to such a way where held by prescription. 183.

Liability of a municipality to a consumer of water for damages sustained through failure of the water supply through negligence on the part of municipal employes. 447.

WHITE HERON—

Is not within the classes of birds finding a home within this state during the whole or a part of the year. 590.

Sale of the plumage of the white heron is not an offense under the laws of Ohio. 590.

WIDOW—

Is not barred from recovery on account of the wrongful death of her husband by the fact that he executed a release in his lifetime on account of the injuries from which he afterward died. 431.

Allowance to a widow made in a proceeding to sell real estate belonging to her deceased husband to pay debts, to which no error was prosecuted or appeal taken, can not be collaterally attacked by exception to her account as administratrix of said essate. 463.

WILLS—

A devisee of land who goes into possession and leases the land and collects the rents from the date of probate of the will, is estopped from contesting the validity of the will; nor can the bar be raised by a surrender of the rents so received. 72.

One who has no pecuniary interest in an estate in case of intestacy and who under the will has only the interest of a remainderman, is a necessary party defendant to an action to contest said will, but has no such interest as will permit him as legatee to file and maintain an answer and cross-petition to contest the validity of the will, or to join in the prayer of the petition to have an issue made up, and it is not error to dismiss such a cross-petition. 72.

An action to contest a will can not take the place of a proceeding to quiet title under the statutes of Ohio. 72.

Construction of a will in an action for partition and accounting. 218.

Want of mental capacity to make a will is not shown by a recital of circumstances and incidents which go no further than to indicate some physical weakness, or failure of memory, or mistake of an unimportant nature in connection with his business affairs. 241.

An attack on a will can not be successfully maintained where the witnesses for the contestants seem to have reached the belief that the testator was incompetent to make a will, because he did not make the kind of a will which they would have made or which they thought he ought to have made. 241.

The fact that a woman of fine sensibilities in making her will followed a request left by her deceased husband rather than her own strong desire, does not show the exercise of undue or improper influence upon her. 255.

Presumption of validity of will arising from its probate. 255.

The word "heirs," where used by a testator having living children, will be regarded as synonymous with children. 264.

Testimony that a son of the testator was heavily in debt at the time the will was executed is competent to show the purpose of the testator to protect the estate against creditors of the son by giving it all to his son's wife and their children. 264.

Construction of rights vesting in a widow to whom was bequeathed all the rights "secured" to her by the laws of Ohio. 391.

Upon contest of a will its validity will be sustained only upon a showing that it was executed in accordance with the provisions of Section 10505, which requires that the testator must not only subscribe but must acknowledge the will as his will in the presence of two subscribing witnesses. 273.

It is error in a will contest to exclude testimony tending to show that a witness thereto made contradictory statements at different times touching his knowledge that the paper writing signed by him as such witness was subscribed and acknowledged by the testator as his will. 273.

Will made for the purpose of carrying out a trust agreement; trust enforcible although based upon an improperly executed deed. 553.

In an action to contest a will it is error to admit the testimony of non-expert witnesses, whose opinions are not based upon facts and observations within their own knowledge, but on a state of facts submitted to them by hypothetical questions. 570.

The fact that the testator was afflicted with progressive locomotor ataxia and was not able to help himself in any way, is not ground for setting his will aside, when. 570.

The making of changes in a will for reasons which appear to have been satisfactory to the testator is not ground for setting the will aside, when. 570.

It is error to instruct the jury that a will should be set aside for "coercion produced by importunity, or by a silent, resistless

power which the strong often exercise over the weak or infirm so that the motive was tantamount to force or fear." 570.

WITNESS—

Impeachment of, where the witness denies that a document is in his handwriting or that the signature thereto is his own. 281.

Where the character of a witness is attacked as to some incident in his life which is wholly immaterial and collateral to the issue in hand, the court is not bound to permit counsel in his cross-examination to go into details with reference thereto. 289.

WORDS AND PHRASES—

Meaning of the phrase "any opening of the body" as used in Section 13043. 253.

The word "heirs" may be regarded as synonymous with children, when. 264.

Meaning of the words "reasonable" and "practicable" as used in the grade crossing act. 321.

Meaning of the word "secured" as used in a will., 391.

As to the use of the word "unprecedented" as applied to a rainfall which overtaxed the sewers. 396.

E. J. H. J.
6/14/12