OHIO

CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME XI.

CASES ADJUDGED

IN

THE CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
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1909.

JUDGES OF THE CIRCUIT COURTS OF OHIO

From February 9, 1908, to February 9, 1909.

HON. MAURICE H. DONAHUE, *Chief Justice*, New Lexington.
HON. LOUIS H. WINCH, *Secretary*, Cleveland.

FIRST CIRCUIT.

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

PETER F. SWING.....Cincinnati
WILLIAM S. GIFFEN.....Hamilton
SAMUEL W. SMITH JR.,.....Cincinnati.

SECOND CIRCUIT.

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

HARRISON WILSON .....Sidney
THEODORE SULLIVAN .....Troy.
CHARLES W. DUSTIN.....Dayton.

THIRD CIRCUIT.

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

CALEB H. NORRIS.....Marion.
SILAS E. HURIN .....Findlay
MICHAEL DONNELLY.....Napoleon

FOURTH CIRCUIT.

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

FESTUS WALTERS .....Circleville.
THOMAS CHERRINGTON .....Ironton.
THOMAS A. JONES.....Jackson.

FIFTH CIRCUIT.

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

FRANK TAGGART ..... Wooster
MAURICE H. DONAHUE ..... New Lexington.
JOHN W. CRAINE ..... Canton.

SIXTH CIRCUIT.

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

ROBERT S. PARKER ..... Bowling Green.
SAMUEL A. WILDMAN ..... Norwalk
REYNOLDS R. KINKADE ..... Toledo

SEVENTH CIRCUIT.

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

JEROME B. BURROWS ..... Painesville
PETER A. LAUBIE ..... Salem
JOHN M. COOK ..... Steubenville

EIGHTH CIRCUIT.

Counties—Cuyahoga, Lorain, Medina and Summit.

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

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OHIO

CIRCUIT COURT REPORTS.

NEW SERIES—VOLUME XI.

CAUSES ARGUED AND DETERMINED IN THE CIRCUIT COURTS OF OHIO.

FINALITY OF A JUDGMENT ON DEMURRER.

Hamilton County Circuit Court.

CYRIL KEHM v. GERMAN MUTUAL INSURANCE CO.

Decided, March 7, 1908.

Judgments—Conclusive on Demurrer by Way of Estoppel, When—Finality of Affirmance of, as Shown by the Record—Not Changed by a Different Reason Stated in the Opinion.

Where the record shows that a demurrer to the petition was sustained by the trial court on the merits of the plaintiff's cause of action, and this judgment was affirmed by the circuit court in the usual form as without error, the finality of the judgment can not be changed by looking to the opinion of the circuit court judge where it appears that the affirmation was based on technical grounds.

Albert Bettinger, for plaintiff in error.
John R. Sayler, for defendant in error.

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* Affirming *Kehm* v. *German Mutual Insurance Co.*, 5 O. L. R., 558.

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

This is an action in this court on error to the judgment of the court of common pleas dismissing the petition of the plaintiff in error against the defendant in error.

Kehm brought his action in the court of common pleas on a policy of insurance held by him in the German Mutual Insurance Co.; in this action he obtained a judgment. The insurance company prosecuted error to the circuit court, wherein the judgment was reversed and the cause remanded for further proceedings.

After the case went back to the court of common pleas, plaintiff filed an amended petition, to which the insurance company filed a general demurrer, which general demurrer was sustained and plaintiff's petition was dismissed. Plaintiff prosecuted error to the circuit court, which court affirmed the judgment of the court of common pleas. Thereupon plaintiff brought another action in the court of common pleas. The defendant filed an answer to this petition in which it set out two defenses, one of which was a plea in bar, setting up a former decision of the same court, between the same parties, in the same cause of action. To this defense the plaintiff filed a reply setting forth the opinions of the judges of the court of common pleas and circuit court in deciding the questions in the former case, as showing that the case was not determined on the merits and therefore was not a bar to a subsequent action. The defendant filed a motion for judgment on the pleadings and this motion was granted and plaintiff's petition dismissed. This is the judgment sought to be reversed in this court.

The judgment in the first action between the parties was rendered in the court of common pleas on a general demurrer to the petition. It is admitted by counsel that the law on this question is correctly stated in Black on Judgments, Section 707, as follows:

"There can be no doubt that a judgment rendered upon a demurrer is equally conclusive by way of estoppel of the facts confessed by the demurrer, as would be a verdict and judgment finding the same facts. But a judgment on a demurrer based on merely formal and technical defects is no bar to a suit on

an amended declaration correctly setting forth a good cause of action."

Again at Section 709, it is stated:

"In many of the states, especially those following the code practice, a statutory and much used ground of demurrer is: 'that the complaint does not state facts sufficient to constitute a cause of action.' A decision upon a demurrer of this kind is an adjudication upon the merits as far as the complaint goes, and is final and conclusive."

The demurrer in the court of common pleas as shown by the record was on the merits of plaintiff's cause of action. But this judgment of the court of common pleas was affirmed in the circuit court, as shown by the opinion of the circuit court judge, which is brought into the record, on a technical ground, viz., that there was no consideration alleged in the petition although the judgment of affirmance was in the usual form simply finding that there was no error in the judgment. The record in this case contains the opinion of the judge of the court of common pleas sustaining the demurrer to the petition and it is admitted that it goes to the merits of the action and was not on technical grounds. The opinion of the circuit court judge affirming this judgment was on the ground that no consideration was alleged in the amended petition, and it is admitted this is a technical ground, the opinion saying that the court found it unnecessary to pass on the other questions of the case. No error was prosecuted to the Supreme Court to reverse this judgment of affirmance.

The general principles of the law applicable to the question at bar seem to be well settled. If no error had been prosecuted to the judgment of the court of common pleas, the judgment of that court on the demurrer would be final and a bar to this action. This judgment was affirmed by the circuit court, and we think the finality of the judgment was not changed by the fact that looking to the opinion of the court, outside of the record of that case, the circuit court based its affirmation on technical grounds. The circuit court might have been wrong in its conclusion and

still the judgment have been right, and if the case had gone to the Supreme Court the question there would have been, not whether the reasons given by the circuit court in its opinion were right, but whether on the record the judgment of affirmance was right. We think the judgment should be affirmed.

REVIEW IN A HOMICIDE CASE.

Circuit Court of Morrow County.

WILLIAMS v. THE STATE OF OHIO.*

Decided, December 9, 1907.

Criminal Law—Defect in Sheriff's Venire—Failure to Deliver Copy of Panel to Accused—Reviewable only when of Record—Objection to Mental Competency of Witness does not Require Immediate Inquisition—Improper Remarks by Prosecuting Attorney to Jury—Testimony of Accused before Grand Jury—Evidence Establishing Death by Violent Means.

1. Under the rule that only matters which are brought into the record can be considered by the circuit court on review, a verdict of conviction will not be set aside on the ground that a true copy of the panel as returned by the sheriff was not delivered to the accused as required by Section 7273, Revised Statutes, where the irregularity complained of is not carried into the bill of exceptions but is brought to the attention of the court by an affidavit to which is attached a paper writing and what purports to be a copy of the jury panel.
2. An objection to the competency of a witness on the ground of his mental incompetency does not require that the court stop the trial at that point and immediately institute an inquisition as to the mental capacity of the witness.
3. The declaration by the prosecuting attorney in this case as to what a certain "black jack" could tell and what the accused could tell, where followed by an admonition from the court that the remark

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* Leave to file petition in error denied by the Supreme Court, January 21, 1908.

should be disregarded and not repeated, did not amount to misconduct if prejudicial.

4. Testimony by the accused before the grand jury that he was not guilty but knew how the murder was committed was properly admitted at the trial together with other incriminating statements and admissions on his part showing guilty knowledge.

5. Evidence as to the disappearance of the deceased, the finding of his body two weeks later with contusions on the head, and abrasions on the neck and other parts of the body, together with the testimony of reputable physicians that death was caused by suffocation, if it does not establish beyond reasonable doubt that the deceased came to his death by violence, at least outweighs the idea of death by accident and reasonably brings to the jury the theory that violence was employed.

J. W. Barry and *W. F. Bruce,* for plaintiff in error.

T. B. Mateer and *Mr. Ward,* for defendant in error.

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

Error to the court of common pleas.

At the April term, 1907, of the court of common pleas Jerry Williams was indicted for murder in the first degree by a grand jury of Morrow county. To the indictment he filed a motion to quash and also a demurrer. This motion and demurrer were overruled by the court. He was placed upon trial and a verdict of "guilty" was returned "of murder in the second degree." A motion for a new trial was filed and overruled; he was sentenced under the law. Thereupon proceedings in error were prosecuted in this court, incorporating all the errors that it is alleged intervened from the time of the indictment to the sentence of the defendant by the court of common pleas.

In respect to the motion to quash, and the demurrer to the indictment, we think the court of common pleas committed no error in overruling them. The next error to which our attention has been called, is a motion to quash the service of the panel, as it is designated. The motion is somewhat extensive; the following is a part:

"Now comes the defendant, Jerry Williams, in his own proper person, and objects to the panel of petit jurors, drawn June 3,

1907, and June 8, 1907, and returned by the sheriff of Morrow county, Ohio, to try the above entitled cause, for the following reasons, to-wit:

"1. Because of the failure of the sheriff, or proper officer, to comply with Section 7273, Revised Statutes, which said section of the statutes reads as follows:

"'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.'

"That no copy of said panel, as returned by the sheriff, has been delivered to this defendant Jerry Williams; that all the paper writing, purporting to be a copy, is hereto attached and made a part of this motion.

"2. Becouse the return of the sheriff does not show that all of the jurors named in the first special venire were served by him to appear as jurors to try the above entitled case.

"3. Because the clerk was not authorized by said return, to cause a special *alias venire facias* to be issued.

"4. Because the clerk drew the special *alias venire facias* in the absence of the court.

"5. Because the record does not show that the special *alias venire facias* was drawn in the presence of the court.

"6. Because the endorsement by the sheriff upon said special venire, 'Not Found,' is not a sufficient return by the sheriff, to show that a juror is not within the county of Morrow, and state of Ohio.

"Wherefore said defendant prays that said panel may be quashed."

Then follows an affidavit:

"The State of Ohio, Morrow County, ss. Jerry Williams, being duly sworn according to law, says, that the paper writing hereto attached and made a part of this motion, is the paper writing served upon him, purporting to have been served by the sheriff, and that the same is the only paper writing served upon him by the sheriff, or by any other person, and that the said Jerry Williams is now an inmate of the county jail and has been confined therein since long before the return of the indictment in this case by the grand jury of Morrow county, Ohio, against said defendant at the April term of this court, to-wit: April —, 1907. (Signed) Jerry Williams. Subscribed in my presence and sworn to before me this twenty-fifth day of June, 1907. (Signed) C. R. Meredith, Clerk of Courts."

So far as this motion purports to set out any irregularities that appear in the sheriff's venire and returns, we can consider them. Such as are required to be shown outside of the venire, by proof, we can not consider. Looking into the matters that are raised on this motion that appear from the venire and return of the sheriff and from the transcript in this case, we think that the clerk and sheriff have fully complied with the law. The only matter that appears outside of the record and that is attacked by the plaintiff in error is, "that a true copy of the panel as returned by the sheriff was not delivered to him;" and this appears by the affidavit and a copy of the papers attached to the motion.

It may be said in respect to that matter, that this does not bring the matter into the record at all; neither is it in a condition that we can consider it for the reason: there is attached to this motion an affidavit by Jerry Willaims, but we do not know that the court acted upon that affidavit alone, or what evidence the court acted upon in overruling this motion; all that appears in this transcript is the overruling the motion.

In order that it may be brought to the attention of the reviewing court, this affidavit and all the affidavits that the court heard must be brought into the bill of exceptions, with the certificate that that was all the evidence that was heard by the court, at the hearing of the motion.

In Henning v. Bartz, 1 C. C.—N. S., 389, the Circuit Court of Wood County thus announced the law:

"A reviewing court can not take notice of affidavits offered on motion for a new trial, unless they are incorporated in a bill of exceptions."

In the case of *Brock* v. *State*, 22 C. C., 364, the Circuit Court of Hamilton County thus lays down the rule:

"These facts are only supplied by the affidavit of the county prosecutor made after the accused had been tried and found guilty. In the first place, an affidavit is no part of the record, and is not made such even though copied verbatim by the clerk

into the record. An affidavit can only become part of the record by being incorporated in a bill of exceptions."

The Supreme Court in *Goyert* v. *Eicher,* 70 Ohio State, 30, thus lays down the rule:

"An agreed statement of facts, although in writing, signed by counsel of all parties and filed, does not become a part of the record unless brought upon the record by a bill of exceptions, or the facts as agreed upon are stated in the journal entry as the court's finding of facts." And cites with approval, *Wells* v. *Martin,* 1 Ohio St., 386, and particularly *Busby* v. *Finn,* 1 Ohio St., 409; also *Lake Erie & W. Ry.* v. *Mackey,* 53 Ohio St., 370, 380.

This is clearly the ruling of the different courts. So far, then, as to any matters outside of the record, they are not before us and we can not pass upon them, but from what appears in the record we think there was no error in the court overruling this motion to quash the service of the panel, and this exception is not well taken.

It is claimed the court erred in the trial of the case, in refusing to hear evidence as to the mental condition of one Herbert Glenn.

Glenn is jointly indicted for this crime; when he was called as a witness, objection was made that he was not mentally competent and it is urged that the court was in error in not hearing testimony as to his mental condition before admitting him as a witness.

Our attention is called to Whittaker's Code of Evidence and other authorities. Where a person of tender years is brought into court, the court can see and it is his duty to ascertain whether the child has such knowledge of the responsibility and nature of an oath, the proper appreciation of the relation of things, that it can state truthfully and relate correctly what it has heard and seen.

Assuming that that would be the same rule with respect to one that was of weak mind (which we do not by any means announce as the opinion of the court), but assuming that (in this case the

witness was introduced, the court could see him; he heard him testify and the motion was again renewed at the close of his testimony), it would be a strange procedure that, on an objection to a witness that is tendered, the trial court would have to stop the trial to test the mental capacity of the witness. We do not think that such is the law of the case.

If the examination in chief, or the cross-examination even, tended to bring to the attention of the trial judge that there was such mental infirmity, it would have been his duty to have taken care of it in the proper way; if it was disclosed that the person was of unsound mind and mentally weak, he should have then withdrawn the testimony from the jury. But from a careful examination of this record, we think there was no prejudice in this case as to the competency of this man on the ground of lack of mental capacity, for the manner in which this record discloses that he had detailed facts and circumstances, and the manner in which he underwent the close, careful, rigid cross-examination of counsel, would indicate that he was at least possessed of the ordinary degree of mentality. We can not hold to the idea, that on a mere objection, that the court was compelled to institute on the side an inquisition as to the mentality of the witness. We think that is not the practice and not the rule. Therefore we hold the court was not in error so far as that objection is concerned, in admitting him as a witness in the case.

The next objection urged upon us is, the misconduct of the prosecuting attorney. There was introduced in the case a "billy" or black-jack" as it is sometimes called, and the prosecuting attorney in the argument of the case, comments on some testimony in the case, which would justify the remark: "That black-jack could tell the story." A certain witness had so stated; he repeated that; that was perfectly proper. He adds, however: "So could Jerry Williams." Thereupon the court very promptly, upon objection of counsel, stopped him, insisted that it was not proper and that it should not be repeated. Now the court in that instance did all that he could do to correct whatever wrong there was in the action of the prosecuting attorney.

And even assuming that the statement, "So could Jerry Williams"; assuming that it was improper, it was corrected and no prejudicial error intervened, in our judgment.

It is urged upon us that the admission of the testimony of Jerry Williams before the grand jury at the January term, admitted at the trial, was erroneous and prejudicial. An examination of this record will show that when it was proposed to introduce the evidence of Jerry Williams taken before the grand jury, it was objected to as being incompetent, because no cross-examination had been made, and no opportunity given for cross-examination. We think that this was entirely competent, upon the well-established rule, that the admission, declaration, or statement of any party on trial made at different times or places is perfectly competent to be introduced against him.

These statements were introduced as substantive testimony, that he had guilty knowledge of the perpetration of this crime. He so testified before the grand jury, that he knew how this crime was committed. Although there were some self-serving declarations, yet there were also incriminatory statements which were perfectly proper as substantive testimony. Besides, this could not be prejudicial. Williams did not take the witness stand, but the admission of this testimony placed before the jury the fact that he did not commit the crime; by the introduction of these statements there was brought before them his sworn testimony that he was not guilty, without subjecting him to a cross-examination, and the effect of this testimony was to create a doubt in the minds of the jury as to his guilt.

But it is urged upon us that the defendant was not properly convicted of this offense; that the verdict was against the evidence and against the law of the case.

To determine whether this verdict was merited by the evidence produced, there are a few things that we can assume as proven beyond all peradventure.

Shadrick Westbrook disappeared on March 17, 1904; was found perhaps on the second day of April thereafter, dead; there is no dispute about that fact. There can be no dispute

as to the condition of the body at that time; that the head was covered with certain contused wounds, that the skin of the knees was torn off or abraded. There were also marks on his throat. We need not enumerate them all in detail.

The first question that would address itself to the triers of the cause would be: Was this a homicide or was it an accident that resulted in the death of the deceased?

We have the testimony of reputable physicians introduced in the case, to say that he came to his death by suffocation. Whether this testimony, beyond a reasonable doubt, establishes the fact that he was violently dealt with or not, we may assume that it reasonably brings to the jury that there was violence employed and there were strong probabilities that some person was guilty of the commission of the offense. We think it outweighs the idea of an accident at least.

There are other facts connected with this case which strengthen that very reasonable position. Shortly after his disappearance certain persons begin to tell the story that Westbrook was murdered, and that one Peck was guilty of the crime. The only persons who would have any motive in telling such a story would be somebody that was interested in his disappearance, or connected therewith.

There has been introduced in the case the testimony of one Herbert Glenn, and let us see whether we can find any testimony outside of him which tends to establish and strengthen the idea that there was a homicide and not an accidental killing.

The defendant, Jerry Williams, in the workhouse and in the grand jury room, says that one Sherman Peck committed this crime. There you have the plaintiff in error bringing to the attention of the jury that it was not an accident but that it was a homicide. We have that from his declarations on several occasions—that the disappearance of Westbrook was not accidental; it was purposely and willfully caused.

Next, after looking to the evidence tending to establish that it was a homicide and not an accident, it becomes necessary to look to see whether we can ascertain the guilty agent. The only

persons that would have an interest in making any statement in regard to this were those that were connected with it.

We have said nothing thus far about Herbert Glenn, but the person, Jerry Williams, who says that this was a homicide and not an accident, shortly after the disappearance of Westbrook himself disappears. Now flight and concealment, unless properly explained, is an evidence of guilt; so that in connection with the fact of his stating that it was a homicide, we have his disappearance and his accusation of Peck. He would be interested in diverting suspicion from himself; he therefore says that it was Sherman Peck who committed this offense.

He was a witness before the grand jury; and in the presence of Herbert Glenn and other witnesses calls attention to the fact that Herbert Glenn could corroborate what he knew about it, that Sherman Peck was the guilty party. They are in the prosecutor's office; they tell the same story; they go before the grand jury and Sherman Peck is indicted. But Sherman Peck was never tried and it is said now that the proof of Sherman Peck's innocence was beyond controversy; assuming that to be true, then you have this plaintiff in error, in conjunction with Herbert Glenn, placing the crime, telling the same story upon Sherman Peck, which might send him to the chair. That being so we reach the next step, that they have some connection with the crime, that they would not have any purpose in diverting susupicion from themselves on someone else, unless they were connected with it.

Later Herbert Glenn tells the story as given on the trial; a story similar in its details with that told before, and as told by Jerry Williams, except that instead of Peck committing the crime, that he and Williams and one Mauck committed this offense.

It is said we are to give no credence to the story of Herbert Glenn. But we call attention to the testimony of the witnesses who heard Glenn and Williams talk in the jail. Williams says: My wife will not say anything that will send me for life, or something in substance of that kind. He says other things there. Glenn testifies on the trial that they took the body of

Westbrook to Williams' home and sought admission, which was refused by Williams' wife.

It is urged upon our attention that there is no corroborative testimony of Glenn here. We think that he is corroborated throughout on very substantial details. True, it is said that he manufactured this case after he learned all the facts about it. He could not have manufactured it, as he detailed it on the trial, without having run counter to Williams, and the greatest corroborative testimony that we find in this record, is Jerry Williams himself, and the facts and circumstances which this record contains.

We think that this verdict is amply sustained by the evidence. We think that it is not against the law of the case; but the plaintiff in error was fairly tried by the court of common pleas, and the verdict of the jury was right and there is no error in this case to the prejudice of the plaintiff in error.

Finding no error in this record of prejudice, the judgment of the court of common pleas will be affirmed, with costs, and remanded.

PROSECUTIONS UNDER THE SUNDAY CLOSING LAW.

Circuit Court of Tuscarawas County.

OWNEY DAUGHERTY v. VILLAGE OF DENNISON. *

Criminal Law—Violation of Sunday Closing Law—Affidavit Must Show Criminal Intent.

An affidavit charging the accused with violation of a Sunday closing ordinance is insufficient unless it charges knowledge and criminal intent.

Healea & Greene, for plaintiff in error.
T. H. Loller, for defendant in error.

KIBLER, J.; POMERENE, J., and ADAMS, J., concur.

The case of Owney Daugherty vs. the Village of Dennison is

* Affirmed by the Supreme Court without report (59 Ohio State, 593).

here on error. Plaintiff in error asks us to reverse the judgment of the mayor, and the judgment of the court of common pleas affirming the judgment of the mayor.

This man was arrested on an affidavit for allowing a place to be kept open on Sunday of the description of those that were open on other days of the week for the sale of liquor. There is an ordinance in the village which we think a good, sufficient and valid ordinance, and under this ordinance the affidavit was made and the arrest was made.

The affidavit charges that on December 15, 1895, said day being the first day of the week, commonly called Sunday, at the village and county aforesaid, one Owney Daugherty allowed a place where intoxicating liquors are on other days sold or exposed for sale (the same not being a regular drug store, nor a place where intoxicating liquors are manufactured) to be open, contrary to the ordinance in such case made and provided.

After his arrest on this affidavit and warrant issued upon the affidavit, a motion was made by Daugherty to dismiss the proceedings on the grounds that the ordinance of the village by virtue of which this action is brought is null and void and of no effect; and second, the affidavit filed herein and upon which this defendant was arrested is insufficient and does not state any offense, and does not charge this defendant with any violation of any ordinance of said village. This motion was overruled, case tried, and resulted in the conviction of Daugherty and assessment of a fine. As I stated, we find that this ordinance is not the subject of criticism made in this motion, but is a proper and valid ordinance.

The only question to be considered is whether or not this affidavit is sufficient. This affidavit simply says, on this day Daugherty allowed a place where intoxicating liquors are on other days sold or exposed for sale, to be open. It is claimed that this affidavit is insufficient for several reasons; among others, that it does not charge that he knowingly allowed this place to be open. The question which we have to consider, and which we think of some importance here, is whether this affidavit, as it is, is sufficient.

Now, an act may be innocent or criminal, and I use the word "criminal" in the broad sense, according to the intent in which it is done. We think that where it is a case where the guilt, or whether the act is innocent or criminal, should be stated in the affidavit—that is to say, the crime, or the intent which makes an act (which may be innocent) criminal, should be stated in the affidavit. Now, this affidavit does not show that Daugherty fraudulently or knowingly allowed a place where intoxicating liquors are on other days sold or exposed for sale to be open. We think some word at least ought to be in this affidavit which shows a wrong intent on the part of this man. Now, a man may go into a place where he has been in the habit of selling intoxicating liquors on week days, with an innocent intent, and may go in for a cigar, for instance, and leaving the door open a little while, and may go in for a number of proper reasons. Therefore, by merely having it open a short time is not an offense under this ordinance, and we think the word "unlawfully" or "knowingly" or something of that description ought to have been in this affidavit in order to show that this opening was a wrongful opening. Now, although we do not hold that the strictness that is used in indictments ought to be expected or required in affidavits of this description, yet as I have said there ought to be something in this affidavit to show that the act was done with a wrongful intent.

In the Ohio Criminal Code, by Wilson, page 340, the charge is stated in this way:

"Being the first day of the week, commonly called Sunday, did unlawfully and knowingly allow to remain open, a certain room, said room being then and there and theretofore a place where on other days of the week than the first, commonly called Sunday, were there and therein sold and exposed for sale, by the said E. F., intoxicating liquors, to-wit: brandy, whisky, gin, ale, beer, and wine, the said room not being then and there a regular drug store."

Now, there is the expression used by this author in this form, "did unlawfully and knowingly." Now we, of course, have not overlooked the statute in respect to criminal proceedings.

"No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested or in any manner affected by the omission of the words 'with force and arms,' or any words of similar import; nor for the omission of the words 'as appears by the record'; nor for omitting to state the time at which the offense was committed, in any case in which time is not of the essence of the offense; nor for stating the time imperfectly; nor for want of statement of the value or price of any matter or thing, or the amount of damages or injury, is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for any omission to allege that the grand jurors were impanneled, sworn, or charged; nor for any surplusage or repugnant allegation, where there is sufficient matter alleged to indicate the crime and person charged; nor for want of averment of any matter not necessary to be proved; nor for any other defect or inperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

I say we had that in view, and having that in view and with the views I have expressed, we are constrained to conclude that this transaction should not have been commenced in this way and that the judgment of the mayor, and the judgment of the court of common pleas, affirming the judgment of the mayor, should be reversed, and it is so ordered and prisoner discharged.

DIVISION BETWEEN RAILROAD COMPANIES OF COST OF CROSSINGS.

Circuit Court of Lucas County.

LIMA & TOLEDO TRACTION CO. v. TOLEDO RAILWAY & TERMINAL CO. ET AL.

Decided, July 7, 1907.

Crossings—By Tracks of Steam, Street, Electric or Interurban Roads Outside of Corporate Limits—Construction of Section 3333-1 with Reference to Division of Cost—Jurisdiction of the Court—Statute Applies to all Crossings—Company First on the Ground Without Special Rights.

1. Section 3333-1, providing for determination by the courts of the mode and manner whereby one railway shall cross the tracks of another outside the limits of a municipality and the apportionment of the cost of construction and maintenance thereof, applies to all crossings whether at or above or below grade, where the companies affected can not agree between themselves as to the mode or manner of dividing the expense of such crossings.
2. A railway which is established and in operation acquires, by reason of having come upon the ground first, no proprietary rights affecting a division of the cost of a crossing, which are superior to those of a later company seeking to cross the road first constructed; and where the crossing will be equally serviceable to both companies, the expense connected therewith should be equally divided between them, notwithstanding the crossing will be of no special benefit to the old company.

Smith & Beckwith and *Cable & Parmenter,* for plaintiff.
C. G. Cunningham, for defendants.

PARKER, J.; HAYNES, J., and WILDMAN, J., concur.

Appeal from Lucas Common Pleas Court.

This is a proceeding brought by the plaintiff against the defendant under the act of May 10, 1902 (95 O. L., 530), entitled "An act to provide for one steam railroad crossing another steam railroad"; and particularly Section 1 of that act, as amended on April 13, 1904 (97 O. L., 548; Section 3333-1, R. S.)

The plaintiff is a company incorporated for the construction and operation of an electric railroad. The defendant company owns and operates a steam railroad. The railroad of the plaintiff company is to extend from the city of Lima in Allen county, Ohio, to the city of Toledo, Ohio; and the tracks of the two companies will cross at a point about a mile southwest of the city limits. The defendant company operates a belt line which extends around the city of Toledo.

In its application the plaintiff, among other things, says that south of the point of crossing the railway of the plaintiff is located and being constructed along the southeast side of and parallel to the railroad of the Wabash Railroad Company, extending in a northeasterly and southwesterly direction, and, if continued in said direction, it will cross the railroad of the defendants near where the railroad of the defendants and that of the Wabash Railroad Company cross at grade. The plaintiff says that about seventeen hundred feet north of where the railway of the plaintiff crosses the railroad of the defendant, plaintiff's railway will also cross a highway and the tracks of the Toledo Urban & Interurban Railway Company, which said highway and said interurban railway are parallel and adjacent to one another.

Plaintiff says that its said line of railway can be so located parallel and adjacent to and along the southeast side of the right-of-way of the Wabash Railroad Company so that it will cross the tracks of the defendant company at grade and will cross over the tracks of the said the Toledo Urban & Interurban Railway Company by an overway passage where the said the Toledo Urban & Interurban Railway Company's tracks are constructed under the right-of-way of the Wabash Railway Company; which method of construction will require the plaintiff's tracks to cross the said highway at grade, unless said highway is lowered so as to pass under the tracks of the Wabash Railroad Company.

Plaintiff says that in constructing its said railroad upon the line above specified, if the defendants be required to lower the tracks of said defendant company, defendant will avoid the two grade crossing referred to, viz., the present grade crossing of the defendant company's tracks and the tracks of the Wabash

Railroad Company, and also the tracks of the plaintiff. Plaintiff says that by diverging from the parallel line with the right-of-way of the defendants at a point about three hundred feet from the right-of-way of the Wabash Railroad Company, it is possible to construct a crossing under the railway of the defendants, which said construction will require the expenditure of large sums of money, namely, about $12,000, and will require the plaintiff to construct at the crossing of the said highway above referred to, and about fifteen hundred feet north of the crossing of the railway of the defendants, an undergrade crossing, and in doing so plaintiff will be required to expend large sums of money in readjusting said highway so as not to change materially the grade of the same, and at a cost of about $3,500; and that course will also require plaintiff to cross under the railway of the said the Toledo Urban & Interurban Railway Company, the cost of which crossing plaintiff is informed and believes will be about $17,000.

Plaintiff says that the maximum grade of its said railway is two per cent. That it is unable to agree with the said defendants as to the manner in which the tracks of the railway of the defendants shall be crossed by the tracks of the plaintiff. It also sets forth that appropriate proceedings are pending in the Probate Court of Lucas County to acquire the right to cross the right-of-way of the defendant company. There are other averments, to which I need not give special attention. The prayer is, that the Court of Common Pleas of Lucas County, or a judge thereof, ascertain and determine by its decree the mode and manner in which the tracks of the plaintiff shall cross the tracks of the said the Toledo Railway & Terminal Company, and if the court order a separation of grades, or decree that the tracks of the plaintiff shall be constructed under the tracks of the railway of defendants, that the court equitably apportion the initial expense of such construction and crossing, and the expenses of maintenance thereof, between the parties to this action; and some other incidental relief is asked for.

The case was tried in the court of common pleas, and a crossing under the tracks of the defendant company having been or-

dered by that court, the plaintiff company was required to pay 86½ per cent. of the cost of the necessary construction, the other part of the cost to be paid by the defendant company. From that judgment the plaintiff appealed to this court. The case has been submitted to us, and we have heard the evidence and the arguments of counsel. The chief point of controversy in the case is as to the apportionment of the cost of the construction made necessary by the road of the plaintiff company passing under the road of the defendant company at the point mentioned. The plaintiff company was not satisfied with the judgment of the court of common pleas, feeling that too large a proportion of the cost had been apportioned to it, and therefore it appealed. On the other hand, the defendant company insists that, if it should pay any part of the cost, it should pay no greater part than has been apportioned to it. But it also contends (and this is a question which is presented at the very threshold of the case) that the matter is not one calling for the interposition of the court under this statute; that the situation is not such as to give to the plaintiff the right to invoke this statute, or the action of the court under it.

It appears from the evidence, and it stands practically undisputed, that, having in view the crossing beneath the turnpike mentioned, and beneath the tracks of the urban and interurban road—something contemplated by the plaintiff, and apparently practically decided upon—it will be more convenient and economical for the plaintiff to cross underneath the tracks of the defendant company than to cross the same at grade. If the plaintiff had not agreed or decided upon crossing beneath the turnpike mentioned and the tracks of the urban and interurban road, it is not apparent that it would be more convenient or economical for the plaintiff to pass beneath the tracks of the defendant company, but as the situation has developed, considering the topography of the country, and considering the purpose of the plaintiff to pass beneath the tracks of the urban and interurban and the turnpike in that vicinity, it is agreed on behalf of the plaintiff that even if the defendant company's tracks were not located as they are, or even if the plaintiff company should be required to

pay the whole cost of the construction made necessary by this crossing beneath the tracks of the defendant company, the plaintiff company would probably cross in that way, to-wit, beneath these tracks; that even if the whole cost were to fall upon the plaintiff, it would still be for it the most feasible and economical method of crossing. This is so chiefly because of a gully that it would enter and traverse in making the crossing of the tracks of defendant, and in approaching the point where it crosses the turnpike and the tracks of the urban and interurban.

There would be great expense, perhaps from $10,000 to $12,000, in the making of the fills across lower levels in order to reach the tracks of the defendant company at grade, and all this is avoided by crossing beneath the tracks through the gully. And it appears that, in the conversations and negotiations between the officers and representatives of these two companies respecting this proposed crossing, they have practically agreed that the crossing beneath the tracks would be most practicable and most desirable for both companies. They have practically agreed that the crossing should be made in that way; and perhaps it may be fairly said that the plaintiff has practically determined that the crossing shall be made in that way, unless some unforeseen object shall prevent, and that the defendant company makes no opposition to the crossing being made in that way, provided it is not required to pay any of the expense incident to the making of such crossing. Thus far the minds of the parties have met upon the matter. Thus far they are in agreement; and yet it can not be said that they have entered into an agreement having the force and effect of a contract, enforcible by one against the other, that the crossing shall be by this route through the gully and beneath the tracks of the defendant company. Had they entered into an agreement having the force and effect of a contract covering the subject-matter, then there would be no occasion for an appeal to this court.

While the statute evidently has in view, primarily, the interests and safety of the public in the construction of railroad crossings, yet the Legislature has seen fit to provide that where the companies agree upon the crossing, the court need not be

appealed to under this statute. It does not follow, however, that there are not other statutes that would have influence upon the matter, and that might prevent the agreement of the parties from being carried out, if it were found to be inimical to the public interest. It is insisted, however, on behalf of the defendants, that the primary purpose of this statute is to provide for the separation of grades, meaning by that the prevention of grade crossings, by requiring that the tracks of one road shall be above those of the other, and that in a case where a grade crossing is not at all practicable, or in a case where the parties have agreed that there shall not be a grade crossing, the matter is removed from the jurisdiction of the court; that in such cases there is nothing for the court to do in the premises; that there is then nothing left but to determine the form of construction to effect such crossing, and to determine the division of the cost between the parties. That for this purpose this statute can not be brought into requisition.

No doubt one of the chief purposes of the law is to prevent, where reasonably practicable, grade crossings; but we do not adopt the view of counsel that where this object is accomplished because of the impracticability of a grade crossing, or because of the agreement of the parties upon a different kind of crossing, there is nothing left for the court to do. As the law stood before the enactment of this statute in 1902, there seems to have been no way of determining through the action of a court, or otherwise than by the agreement of the parties, what the form of construction of a crossing should be, whether a grade crossing or one not at grade. If, for instance, under circumstances like those presented here, the plaintiff company should condemn the right to cross, and if its right to cross should be limited by the proceedings in condemnation to a crossing beneath the tracks of the defendant company, yet the form of construction, whether by an iron bridge, or a stone culvert, or a cement arch, or what not, as we understand it, could not be determined by the judgment of any court or in any manner except by agreement of the parties. Naturally it would fall out, and must have occurred in many cases, that the parties would be unable to agree upon the

form of construction of the crossing, and great harm or injustice might result to the company over and across whose tracks the right-of-way had been acquired by the condemnation proceedings through the construction of a crossing unsafe and inconvenient for it. We understand that this statute was meant to reach cases of that character, as well as to prevent grade crossings where practicable; that it was meant to provide for safe crossings, whether grade crossings or crossings not at grade, and whether such safety was to be provided for by derailing and other safety devices where the crossing was at grade, or by proper bridges or structures where the crossing was not at grade.

If the statute is not available to a party who agrees that a grade crossing may, should and shall be avoided, but is available to those only who stubbornly insist upon a grade crossing, regardless of the dictates of humanity, business policy and common sense, then it offers a premium to those who seek to defeat one of its principal objects, *i. e.*, the prevention of grade crossings; or to those who in bad faith to the court pretend that they desire a grade crossing merely to obtain the benefit of the provisions as to the division of expense, and its benefits are withdrawn as a sort of penalty from those who seek to promote the policy of preventing grade crossings. A construction that would result in such absurdity and injustice should not be adopted unless it is plainly required by the words of the law.

The statute as it was first passed seems to have been imperfect, in that it did not provide for a division of the cost, as we think it should have done, and this imperfection in the statute appears to have been recognized by the Legislature later on when the amended Section 1 was passed. Section 1 as amended provides:

"That where it becomes necessary, outside the corporate limits of a city or village, for the track of a steam, street, electric or interurban railroad company to cross the track of another steam, street, electric or interurban railroad company, unless the manner of such crossing shall be agreed to between such companies, it shall be the duty of the court of common pleas of the county wherein such crossing is located, or a judge thereof in vacation,

on application of either party, to ascertain and define by its decree the mode of such crossing which will inflict the least practical injury upon the rights of the company owning or operating the road which is intended to be crossed."

I pause at that point. That, it will be observed, is not limited to cases where a grade crossing is practicable. Nothing thus far has been said about grade crossings, nor any other particular manner of crossing; and the matter which is to be presented to the court if not agreed upon is the *mode* of crossing, and that is to be fixed. That is to be fixed if the parties are unable to agree upon the *manner* of crossing, and we understand the words "mode" and "manner" to be used there synonymously; and we do not understand them to be confined to the idea of whether the crossing shall be at grade or above grade or beneath grade, but that the manner or mode of crossing includes as well the construction by which the crossing is made possible in any case; that the thing the parties must agree upon, in order to put the matter beyond the province of the court, if the court should be appealed to, is not only whether there shall be a grade crossing or an overhead crossing or an underway crossing, but the kind of construction in either case, and we suppose, as well, the division of the cost thereof, though as to that we need not say in this case because the question is not presented. It is possible that if all else were agreed upon excepting the division of the cost, the parties might not be able to bring that matter before the court for adjudication. As I say, we do not pass upon that question. We do hold, however, that in order to make an agreement that would be effective as an answer to the application to the court, it must a least cover the form of construction, the kind of construction, whether by bridge or trestle or culvert or arch, or what not, as well as the question whether it shall be located above or below or at grade, or at one point or another along the line of the road to be crossed. The statute proceeds:

"And, if in the judgment of such court or such judge thereof, it is reasonable and practicable to avoid a grade crossing, it shall by its process prevent a crossing at grade."

That is to say, that object, the prevention of grade crossings, is to be kept steadily in mind by the court in fixing what the crossing shall be, what the construction shall be, in dividing the cost, and all that; for while certain forms of construction may be necessary to provide for the safety of the traveling public where the crossing is not at grade, or certain forms of safety devices may be essential to provide for safety when the crossing is at grade, it is to be borne in mind that one of the most effective means to secure safety is to prevent the grade crossing where possible. There are certain conditions mentioned in the statute under which a grade crossing can not be prevented, conditions respecting the grade established by the company building the new line, and with respect to the high-water mark, etc. Then follows this provision, which is added to the original section: "The court shall, in its order equitably apportion the initial expense of such construction or crossing and the expense of maintenance thereof among the parties interested." And there is also a provision for appeal, under which the matter has been brought to this court.

Now the initial expense is to be equitably apportioned, and, as has been well said, that does not necessarily or under all circumstances mean equally divided. It is urged on behalf of the defendant that, since its railroad is in place and in operation, bridging this gully by trestle work and fills, it should not be required to pay any part of the expense of the construction required for this crossing, since the construction will be of no advantage to it. It appearing that a water-course traverses this gully and passes under the tracks of the defendant company, and that some time in the course of a few years it may be necessary to replace the piling, and that it will probably be expedient to put a culvert over this water-way, it is conceded by the defendant company that it may be just that it should bear a share equal to the expense which would fall upon the defendant company if the plaintiff company should not occupy that place, *i. e.*, that it might be equitable to apportion to the defendant company as much as that culvert would cost. It appears that it would need

to be five or six feet high and seven or eight feet wide, to accomodate the stream, and that it would cost from $1,000 to $1,200.

On the other hand it is urged that in the eye of the law the companies have an equal right at this place—an equal right to cross at this point; that by coming upon the ground first the defendant company has not acquired any such proprietary right as enables it to levy tribute upon the plaintiff company, or to say to the plaintiff company: "This construction is made necessary by your coming here, and therefore you should pay the whole cost of it."

It is pointed out that if the plaintiff company had come upon the ground first and occupied this gully, no overhead construction would have been required for its purposes; that the defendant then coming along with its road to span the gully might have been met with the proposition that it came last, and the expense of the bridge over the gully and all construction necessary to protect the plaintiff company and its tracks should fall upon the defendant company. It is said by counsel for the plaintiff company that this would not be fair, would not be equitable, but that the matter should be considered and adjusted as if the parties had come to this point to cross at the same instant, with equal rights, and that then and there the necessity had arisen for a construction which would enable one to cross over the other. In that event, it seems to us quite apparent that the cost should be equally divided between them; and if that is the proper view of the matter, it follows that the judgment of the court in this case should divide the cost equally.

So the problem seems to our minds to resolve itself into a question as to whether the defendant company has acquired any superior proprietary rights in the premises by reason of its having reached the place of crossing first with its tracks. If so, the same result would probably follow whether it had reached that point a score of years or an hour before the plaintiff company had reached it, or long enough before to have constructed a trestle sufficient to carry its trains over the gully.

If we understand the views of the Supreme Court of Ohio, as

expressed in the case of *Lake Shore & M. S. Ry.* v. *Railway*, 30 Ohio St., 604, they require us to resolve this question in favor of the contention that no superior right is acquired by the company that first comes upon the ground. These franchises are granted to these public service corporations because of the supposed advantages to the public. Their right and authority to appropriate right-of-way are based upon the same ideas; and we believe it is not contemplated by law, especially not by this statute, that one such corporation can place itself across the track of another, or the contemplated track or course of another, in such a way as to make it more burdensome or difficult for the company coming upon the ground later to traverse such track, except as changed physical conditions may make it more expensive and difficult. And that when it comes to the changing of such physical conditions in order that both may pass a given point, and in order that the interests of the public may be subserved, unless there is some special reason why there should be a different division of the expense, we think it should fall upon the companies equally.

We may imagine cases where there would be such special conditions, as if, for instance, where there had been expensive work constructed by the defendant company at the point of crossing by the defendant company, so that a line laid out by the plaintiff company would require its destruction; or if the structure, when constructed, would afford some special advantages or facilities to one and not to the other. But here all that either company acquires by this construction is a crossing at that point. One company is enabled to go beneath the lines of the other; and that is all they have in the matter, all the good they get out of it, and each appears to be equally served by the construction. We have endeavored to apply the principles heretofore recognized by us as applicable to such cases, *i. e.*, in the unreported case of *Akron & C. J. Ry.* v. *Railway,* decided by this court in Huron county.

Now, as to the form of construction, we conclude to order the same as was ordered by the court of common pleas. Perhaps that is not the very best that could be constructed, perhaps not as good as that proposed by the plaintiff company; but it seems

to be safe and serviceable, and we think will answer all the purposes of the parties and the interests of the public.

The cost of the construction and maintenance of the abutments and the girders should be equally divided. Of course the track that the defendant company lays upon the girders is a matter the expense of which will fall upon the defendant company; and in the same way, the track of the plaintiff company will be a matter for it to pay for itself. But everything pertaining to the abutments and the girders, the work and the materials and all, and this we understand will span the stream so as to allow the water to pass—we understand that is provided for—shall be divided equally between the parties. And the costs of this proceeding will likewise be divided between the parties equally.

INSURANCE PAYABLE TO MORTGAGEE.

Circuit Court of Ashtabula County.

OHIO FARMERS' INSURANCE COMPANY v. ERIE BREWING COMPANY ET AL.

Decided, September, 1907.

Fire Insurance—Mortagee not Bound by Appraisal and Award made by Insurance Company and Mortgagor without his Knowledge, When—Proper Procedure by Mortgagee.

A mortgagee who holds a policy of insurance issued to the mortgagor, which provides that in case of loss there shall be an appraisal and award, with the usual mortgage clause attached, "loss if any payable to the mortgagee as his mortgage interest may appear, and further in substance, that the insurance as to the interest therein of the mortgagee, should not be invalidated by any act or neglect of the mortgagor, is not bound by an appraisement and award made by the mortgagor and insurance company without the knowledge of the mortgagee. In such case where the mortgagee repudiates the appraisement and award made by the mortgagor and insurance company it is the duty of the mortgagee to demand an appraisal and award before insisting upon the payment of the loss to him, either by original action or by cross-petition in an action brought by the mortgagor.

Elliott, Betts & Mooney, for plaintiff.
Allen M. Cox, for defendant insurance company.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Bridget Cullen was the owner of a parcel of real estate upon which there was a mortgage for a considerable amount. Two policies of insurance were taken out by her, one in the Ohio Farmers' Insurance Company and the other in the Columbia. These policies were endorsed in the ordinary manner, "loss if any payable to the mortgagee."

The mortgage was assigned by the mortgagee to the Erie Brewing Company and the policies delivered by the mortgagee to it. When the policies expired, new policies were issued in the name of Bridget Cullen by the insurance companies for seventeen hundred and fifty ($1,750) dollars each, and the one issued by the Ohio Farmers' Insurance Company, is the one in controversy. This policy provided that, "the loss if any should be payable to the Erie Brewing Company," and further had the following endorsement known as the standard mortgage clause, "it is hereby specially agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." The building was partially destroyed by fire and after the fire Bridget Cullen entered into an agreement with the two insurance companies for an appraisement of the loss without the knowledge of the brewing company, and the appraisers fixed the amount of the loss at about twelve hundred ($1,200) dollars and rendered an award for the same.

The amount due the brewing company upon its mortgage was over twenty-four hundred and fifty ($2,450) dollars and it claimed the amount of the loss was from eighteen hundred to two thousand dollars.

The Ohio Farmers' Insurance Company failing to pay the amount of the award, Bridget Cullen brought suit against it on the award making the Erie Brewing Company a party defendant. The brewing company filed an answer and cross-petition setting up the facts herein set forth and insisting that it

was not bound by the award agreed upon by the insurance company and the owner and mortgagor of the property and asking judgment for the full amount of the actual loss. The mortgagor took no further action in the suit after the filing of the petition, and the case was tried alone on the cross-petition of the brewing company. The court charged the jury that the brewing company was not bound by the award and the jury returned the verdict against the insurance company for $1,049.41, being one-half of the actual loss with interest, the other half to be paid by the Columbia Insurance Company.

The principal question that is made in the case is: Did the court commit error in its charge to the jury upon this question? It has been generally held in cases of mere endorsement upon a policy "loss if any payable to the mortgagee," that the contract is still with the mortgagor and is for the insurance of his interest, and the holder of the policy by such endorsement takes such policy subject to all the conditions of the policy as to non-occupancy, increase of hazard, other insurance, alienation, etc. Jones on Mortgages, Section 406.

But would this rule apply as to the settlement of the amount of the loss after fire? It would seem that it should not, as it would be unjust to the mortgagee. They select the appraisers and the mortgagor under certain circumstances might not feel inclined to get the full amount of the loss or at least to insist upon the same.

In Jones on Mortgages, Vol. 1, Section 409 (5th Edition), it is said:

"It is well settled that a mortgagee to whom a loss is payable is not bound by an adjustment to which he is not a party and is made without his knowledge and consent and that an adjustment made only by the insurer and mortgagor is without effect as to the mortgagee."

But in this case the mortgage clause provided:

"It is hereby specially agreed that this insurance as to the interest of the mortgagee only therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured."

By this provision no act of the mortgagor could affect the interest of the mortgagee in the insurance. The insurance company must deal directly with the mortgagee. The full amount of the loss must be paid to him at least up to the amount of his claim and he settles with the mortgagor (Jones on Mortgages, Vol. 1, Section 409, 5th Edition). In such case it is precisely the same as if the mortgagee had taken out a policy in his own name to secure his interest, a separate and distinct contract between him and the insurance company. Such was the holding in the case of *Hastings et al* v. *Westchester Fire Insurance Company,* 73 N. Y., 139.

In that case "the policy contained a clause declaring in substance that in case of other insurance the insured could only recover upon the policy its proportionate share of any loss." In an action upon the policy, held "that the mortgage clause operated as an independent insurance of the mortgagee's interest; it gave them the same benefit as if they had taken out a separate policy, free from the conditions imposed upon the owner and making them responsible only for their own acts; and that therefore the clause of the policy limiting defendant's liability in case of other insurance did not apply as the mortgagees had procured no other insurance, and plaintiffs were entitled to recover the whole loss without regard to the additional insurance procured by S."

In the opinion, on page 150, it is said:

"The rules laid down in the authorities cited have no application, however, to a case where a provision has been inserted in the policy which places the mortgagee upon another and a different footing from that of a mere assignee or appointee to receive a loss. The mortgage clause was agreed upon for this very purpose, and created an independent and a new contract, which removes the mortgagees beyond the control or the effect of any act or neglect of the owner of the property, and renders such mortgagees parties who have a distinct interest separate from the owner, embraced in another and a different contract. The tendency of the recent cases is to recognize these distinctions, and thus protect the rights of the mortgagee when named in the policy, and the interest of the owner and of the mortgagee are regarded as distinct subjects of insurance." *Excelsior*

Fire Ins. Co. v. *Royal Ins. Co.*, — N. Y., 343; *Springfield Ins. Co.* v. *Allen*, 43 *Id.*, 392.

We are therefore of opinion upon principle and authority the charge of the court was correct.

Another question however that presents itself is: That if by such endorsement upon the policy it made the contract of insurance a separate and distinct one between the mortgagee and the insurance company the same as if the interest of the mortgagee, had been insured by a separate policy, what right had the mortgagee to insist upon the payment of the loss or bring suit for the same until it had demanded an appraisement of the loss? It was bound by all the requirements of the policy that it was required to perform; and if the manner of ascertaining the amount of the loss was one of such requirements, no suit could be brought until the mortgagee procured an award or ascertainment of the loss by appraisers or showed a legal excuse therefor, the loss being a partial one. 75 Ohio State, 374.

Why was not the provision for an appraisement binding upon the mortgagee? If, as said, it was equivalent to a separate policy upon its interest, surely it could not insist upon the payment of the loss until the amount was ascertained in the manner provided by the policy.

The brewing company repudiated, as it had a right to do, the appraisement made by the insurance company and the mortgagor, but the insurance company had the right to an appraisement and award and the mortgagee could not deprive it of such right.

We are therefore of opinion that the brewing company had no right to proceed upon its cross-petition until such appraisement and award was demanded or a legal excuse given why it was not done. The cross-petition shows no such demand or excuse; neither does the evidence.

For this reason the judgment of the common pleas court must be reversed and the case remanded for such further proceedings as may be required by law.

NATURE OF THE HEARING UNDER A JONES LAW PETITION.

Circuit Court of Hamilton County.

IN RE JONES LAW (HYDE PARK PETITION). *

Decided, February 15, 1908.

Jones Local Option Law—Proceedings for Establishing a Residence District—What the Hearing Comprehends—Attendance of Witnesses may be Compelled—Error to Refuse Process—Burden of Proof—Description of the Territory—Hearing Judicial in Character—Final Jurisdiction.

At a hearing before a judge of the common pleas court under a petition for the establishment of dry territory within a residence district, under the provisions of 98 O. L., 68, it is prejudicial error to deny the ordinary process of the court, where request is made therefor in good faith and within reasonable bounds.

Jerome D. Creed, for contestant.
Eldon R. James, contra.

GIFFEN, J.; SMITH, J., concurs; SWING, P. J., does not concur in judgment of reversal—see separate opinion.

Adopting the definition of a proceeding in court and what it comprehends as set forth in the case of *The City of Zanesville* v. *The Zanesville Telegraph & Telephone Co.,* 64 O. S., 67, it is manifest that the hearing provided for in the act of March 15th, 1906 (98 O. L., 68), is judicial in character and comprehends the filing of the petition, process for bringing in the proper parties, and a judicial inquiry according to established rules and practice. The plaintiff in error or contestant was entitled upon application to require the clerk of the court of common pleas to issue a subpoena for witnesses under the seal of the court, the sheriff to serve them, and the process of the court to enforce obedience thereto. The court therefore erred in refusing to compel attendance of the witnesses who were duly served and failed to appear, there being about twenty-one in

* Reversing the judgment below (6 N. P.—N. S., 251).

all. It is claimed, however, that no proper exception was reserved; but it appears at page 326 of the bill of exceptions that counsel for contestant made a request for a ruling by the court as to whether it would compel the attendance of such witnesses; but without then ruling thereon and apparently without fault of counsel, a discussion arose concerning a particular witness, Wenzel, then again as to four other witnesses; and thereupon the court said, as appears at pages 329 and 330: "If those gentlemen come in, Glenn and Daniel, by half-past two o'clock I will hear from them, and also hear Mr. Sackhoff and Mr. Kraemer; and the case is closed, subject to the coming in of those four parties." To which counsel for the contestant excepted.

While this was not a direct and positive ruling upon the request made by counsel, it was significant and broad enough to overrule any request made and not already passed upon. The statute itself contemplates attempts at bribery, boycott, and intimidation of electors and the discharge of an employe; but it would be difficult, if not impossible, to defeat such attempts or such acts if the court refused to compel the attendance and testimony of witnesses. It also suggests the impossibility of advising the court in advance what the witnesses will testify, as they are at the time under restraint, or believed to be so. There seems therefore no good reason to deny a party in a proceeding of this kind the ordinary process of the court, provided his demands are made in good faith and within reasonable bounds. The court erred to the prejudice of the contestant.

The burden of proof was upon the petitioners to show that the territory described in the petition was a residence district; and while the evidence tending to prove such fact was slight, yet in the absence of any rebutting testimony it was sufficient to support the finding made.

The petition is composed of eleven different papers, each containing a description of the territory, and it is claimed that three of them contain a different description from that in the other eight, the discrepancy if any, consisting in a reference to the east boundary line of precinct H, instead of precinct B as a part of the east boundary line of the district. We deem it im-

material whether the reference be to precinct H or B, because the northern terminus of the east boundary line is fixed as the northeast corner of precinct M, and if the course southwardly and the monuments other than precinct B are followed, the same point in the center of Linwood avenue will be reached for the southern terminus, and the same territory included.

The final jurisdiction given by statute to this court only prevents further proceedings in a higher court, and does not interfere with the right to grant a new trial in the court of common pleas.

Judgment reversed and cause remanded for a new trial.

SWING, P. J.

I do not concur in the judgment of reversal for the reason that the errors committed by the court do not appear to be prejudicial. There was no claim in the argument in this case but what a majority of the resident electors of the district had signed the petition, and there is no intimation in the record that any one of these electors were induced to sign the petition through intimidation or bribery, or that counsel proposed to show by any of the witnesses subpoenaed, and which the court refused to bring into court, that bribery or intimidation had been resorted to.

Counsel said to the court as to three of the witnesses, he proposed to prove that they were not proper petitioners. One of them not being a resident, and two that they had not in fact signed the petition. Admitting that these three were not proper petitioners, there is still a large majority in its favor. As to the other witnesses, counsel made no statement to the court as to what he expected to prove by them; possibly he was not bound to state explicitly what he expected to prove by each witness, but having stated what he expected to prove by three of them, and making the statement to the court that his object was to get a ruling of the circuit court on the question of compelling the attendance of witnesses, I conclude that he had limited himself as to these three witnesses, and if there is still left a majority in favor of the petition after granting all he claims, I fail to

see the error that is prejudicial and which would warrant a reversal of the proceedings.

As to the law of the case I fully concur in what the court say and state further—

It must be apparent to the most casual observer that this law as to the procedure of the courts in its determination and the enforcement of its provisions is very crude, and in order to give to it the evident intention of the Legislature, the courts must supply what has been omitted.

The law provides that there shall be a public hearing before the judge, and he shall decide upon the sufficiency of the petition and all other questions involved in the law. And such a hearing and decision must be in accordance with established rules and practice in judicial hearings and decisions.

If it is not judicial in its nature, the courts should have nothing to do with it. In *Gordon* v. *United States*, 117 U. S., 706, Chief Justice Taney says:

"And while it executes firmly all judicial processes entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

And further on page 702, he says:

"And Congress can not extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer or impose on it the authority or duty of hearing and determining an appeal from a commissioner, or auditor, or any other tribunal exercising only special powers under an act of Congress. Nor can Congress authorize or require this court to express an opinion on a case, when its judicial power can not be exercised and when its judgment would not be final and conclusive upon the rights of the parties and process of execution awarded to carry it into effect."

In line with the above is the law as announced in the first three propositions of the syllabus in the case in 64 O. S., 67, referred to in the opinion of the court in this case. These propositions are as follows:

"1. The distribution of the power of the state by the Constitution to the legislative, executive and judicial departments

operates by implication as an inhibition against the imposition upon either of these powers which distinctively belong to one of the other departments.

"2. The fact that a power is conferred by statute on a court of justice to be exercised by it in the first instance in a proceeding instituted therein, is of controlling importance as fixing the judicial character of the power, and is decisive in that respect, unless it is reasonably certain that the power belongs exclusively to the legislative or executive department.

"3. The institution and prosecution of a proceeding in a court comprehends the filing of a proper complaint, process for bringing in the proper parties, and a judicial inquiry according to established rules and practice."

The powers and duties of courts is clearly set forth in these decisions. Only such duties as are judicial in their nature can be imposed on the courts, and such duties must of necessity embrace the hearing and determination of some judicial question with the power to render judgment and the further power to enforce the judgment when rendered.

To hear and determine a question in a judicial way, the court must have power to bring before it all proper evidence which bears on the question for determination. One of these necessary powers is that of compelling the attendance of witnesses within the jurisdiction of the court. Without such power there could be no trial.

When the court is this case refused to compel the attendance of witnesses, it denied to the parties the opportunity to have a fair trial and denied to itself the right to hear all the evidence it should have had in order to get at the right of the case.

GUARDIAN DENIED BENEFITS FROM SALE OF PROPERTY OF WARD.

Circuit Court of Cuyahoga County.

HENRY J. OSTENDORF, GUARDIAN, v. LOUISA M. SHALE ET AL.*

Decided, March 27, 1905.

Guardian and Ward—Property of Ward Sold by Guardian—Purchase Price Provided by Guardian—Trust Created and Benefits Denied to Guardian—Accounting Granted.

Where a guardian negotiates what is in form a sale of the goods of his ward, but himself assumes the payment of the purchase price, in consideration of a conveyance of land by the purchaser to such guardian personally, the latter will not be permitted to benefit by such transaction, but will be held to have acquired such land in trust for the benefit of his ward.

Foran, McTighe & Gage, for plaintiff.
Meyer & Mooney, for defendants.

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

This cause is here on appeal. It is essentially a controversy among the children and certain grandchildren of Henry Beckman, Sr., over what remains unsold of ten acres of land on Bolton avenue, together with the proceeds of the part that has been sold. The history of the title to this land is in brief as follows:

Henry Beckman, Jr., son of Henry Beckman, Sr. (both now deceased), purchased the land from certain executors, under circumstances which seem to indicate that the father furnished the purchase money, but being unable lawfully to take the title, by reason of his having been one of the appraisers, he caused the deed of conveyance to be made to his son. We shall give no further consideration to this phase of the controversy, since it furnishes no sufficient proof of the existence of any lawful trust. The family, however, seem to have urged upon Henry Beckman,

* Affirmed by the Supreme Court without report, *Shale* v. *Ostendorf*, 75 Ohio St., 581. See opinion immediately following.

Jr., that he had no right to the property, and finally, just after his marriage, he conveyed it to his mother for $10,000. His mother was at that time the guardian of her husband, who was mentally incompetent, and on the same day she as such guardian transferred to her son Henry a stock of goods, belonging to her husband, of the appraised value of $13,394.11. Of this amount, it seems clear that Henry, Jr., paid only the excess over $10,000. Before the mother was called upon to account in the probate court for the proceeds of the goods so sold, her husband died, and she, being the legatee of his personal property, alleged that fact and her consequent ownership of the fund, in lieu of any strict accounting.

At the time, however, of her sale of the goods and acquisition of the land, Henry Beckman, Jr., was prospectively entitled, by the terms of his father's will (then unalterable in view of the latter's condition of mind), to the sum of $10,000, payable out of the stock of goods in question; so that the inference is plain that the transaction was in this respect an anticipatory settlement of the father's estate.

Mrs, Beckman, Sr., thenceforward treated the land as her own, giving it first to certain of her daughters, being five of her seven children, by a deed, which, however, she never effectually delivered but retained in her own possession until her death. After making this deed allotted the land and conveyed large parts of it again to various innocent purchasers. She had power under her husband's will to make such conveyances for the benefit of his estate, but she converted the proceeds to her own use, and finally, by her will, of which the same five daughters were made the executors, she excluded her deceased son Henry's children and the children of her daughter, Mrs. Ostendorf, from any participation in said proceeds. The deed to the five daughters was put on record after her death, and they have ever since continued in the exclusive enjoyment of the premises.

It is now sought to have this deed set aside and to obtain an accounting of the proceeds of the lots sold, so that the other heirs may participate in all the property in question under the provisions of the will of Henry Beckman, Sr.

Plaintiff claims that the deed from Henry, Jr., to his mother was made in trust, and produces evidence of T. H. Graham, Esq., that Henry, Jr., so declared at the time the conveyance was made. The defendants, however, insist that Graham's testimony is incredible because he himself drafted the deed from Mrs. Beckman, Sr., to her five daughters, which would have been in direct violation of the alleged trust, had it existed. They further urge that she herself assumed the burden of accounting for $10,000 of the price of the stock of goods which she sold to her son, so that it can not be held that she paid for the land with $10,000 of her husband's property.

It is enough to say in answer to this last contention that a guardian can not be permitted thus to traffic or juggle with his ward's estate. Nor can it benefit the defendants that the $10,000 worth of goods was already prospectively the property of Henry, Jr., thus exonerating his mother from any breach of trust in turning it over to him; for that would be to say that Mrs. Beckman, Sr., obtained the land from her own son under the form of a purchase without in fact paying anything for it.

On the whole case we are satisfied that plaintiff's contentions are well founded and, without further discussion of the evidence, except to say that at every point defendants' counsel have most ingeniously presented the best possible side of a desperate case, we hold that the children of Mrs. Ostendorf and Henry Beckman, Jr., are entitled to participate in the property in question, and a decree may be taken accordingly.

SECRET TRUST WHEREBY AN APPRAISER BECAME A PURCHASER.

Circuit Court of Cuyahoga County.

JOSEPHINE BRICKMAN ET AL v. LOUISA M. SHALE ET AL.*

Decided, March 28, 1908.

Accounting—Action for, under a Secret Trust—Son of One of the Appraisers Purchases the Property at Executor's Sale—Co-incidents Establishing a Trust—Prohibition of Section 5404 Held Applicable—But Equities Found to be Stale.

B served as appraiser of land which had been ordered sold to pay the debts of a decedent, and his son purchased the property at the executor's sale, assuming an existing lien and executing mortgage notes for the deferred payments. It subsequently appeared that the father withdrew from bank at the time of the sale the exact amount of the cash payment made by the son for the property, and the son thereafter disclaimed any interest in the property and reconveyed the property to his mother who had become guardian of her husband. Thirty years later, after the land had very greatly increased in value, the heirs of the decedent brought the present action for recovery of the unsold portion of the land and an accounting. *Held:*

1. That the purchase by the son amounted to a secret trust for his father, and was in fraud of the estate owning the land at the time the sale was ordered.
2. But inasmuch as the estate was hopelessly insolvent and would have received no part of the proceeds had the sale been conducted with the utmost regularity, no actual fraud was committed upon the heirs of the decedent, and the lapse of thirty years together with their knowledge, actual and constructive, of the facts, renders utterly stale the equity which the heirs now attempt to assert in the respect to technical fraud found to have been committed,

W. B. Neff, B. Pearce and *Frank R. Marvin*, for plaintiffs.
M. P. Mooney, for defendants.

HENRY, J.; WINCH, J., concurs; MARVIN, J., dissents.

This is an appeal from the judgment of the court of common

*See opinion immediately preceding.

pleas in an action there commenced by the heirs and legatees of Dr. Joseph T. Lammersman, who died in 1876, against Louisa M. Shale, and others, heirs of Henry Beckman, Sr., to recover such portion of a certain tract of land as still remains unsold in the hands of the defendants and for an accounting and recovery of the net proceeds of such portions of said land as have been sold by them.

The land in controversy is the same tract as the one in litigation in the case of *Ostendorf et al* v. *Shale et al,* decided by this court March 27, 1905, and affirmed by the Supreme Court, without report, in 75 O. S., 581, and the facts in the two cases are largely identical. It is therefore unnecessary now to make a complete re-statement of the matter.

Suffice it to say that the land in question was sold in 1877, under an order made by the probate court of this county in a proceeding for the sale of lands to pay the debts of Dr. Lammersman's estate. Henry Beckman, Sr., was one of the appraisers of said land in said proceeding, and Henry Beckman, Jr., his son, purchased the land at the executor's sale which ensued, paying therefor, in addition to the assumption of a subsisting lien thereon and the execution and delivery of his own mortgage notes, the sum of $1,053 in cash. It further appears that Henry Beckman, Sr., withdrew from his bank account at the time of this sale a sum of money precisely equal to the cash payment thus made. Subsequently, Henry Beckman, Jr., conveyed the same land to his mother, then the guardian of her husband, Henry Beckman, Sr., under circumstances which, as we formerly held, and now hold, clearly indicate that the son intended to disclaim any beneficial interest in the property and meant the conveyance to inure to the benefit of his father.

In the former case we reached this conclusion, without deeming it essential thereto to hold unequivocally that said purchase by Henry Beckman, Jr., was made upon a secret trust for his father in fraud of the Lammersman estate. But in the present case on the facts in evidence before us we can not avoid this conclusion. Without rehearsing all the circumstances *pro* and *con* which bear upon the question of the intention of the Beckmans,

father and son, concerning the purchase of the land, we are unable to escape the force of the coincidence above referred to in regard to the cash payment and the subsequent declarations made by the son disclaiming beneficial ownership of the land in controversy.

Having found that a trust was contemplated, we must also conclude that it was conceived and executed in flat violation of the act of March 29, 1841 (39 Ohio Laws, part 1, page 42), entitled "An act declaratory of the law in certain cases, and to prohibit the appraisers of land from purchasing the same," Section 1 whereof provided:

"No appraiser of any lot or tract of land, which shall hereafter be directed to be sold under the provisions of any law of this state, shall become the purchaser thereof, at any sale, wherein the price for which such real estate must sell, shall be governed by the valuation made by him, as one of the appraisers thereof."

We do not deem valid the contention that, because the appraisal and sale, in proceedings for the sale of land of deceased persons to pay their debts, are subject to the judicial oversight and confirmation of the court in which such proceedings may be brought, this act is rendered inapplicable in that the price for which such real estate must sell is not governed by the valuation made by the appraisers. Their relation to the sale in such cases is not essentially different from that in execution sales.

The act in question is, moreover, affirmed by the General Assembly to be declaratory of the law in such cases, and as so declared the rule is identical with that previously laid down by the Supreme Court in *Armstrong* v. *Huston's Heirs*, 8 Ohio, 552. It is true there is some difficulty on this point in the opinion of the court in *Bohart et al* v. *Atkinson*, 14 Ohio, 228, where it was held that: "In proceedings in partition, an appraiser, in the absence of fraud, prior to the act of March 29, 1841, might become a purchaser at the sheriff's sale." But the court pointed out (page 237) that in the partition sale, unlike sales by personal representatives, "The object of the proceeding was to enable several co-tenants to enjoy each his own in severalty. A sale

could not take place until each and all of the tenants in common had declined in court to take the property at its appraised value." Thus the opportunity for an appraiser fraudulently to purchase property undervalued for partition can seldom arise.

The act of March 29, 1841, after the Lammersman sale took place, was superseded in the revision of 1880 by Section 5404, Revised Statutes of Ohio, which is construed in *Hurst et al* v. *Fisher et al,* 64 Ohio State, 530, in the *per curiam*, at page 531, as follows:

"Where it appears, as in the present case, that the successful bidder at a sheriff's sale of land was one of the appraisers on whose appraisal the land was valued for sale; that the purchaser attempted to discourage other bidders at the sale and prevent them from bidding; that the land probably did not bring its real value, and that the owners (the judgment debtors) were not aware of the facts as stated until after confirmation of the sale, execution of a deed and distribution of the purchase money, a proper enforcement of the policy expressed in Section 5404, Revised Statutes, requires that the sale be set aside and the land again offered for sale, even though no guaranty is offered that the land will bring more. The remedy may prove somewhat harsh upon the purchaser, but if so, he has only himself to blame for the dilemma in which he finds himself placed."

This language, it will be observed, is of the mildest character and may be taken to imply that in the absence of actual fraud the court will not be reluctant to give intervening equities their due weight. Thus, as was held in *Terrill* v. *Auchauer*, 14 Ohio St., 80:

"A purchase of real estate at a judicial sale, by one who, at the appraisement under which such sale was made, served as an appraiser, is not, under the provisions of Section 441 of the code, strictly void, but is voidable only; and will 'be considered fraudulent and void,' only on an interposition or proceeding by a party in interest directly for the purpose of avoiding such sale."

It is true, as held in *Armstrong* v. *Huston's Heirs, supra,* that: "An appraiser of land at an administrator's sale, stands in such relation that his purchase, without fraud, will be set

aside at the instance of the heirs." But it was distinctly held in *Wade* v. *Pettibone*, 11 Ohio, 57, that this right "must be asserted within a reasonable time after notice of such purchase."

Here no claim is made that the Lammersman property was undervalued by Henry Beckman, Sr., and his co-appraisers. On the contrary, it is affirmatively shown that the appraisal was entirely adequate. The Lammersman estate was not actually defrauded by the Beckmans, father and son, in their subsequent purchase of the land. The fraud here relied on is constructive only and derives its sole basis and support from the provisions of the statute and the common law rule of which it is declaratory.

Moreover, the plaintiffs here were parties to the judicial proceeding which culminated in the sale in question. The record of that proceeding produced here shows that they were duly served with summons, and they are therefore conclusively chargeable with notice of each and every step, including the appraisal by Henry Beckman, the sale to Henry Beckman, Jr., and the confirmation of these acts. They may reasonably be presumed to have known also that Henry Beckman and Henry Beckman, Jr., were father and son. If there was any badge or suggestion of fraud, however slight, manifest in this coincidence of names and relationship of parties, the plaintiffs will be affected with notice of whatever further facts would have been disclosed confirmatory of such indication, had they then followed the matter up with reasonable diligence. In *Kernohan* v. *Durham et al,* 48 Ohio State, 1, it is said in the opinion of the court, by Dickman, J., at page 19:

"Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to nor tend to show an *actual* notice, but which are sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, claim, or right; and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth—to a knowledge of the interest, claim or right, which really exists; the party is absolutely charged with a constructive notice of such interest, claim or right. The presumption of knowledge is then conclusive."

Counsel for plaintiffs, in argument before us contended earnestly for the proposition that the law is or ought to be such as to preclude and make void unlawful purchases not only by appraisers, administrators, and other fiduciaries, but also by any member of their immediate families. The inference thus urged has indeed been countenanced to same extent in *Riddle et al* v. *Roll et al*, 24 Ohio St., 572, where an administrator's sale was set aside in equity because the land was conveyed to a trustee for the use of the administrator's wife during her life with remainder to her children begotten by him, and with power in the wife to sell the land, although it was clearly shown that the wife, having ample means of her own, in fact paid for the property with no assistance from and no previous understanding with her husband.

That the relation of father and son under such circumstances, though not so close as that of husband and wife, may nevertheless be suggestive of actual fraud, has not indeed been decided by our own Supreme Court, but is distinctly intimated in sundry other jurisdictions. *Trefts* v. *King*, 18 Pa. State, 157; *Ringgold* v. *Waggoner*, 14 Arkansas, 69.

It may be remarked parenthetically that at the time the Lammersman sale took place in 1877, there was little or no incentive on the part of his heirs and legatees to follow up a clew of this sort with any diligence whatever, for the Lammersman estate was hopelessly insolvent and the sale was, as already noted, plainly destitute of any actual fraud as distinguished from the constructive fraud which the law implies under the circumstances of this case. The property was at that time, farm land. Thirty years later, when this suit was instituted, it had become highly valuable property in one of the best residence sections of the city of Cleveland. Had there been in 1877 any such reward for diligence in detecting and following up irregularities in the sale as are now offered to the plaintiffs in this action, it can hardly be doubted that the coincidence of names of appraiser and purchaser would have been seized upon as a badge of fraud and a clew with which to prosecute further inquiries with as much diligence as is now mainfested. Had such been the case the

plaintiffs should then easily have discovered that Henry Beckman, Jr., was a young man living with his father and without means of his own. They should have discovered by interrogatories, or otherwise, where Henry Beckman, Sr., kept his bank account, and they would have ascertained that he withdrew the sum of $1,053 therefrom on the very day that his son paid the $1,053 for the property in question. In other words, they would then have uncovered the secret trust which we now find existed at the time, but which for lack of incentive they did not seek out nor discover until the litigation in the Beckman family in the case of *Ostendorf et al* v. *Shale et al, supra,* disclosed to the world the skeleton in the closet.

Thus, after the lapse of thirty years, when the Beckmans, father and son, are both dead, when the property in question is vastly increased in value, when a large part of the property has been sold off, when the Beckman heirs have conformed their lives to a state of the family fortune which they had no more reason to suspect was tainted than had the plaintiffs in this case, we are asked upon our consciences as a court of equity to transfer this property upon a mere technicality to those from whom no value was ever taken, and who, had the sale in 1877 been conducted with the utmost regularity, would never have enjoyed any portion of that which they now claim.

To a majority of the court this seems so utterly repugnant to equity and good conscience that we can not accede to it. A lapse of thirty years, after constructive knowledge to the plaintiffs of such merely technical fraud as that here complained of, renders their equity utterly stale.

In *Webster et al* v. *Bible Society*, 50 Ohio State, 1, the opinion of the court by Williams, J., at page 18, cites with approval *Baker* v. *Read*, 18 Beavan, 398, wherein "a bill, after seventeen years, to set aside a purchase of the testator's estate by his executor, at an undervalue, was dismissed on the ground of delay, although the court was clear that the sale, if recent, should be set aside." And the entire opinion may be studied with profit upon the question whether the lapse of so long a period should not take from any appeal to equity, under such circumstances

as here appear, much, if not all of its original persuasiveness. See, also, 5 Pomeroy's Equity Jurisprudence, Section 23, *et seq.*, and many authorities there cited.

Slight circumstances may well be seized upon in such cases to affect the plaintiffs with constructive notice and consequent laches or acquiescence, and the circumstances which manifestly challenged investigation of this sale at the time it took place, were to our mind, by no means slight. The plaintiffs must be held to have acquiesced in this sale, which, though they had the means of knowing that it was irregular, they forbore to challenge, because they had no substantial motive at that time for endeavoring to overturn it.

The petition is dismissed.

EFFECT OF GIVING BOND UNDER VOID ATTACHMENT.

Circuit Court of Hamilton County.

BROWN & KETCHAM IRON COMPANY v. L. P. HAZEN & COMPANY.

Decided, January 4, 1908.

Jurisdiction—Giving of Bond does not confer, in Attachment Proceedings, When.

In an attachment proceeding which is rendered void by a defect in the affidavit, jurisdiction is not conferred over the defendant by reason of the fact that he has given bond.

Cobb, Howard & Bailey, for plaintiff in error.
Raymond Ratliff, contra.

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

Upon the authority of *Ward* v. *Ward,* 20 C. C., 136, we are of the opinion that the affidavit for attachment filed herein was void. This being so, did the giving of a bond by the defendant below to discharge the attachment have the effect of submitting the defendant to the jurisdiction of the court? We think not. See *Saxton* v. *Plymire,* 3 C. C., 209. The court therefore erred in overruling the motion of plaintiff in error to discharge the attachment, and said judgment is reversed.

BLENDING OF PERSONAL PROPERTY AND PROCEEDS OF REALTY.

Circuit Court of Henry County.

BOSTON GILSON, EXECUTOR, v. MARY A. GILSON.

Decided, October Term, 1907.

Wills—Rights of a Widow who Elected not to Take—Undevised Portion Applicable to Payment of Debts—Other Portions of Real Estate Exonerated Therefrom—Proceeds for Sale of Realty can not be Blended with Personalty, When—Doctrine of Equitable Conversion not Applicable, When.

A testator left all of his personal property and a life interest in his realty to his widow. The will provided that, after the death of the widow, the real estate should be sold by the executor and the proceeds divided into nine parts, eight of which were given to specified heirs and one part was left undisposed of. The widow elected not to take under the will and received her statutory allowances of dower and year's support. Upon the sale of the real estate by the executor under authority of the probate court: *Held*—

1. That the undevised one-ninth is first applicable to the payment of testator's debts in exoneration of the real estate that was devised.
2. That as the will contains no provision for the blending into one fund of the personal property and the proceeds of the realty; but on the contrary treats the two as distinct classes of property and contemplates a sale of the realty only after the death of the widow. The doctrine of equitable conversion does not apply and the widow is not entitled to a distributive share in the proceeds of the realty after its sale. *Hutchings* v. *Davis*, 68 Ohio St., 160, distinguished.

Donovan & Dittmer, for plaintiff.

W. W. Campbell, Donovan & Warden, for defendant.

HURIN, J.; HAYNES, J., and WILDMAN, J. (of the Sixth Circuit, sitting in place of NORRIS, J., and DONNELLY, J), concur.

Appeal from Henry Common Pleas Court.

The essential facts in this case are agreed upon and are as follows:

The defendant, Mary A. Gilson, is the widow of David D. Gilson, deceased, who died, testate and childless, November 21, 1904. The will of David D. Gilson gave to his widow, Mary A. Gilson, a life interest in all his real estate besides giving her all of his personal property which she was to have absolutely. The will directed that the real estate be sold by the executor after the death of testator's wife, and the proceeds divided among eight classes of heirs, one-ninth to each (leaving one-ninth undisposed of).

The widow elected not to take under the will and has received all of her statutory allowances of dower and year's support. The land has been sold by the executor, the personal property not being sufficient to pay the debts; all debts of the testator have been paid out of the joint proceeds of the personal and real property and the widow now demands, in addition to what she has already received, her distributive share of the proceeds of the land considered as personal property. She also demands, as her husband's heir at law, the undevised one-ninth of his real estate or the proceeds thereof.

The debts now paid amounted to about the same amount as the proceeds of the one-ninth of the real estate which was undisposed of by will. The executor in this suit asks a construction of the will. On the facts thus disclosed, two questions arise:

1. What disposition should be made of the one-ninth of the estate which was not disposed of by will?

2. Has the widow, having received in money the value of her dower interest in the land and of her year's support, the right to further demand a widow's share of the value of that real estate considered as personalty after its sale by the executor?

The first question presents no great difficulty. By Section 5972, Revised Statutes, it is provided that when the "personal estate shall be insufficient for the payment of his debts, the undevised real estate shall be first chargable with the debts, in exoneration as far as it will go of the real estate that is devised, unless it shall appear from the will that a different arrangement of his assets for the payment of his debts was made

by the testator; in which case they shall be applied for that purpose in conformity with the provisions of the will."

Under the provisions of the will of David D. Gilson, all the real estate was to be sold by the executor after the widow's death, all the personal property having been bequeathed to the widow, and the proceeds of said real estate were to be divided into nine parts, one of which was by an apparent oversight undisposed of. No special provision was made for the payment of debts out of any specific fund.

The assets in the executor's hands after the payment of the widow's allowance were not sufficient to pay the debts of the estate. The real estate was sold, not in conformity to the will, but necessarily sold in order to pay debts. The one-ninth of the estate being only equal to the amount of the debts, it is clear that, under the letter and spirit of Section 5972, Revised Statutes, the portions actually disposed of by will should be exonerated from contribution to the payment of these debts, in so far as the portion undisposed of, together with the balance of the personal property will suffice to pay them. The widow therefore can not claim as heir this portion undisposed of by will and require the legatees to contribute to pay the debts out of the portions devised or bequeathed to them.

But the second question is a more serious one.

The widow has already received in money the value of her dower interest in the real estate, as real estate. Is she also entitled to share in the proceeds of that same real estate after it has been sold, considering such proceeds personalty, and by so doing reduce the share of each legatee?

This question depends for its answer upon the preliminary question, whether the sale of the land by the executor changed its character and required the proceeds to be treated as personalty and not as real estate. We are cited to the leading case of *Hutchings* v. *Davis*, 68 Ohio St., 160, where it is held:

"The positive direction by a testator to sell all of his real estate and to blend the proceeds with his personal property in one fund for the distribution of his whole estate according to the scheme of the will, makes an absolute conversion for all pur-

poses into personal property, which should be distributed as personal property, even if the special object intended by the testator should fail.

"A widow for whom no provision is made in her husband's will and who has been paid the value of her dower in money from the proceeds of the sale of real estate, converted into personal property pursuant to a direction in the will, is not thereby precluded from asserting and receiving the widow's distributive share in such proceeds as well as in the other personal property of the testator."

That case and the one at bar are at first sight hardly distinguishable. While in the case at bar there was a provision in the will for the widow, yet she elected not to take under the will and as to her the will must be construed and executed as if she had not been mentioned in it.

There is, however, this serious difference between the two cases. In *Hutchings* v. *Davis, supra,* the will provided for the sale of all of the real estate within two years of testator's death, practically an immediate conversion into personalty. In the case at bar the land was not by the terms of the will to be sold till after the death of the widow, who was to have a life interest in it as realty.

In *Hutchings* v. *Davis, supra,* the testator was not a married man at the time he made his will and he consequently made no provision whatever for his wife. In the case at bar the wife is not only provided for and given all the personal property *absolutely* (which was not, therefore, to be blended in one fund with the real estate), but she is given a life interest in all the real estate, and it is only at her death that the intention to convert it into personalty was to be carried into effect and even then there was no provision for blending it with the personalty. In fact, however, it became necessary to sell it sooner to pay debts, and it was so sold by the executor. Probably it might have been so sold by the executor even if its sale was not necessary to pay debts, for the widow having elected not to take under the will and having thereby waived her right to enjoy a life interest in the real estate, the reason provided by the will for postponing the

sale of that real estate had failed, and under the doctrine known as "accelleration" the executor might have sold the land in order to execute his trust and wind up the estate, even though the widow still lived.

But, even in that event, this case would have been clearly distinguishable from *Hutchings* v. *Davis*, for that depended upon the fact that, *by the terms of the will*, the real and personal property were directed to be blended in one fund, and the court held, Judge Shauck dissenting, that this amounted to an equitable conversion of the real estate into personalty.

Does this rule apply where, as in the case at bar, the will did not contemplate a conversion during the life of the widow and where the sale by the executor during the widow's life was only authorized by the necessity of paying debts or, after her waiver of the life estate, by the executor's wish to wind up the estate; and where there was no provision for the blending of the two kinds of property in one fund? Can the testator be said to have intended to effect an equitable conversion of his real estate estate into personalty when he expressly provides that, so far as the widow is concerned, she shall hold it and use it as real estate all the days of her life and that only at her death shall it be sold?

In the case of *Craig* v. *Leslie*, 16 U. S. (3 Wheat.), 563, 577, Washington, J., in his opinion, quotes with approval from *Fletcher* v. *Ashburner*, 1 Bro. Ch. Cas., 497, the doctrine that. "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted." But while this is the settled law, it may well be doubted whether it can be held to apply for the benefit of one during whose lifetime the will directed the land to be held as land, and at whose death only the conversion was to be made. In the case of *Furgeson* v. *Stuart*, 14 Ohio, 140, it was held that "Land directed by a will to be sold and converted into money, is treated as personal estate," but there the will provided for an immediate conversion—no life estate intervened, nor were there any devisees of the realty, a very different case from the one at bar.

And, by statute, Section 6171:

"In all cases of a sale by an executor or administrator of part or the whole of the real estate of the deceased, under an order of court, * * * the surplus of the proceeds of the sale remaining on the final settlement of the account, shall be considered as real estate, and shall be disposed of accordingly."

And in the case of *Griswold* v. *Frink*, 22 Ohio St., 79, it was held that:

"The surplus of the proceeds of a sale of real estate by an administrator, remaining in his hands on the final settlement of his account, under the statute is to be considered and disposed of as *real estate*, and the widow of the intestate is not entitled to any part thereof in her capacity as one of the distributees of the *personal* estate."

This decision has never been overruled unless by implication in *Hutchings* v. *Davis, supra.*

If, then, the land in the case at bar was sold by the executor under an order of court (as it was—the will itself so provides), and in order to pay debts, for this is the evident meaning of the statute as recognized by the court in the statement of facts in *Griswold* v. *Frink, supra,* the surplus of the proceeds of the sale must still be considered and disposed of as real estate and not as personalty.

And there seems to be especially good reason for applying this rule to this case. The testator, by giving to his wife a life interest in the real estate and providing for its sale only after the termination of that estate, shows that he thought of it only as real estate so far as she was concerned. By giving to her all his personal property and in addition to that, the life estate in the realty, he shows that he distinguished between personal and real property. He even thought of it as realty after it was sold, for he uses the word "devisees" in describing those among whom the proceeds were to be divided, while he uses the two terms "devises" and "bequests" to describe respectively the devise of the real estate to the other heirs and the bequest of his personal property to his wife, thus showing that he recognized the legal significance of these terms and the distinction between them.

Some importance is attached by counsel to the significance of the provision of the will of David D. Gilson that the devises to his beneficiaries other than his wife shall be treated as debts. This is perhaps important as an aid to our conclusion for, if they are debts of the estate, then they must be paid by the executor and are not subject to distribution as assets of the estate. Hence the widow would be entitled to no share in their proceeds.

There seems, therefore, to be especially sound reason for applying to this case the rule stated in the dissenting opinion of Judge Shauck in the case of *Hutchings* v. *Davis, supra,* where he says:

"The view seems to be (referring to the opinion of the majority of the court), that the testator was entrapped in the equitable doctrine of conversion. But that doctrine was devised, and it should be applied, to effectuate intention, not to defeat it. It may, therefore, be invoked by one who claims under an instrument, not by one who claims against it."

We have read with care numerous authorities cited by counsel for Mrs. Gilson to uphold the doctrine that a sale of real estate by an executor in accordance with the terms of a will is *per se* an equitable conversion of the realty into personalty.

In most, if not all, of the Ohio cases so cited this conclusion is reached from the peculiar language of the will there under discussion—the intention of the testator controlling the decision of the case. While the rule probably differs in different states and it appears that in some of them the authorized sale of the land by the executor converts it, *co instanti,* into personalty, such does not seem to be the rule in Ohio and is not, we think, founded on sound reason. Not even in *Hutchings* v. *Davis, supra,* is so broad a view endorsed.

But, while the rule laid down in *Hutchings* v. *Davis* is the final expression of the law of this state as applied to such a state of facts as was disclosed in that case, the courts of other states have shown great reluctance to recognize that rule; and particularly is this the case in the state of Pennsylvania.

In *In re Cunningham's Estate,* 137 Pa. St., 621 (20 Atl. Rep., 714), it was held that—

"Where a will directs the conversion of real into personal property, but the widow elects to take under the statute, her rights are fixed irrespective of the will, and she can not claim that the conversion operated in her favor so as to entitle her to one-half the fund absolutely. As to her, the fund must be regarded as realty, and she is only entitled to one-half interest therein for life."

And in that case it was said by Mitchell, J., in deciding the case:

"'Election,' in the sense that applies to the present contention, means 'a choice between two courses of action; acquiescence by the widow in her husband's disposition of his property, or disregard of it and assertion of the rights the law gives her.' There is no third or mixed course. Her legal rights, which are paramount to the husband's control, attach *eo instanti* that he dies, and there is no interval during which the will can slip in and work a conversion, and then stand aside to let in her intestate rights upon the converted estate. Conversion takes place by virtue of the will, but as to the widow so electing there is no will. She must make her choice and it is will or no will. * * * The law does not permit her to say there is a will for conversion, and no will as to her share. * * * The election which the widow is required to make is between rights, not between benefits."

And in *In re Petterson*, 198 Pa. St., 78 (45 Atl. Rep., 654), it was held that, "A conversion worked by direction in a will to sell is inoperative as to the testator's widow, electing to take against the will."

And in *Hoover* v. *Landis*, 76 Pa. St., 354, the same rule is announced, as follows:

"By her (the widow's) election the intestate laws superseded the will as to her, and excluded the power of conversion under the will so far as it affected her estate. Having declined to accept under the will, as to her there was no will and she could not claim her share of the proceeds of a sale by the executor, absolutely as personalty."

And this seems also to be the rule in Kentucky, for in *Barnett* v. *Barnett*, 58 Ky., 254, it was held that:

"A widow, renouncing the provisions of her husband's will under the act of 1797 (2 Stat. at L., 1544), has a right of dower in lands which are directed by the will to be sold by the executor, and the proceeds paid to the devisees and being so entitled, she can not claim an interest in them as personal estate, converted into that character by the terms of the will."

The same rule seems to apply in Tennessee. See *Armstrong* v. *Park,* 28 Tenn. (9 Humph.), 195.

In New York, too, the courts have taken the same stand; *e. g.,* in *Brink* v. *Layton,* 2 Redf. (N. Y.), 79, it was held:

"An absolute direction in the will to sell real estate, since it effects an equitable conversion from the time of the testator's death, is inconsistent with a right of dower in the widow, and she should be put to her election whether to take a share of the proceeds of conversion or to claim dower."

And in *Asch* v. *Asch,* 113 N. Y., 232, the judge rendering the opinion said:

"Although there is no express language providing that the bequest to the widow shall be in lieu of dower, yet, where there is a manifest incompatibility between such provision and dower, it is held that she can not take both, and is put to her election between them." Citing *Vernon* v. *Vernon,* 53 N. Y., 351; *Konvalinka* v. *Schlegel,* 104 N. Y., 125; *In re Zahrt,* 94 N. Y., 605.

It thus appears that the rule as stated in *Hutchings* v. *Davis, supra,* is not in accordance with many excellent authorities in other states and that even that rule was based on a condition of facts not paralleled in the case at bar and can not therefore fairly apply to this case.

It appears also that the evident intention of the testator in the case at bar as disclosed by his will was not to effect a conversion of his realty into personalty for the benefit of his widow. It is inconceivable that such a thought was in his mind when he executed this will. He expressly provides for her in a way utterly inconsistent with such a construction.

Under the well recognized rule of construction that the intention of the testator should control, as well as for the other rea-

sons which we have stated, the finding of the court will be that the widow is not entitled to share in the proceeds of the realty.

Decree accordingly.

ACCOUNTING FOR STOCK HELD IN TRUST.

Circuit Court of Hamilton County.

CARRIE E. BONNELL AND ALLIE L. MORRIS v. FRANK W. BROWN.

Decided, March 7, 1908.

Assignment of Stock to Brother for Voting Purposes—Lapse of Time not a Bar to Recovery—How Trust may be Disclaimed—Laches—Statute of Limitations—Accounting—Title.

Where stock in a turnpike company, not paying dividends, was assigned by sisters to their brother for the purpose of enabling him to be elected to the salaried position of secretary and treasurer of the company, and he thus held the stock for many years and until it became valuable, he will not be heard in an action by the sisters for an accounting to plead laches or the statute of limitations, but under the evidence in this case a trust is fastened by parol, and an accounting will be ordered.

C. W. Baker, for plaintiff.
Horstman & Horstman, for defendant.

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

This case involves the title to 2006 shares of stock in the Reading Turnpike Company which originally belonged to the estate of Lloyd S. Brown, deceased, father of plaintiffs and defendant. The plaintiffs claim that they assigned their interest therein to the defendant in trust to enable him to be elected as secretary and treasurer of the company, and that he agreed to account to them for all dividends declared and the proceeds of any sale that might be made of the turnpike; on the other hand the defendant claims that the transfer was absolute upon consideration that he agreed to and did assume the payment of a debt of $4,613.88, owing by the estate of Lloyd S. Brown, deceased, to the turnpike company, which consisted of unpaid and unclaimed

dividends to sundry stockholders and held by Brown as treasurer of the company.

The plaintiffs testify positively that on account of their youth and inexperience in business they requested delay in making the transfer in order to obtain the independent advice by their counsel, Judge Conner, but being assured by defendant that he would account to them for all dividends and proceeds of sale received by him, and relying upon such promise and having implicit confidence in him as their brother, they joined with their mother, as administratrix of the estate, in a transfer of the stock to the defendant. He testifies at pages 235 and 236 of the transcript of the evidence that negotiations were had with his mother and Mr. John Cooper, president of the company, and that he finally accepted the stock and agreed to assume the debt of the estate. He denies that he had any conversation with his sisters, and it nowhere appears that the mother was authorized or assumed to act for them, or that they were informed of the result of the negotiations, except as may be inferred from the act of signing the transfer, which is not by them denied and is entirely consistent with their version of the transaction.

The defendant's own testimony therefore fails to show that the contract with the mother was binding upon the sisters unless afterwards ratified by them, and in the absence of other contradictory evidence we must hold the proof offered by plaintiffs to be of that clear and convincing character necessary to fasten a trust by parol evidence upon a conveyance absolute.

The defendant pleads laches and the statute of limitations; but lapse of time as between trustee and *cestui que* trust is no bar, unless the trustee disclaims the trust either expressly or by acts that necessarily imply a disclaimer for a period equal to that prescribed in the act of limitations. *Williams* v. *The First Pres. Soc. of Cincinnati,* 1 O. S., 478; Section 4974, Revised Statutes.

The turnpike stock was transferred in 1881, and about ten or twelve years thereafter one of the plaintiffs, according to their testimony, made demand of defendant for her share of the dividends, and he replied "you will never get it" and at another time he made no reply to the demand, but took his hat and walked

out of the house in a petulent mood, or as the witness expressed it "got mad." This and other like testimony of the plaintiffs does not necessarily imply a disclaimer of the trust, and the testimony of the defendant excludes any thought or opportunity of disclaiming as appears at page 237, to-wit:

"Q. When did you see your sisters to talk anything about that transaction after it occurred? A. Well I never had any talk with them, except they would twit me in a sarcastic manner for years afterwards; they knew I wasn't making any money for years afterwards out of it; didn't until after Mr. Cooper's death."

Again at page 240:

"Q. Did either of them at any time until shortly prior to the commencement of this suit ask for any part of the dividends or of the pike proceeds? A. Never have asked me. The first intimation I ever had that they thought they were entitled to anything out of this pike was a letter I received from Judge Ferris asking me to come to his consultation room in the city. I received that letter during the first week of September, 1904, about three months before they brought this suit."

The plaintiffs aver in their amended petition that their brother promised that if they would transfer their stock to his name, so that he would appear as the owner of the same, he would pay out of his salary any dividends as their father's estate might be liable for, and that he was then drawing a large salary.

They testify that they understood at that time that he receiving a salary of $1,200 per annum.

We are of opinion therefore that he is entitled to credit himself with such amount as will together with the salary received make an allowance of $1,200 per annum from the date of the transfer until demand made in 1893 for an account; and thereafter, having rendered valuable services in the interest of the trust, he should be allowed a credit of such sum as will together with the salary received amount to $600 per annum until 1904, when a portion of the pike was sold; all such amounts to bear interest. He should also account for all dividends and proceeds of sale received by him on account of such stock together with interest on the several amounts from the time received. We

find the amount in the hands of defendant to be accounted for October 3, 1907, $9,904.18, subject to verification by counsel.

Decree accordingly.

NEGLIGENCE AT A FOOTWAY OVER RAILWAY TRACKS.

Circuit Court of Montgomery County.

LENA LEAR, ADMINISTRATRIX, v. C., H. & D. RY. CO. *

Negligence—License to Use Footway across Railroad Tracks—Child Run Over at such a Crossing—Questions for the Jury—Verdict for Defendant in Negligence Case—Improperly Directed, When.

1. Permission to construct and maintain a footway across railroad tracks, or long use of such a crossing, implies a license to pedestrians to cross at that point, and the rights of persons using such footway are not to be determined by rules applicable to mere trespassers; and where a child nine years of age is struck by a train at such a crossing, it is a question for the jury whether he could have avoided injury by a proper use of his faculties.
2. Where the undisputed facts do not show negligence on the part of the plaintiff contributing to the injury, and there is evidence tending to show negligence on the part of the defendant, it is error to direct a verdict for the defendant.

The amended petition alleges that the defendant's railroad extends through a thickly inhabited section of the city of Dayton, a portion thereof extending from Washington street to Homestead avenue; that the portion of the railroad lying between said streets as aforesaid had been used by the public, including children, in general as a passageway for foot passengers from and between said streets, with defendant's knowledge, consent and acquiescence for some time previous to the injury complained of; that deceased, a child nine years of age, while walking along the railroad track between the streets aforesaid was negligently run over and killed.

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* Affirmed by the Supreme Court without report (60 Ohio State, 602).

SHEARER, J.; SUMMERS, J., and WILSON, J., concur.

The judgment herein must be reversed for error in withdrawing the case from the jury and giving judgment for defendant.

There is evidence tending to show negligence on the part of the company in failing to stop the train; a conflict as to the distance within which it could have been stopped, etc.

There is also evidence on the question of the negligence of the decedent which should have been submitted to the jury, whether by the use of his faculties under all the circumstances he could have avoided the injury.

The decedent does not seem to have been a trespasser. Long use of the crossing and the permission to some one to construct and maintain a footway across the track or construction and maintenance of the same by the company itself (which does not appear) implies a license to foot passengers to cross the track at that point. The right of the parties are, therefore, not to be determined by the same rule which would apply in case the deceased was a mere trespasser. Whether he was a trespasser was a question that should have been submitted to the jury.

The undisputed facts do not show negligence of the deceased contributing to the injury, and there is evidence tending to show negligence of the company.

Reversed and new trial granted.

RESTRICTIONS IN LEASE.

Circuit Court of Hamilton County.

THE APOLLO CIGAR CO. v. ROBERT J. O'BRIEN ET AL.

Decided, February 15, 1908.

Covenants of Restriction—Construction of, where of Doubtful Meaning —Breach Alleged as to Cigar Privilege.

The rule that, where there is doubt as to the meaning of a covenant of restriction it must be resolved adversely to the restriction, forbids a finding that a breach has occurred in the covenant of the lease involved in this case as to cigar privileges in other parts of the same building.

Frank J. Dorger and *Denis F. Cash,* for the demurrer.
Karl H. Cadwell, contra.

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

It appears from the petition that the plaintiff leased from the defendant, O'Brien, "the first floor and basement of the four-story brick building known as No. 11 East Sixth street, and forming a part of the Hotel Savoy building, from Nos. 5 to 15 inclusive, East Sixth street, Cincinnati, Ohio," and that in the lease he agreed for himself and his assigns—

"That he will not rent any of the store rooms connected with the Hotel Savoy building, numbered 5 to 15 inclusive, East Sixth street, for a cigar and tobacco business, during the occupancy of this plaintiff herein, excepting that the defendant, Robert J. O'Brien, expressly reserved the right to sell cigars, tobacco, smoker's articles, magazines and periodicals at a stand not to exceed eight feet in length in the hotel office, at the bar connected with the said hotel, and from a stand in a restaurant, if one should be established and a cigar stand desired, which latter stand was also not to exceed eight feet in length, the said stands to be located at the hotel office desk, and the restaurant cashier's desk."

The first part of the above allegation sets up a restriction of the right of the lessor to rent any of the other store rooms for

a cigar and tobacco business. It does not in terms nor by implication refer to or apply to the hotel office or lobby. The rest of the allegation states an apparent exception to or reservation in the restrictive clause, but can have no application as such unless the lessor or his assigns should conclude to establish a restaurant in one of the aforesaid store rooms. In other words, the lessor had conveyed no right pertaining to the hotel office nor restricted the use thereof in any way that would require or permit an exception or reservation. It may be said, however, that from the designation of a specific location and size of the cigar stand in the hotel office, an intention to so restrict it may be inferred; but it seems well settled in cases of this kind all doubts must be resolved in favor of natural rights and against restrictions thereon. If there is doubt as to the meaning of the covenant, it must be resolved adversely to the restriction, but in determining its meaning, that must be found from the language used, which is not to be extended or enlarged by implication. *The Postal Tel. Co.* v. *Western Union Tel. Co.*, 155 Ill., 335.

The erection and maintenance in the hotel lobby of a cigar stand sixteen feet in length by the Hotel Savoy Co., one of the lessor's assigns, is not therefore a breach of the covenant in the lease, and the demurrer to the petition will be sustained.

EVIDENCE OF CUSTOM WITH REFERENCE TO THE MANNER OF PERFORMING WORK.

Circuit Court of Lucas County.

PHILIP SCHWARTZ v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Decided, March 5, 1907.

Negligence—Brakeman Injured While Coupling Cars—Failure of Automatic Coupler to Work—Custom with Reference to Signals and Going Between Cars—Admissibility of Testimony Having Reference to Such Custom—Error in Directing Verdict for Defendant.

The local yard custom among brakemen, upon discovering that a car coupler would not would not couple, as to giving the usual stop signal and stepping between the cars to adjust the coupler, is admissible to meet a charge of contributory negligence against a brakeman injured by stepping between a car and locomotive tender to adjust the coupling device. *L. S. & M. S. Ry.* v. *Botefuhr*, 10 C. C. —N. S., 281, reaffirmed.

Marshall & Fraser, for plaintiff in error.
Doyle & Lewis, contra.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

This is a proceeding to reverse the judgment of the court of common pleas rendered in an action brought by Schwartz, for personal injuries, caused as he claims by the negligence of the defendant company. Upon the trial in the court of common pleas, at the close of plaintiff's evidence, the court directed a verdict for the defendant, upon two grounds: That the evidence failed to show negligence on the part of the company, and that it disclosed contributory negligence on the part of the plaintiff. The case is one of a character not unfamiliar to courts. The plaintiff was a brakeman in the employ of the defendant company and received severe injuries while engaged in coupling cars upon a train. He was between the tender of the locomotive and a car, when in obedience to a signal from the conductor the locomotive was moved, without warning to

Schwartz, and his arm was crushed. I will not attempt in more detail a review of the evidence in the case, but will give my attention to one or two points which are claimed in the petition in error as ground for a new trial.

It is alleged as one ground of error that the court erred in the rejection of evidence offered by the plaintiff. On pages 56 and 57 of the bill of exceptions before us we find an offer of evidence as to the custom of the railway company in switching cars under circumstances like these in the case at bar.

The court, however, sustained the objection to the question, and an exception was taken by counsel for the plaintiff, who at the same time offered to prove by the answer of the witness that "according to the universal custom of the defendant in that railroad yard, the brakeman, after seeing that the coupler would not couple"—it being a mechanical coupling between the tender and the car, which it appeared by the evidence would not work—"would give the engineer the usual stop signal with his hand, and step in between to adjust the knuckle." Then counsel informed the court: "and this will be followed up by questions, which, if permitted to be answered, will draw out the statement from the witness, that according to the custom he would not go to the engineer and tell him what he was going to do or what his signal meant, and he would not before stepping in between the cars wait until he had told the conductor what he was going to do in there; and further that in compliance with the custom the brakeman would not, after the engine stopped, after it was standing still, after he had given the stand signal, he would not before stepping in between look and see whether the engineer was watching." Whereupon the court said: "The objection to the introduction to that testimony will be sustained"; and the defendant excepted.

In the conversation preliminary to this offer, between counsel and the court, the judge in saying that the objection would be sustained added: "I do not understand it to be competent to show what was the proper thing to do by showing what they usually do." The questions by which this evidence was sought

to be elicited from the witness were not very artistically framed, and possibly the court may have been justified in requiring some clearer statement of the interrogatories to the witness; but we gather from the language of the court that it was intended to exclude evidence of that character upon the ground suggested by the court—that it was not competent to show what ought to have been done, or what it was proper to do by what was usually done. We think, however, that if the court intended to exclude all evidence as to a local custom which had obtained in the operation of defendant's trains in the yard, that the court was in error.

It is hardly worth while to cite many authorities, in view of the fact that this question has come before the court on other occasions, and the holding, so far as I know, has been uniformly made that a custom of this character may be shown for its hearing upon the conduct of the parties. A custom of brakemen of going between cars to uncouple and remaining there in supposed security against any danger from moving of the train, would naturally have some effect upon the conduct of the brakeman. His knowledge that the conductor would not be likely, by reason of the custom, to signal for the moving of the train while he was in such a place of danger, bears legitimately on an inquiry whether he exercised ordinary care. The custom would naturally have an effect upon the conduct of the conductor also, because he might assume that the brakeman, having knowledge of such a universal practice, would follow it.

The cases of *Carl* v. *R. R. Co.*, 10 Circuit Court Reports, 711; *Pennsylvania Company* v. *Mahony, Admr.*, 12 Circuit Court, 366; *Memphis, etc.*, v. *Britton*, 1 C. C.—N. S., 33, are all cases which perhaps should be referred to in this connection in support of the position which has just been taken and expressed. The case of *Toledo Railway & Light Co.* v. *Ward*, 2 C. C.—N. S., 256, is another case wherein it is held, as disclosed by the syllabus:

"Evidence of a custom of slackening the speed of electric cars in approaching a particular street crossing is admissible in a trial involving a collision at that crossing, as bearing upon the question of contributory negligence on the part of the one injured."

The case at bar is very similar in some of its aspects to the case of *Pennsylvania Co.* v. *Mahony, supra*; the case of *Andrews* v. *R. R. Co.*, 8 Circuit Court, 584, decided by this court and also the case of *Lake Erie & Western R. R. Co.* v. *Mulcahy*, 16 Circuit Court, 204, decided by the circuit court of the third circuit. Another case almost precisely in point and remarkably like the present one in most of its details, was decided by this court at the last term, Judges Haynes, Parker and Taggart sitting, I being engaged at the time in the Cuyahoga Circuit. The case to which I refer is that of *Lake Shore & M. S. Railway Co.* v. *Botefuhr, Admr.* [10 C. C.—N. S., 281; affirmed by the Supreme Court without report, April 14, 1908.] In this case, as in the others, the principle was announced that evidence as to a custom in a yard was proper to be received. The language in the syllabus of the case is as follows:

"Evidence that it was the custom of a railway conductor to give warning to the trainmen assisting him in the making up of a train in the yards, is admissible upon the question whether, knowing the custom, the conductor exercised ordinary care, and also upon the question of whether the deceased, being aware of the custom and of the habit of the conductor, was guilty of contributory negligence."

In the case at bar Schwartz had been in the employ of the railway company for many years, and it may be said, as in the Ward case, *supra*, that it was a question for the jury whether or not he had such knowledge of a common practice and to what extent his conduct was influenced by it.

Whether we should reverse the judgment because of the rejection of this evidence, it is perhaps unnecessary for us to say. The framing of the question was such that possibly the court may have been justified in refusing to permit it to be answered without some reformation of it so as to make it more clearly express to the witness the meaning of counsel. But I have said this much with regard to this evidence, in view of the claim made that the court erred, and by reason of the fact that we have concluded that the judgment should be reversed on another ground, and we desire to indicate to the trial court what should be the

rule on another trial as to the admission or rejection of evidence of this character.

I will not stop to read further from any of the cases cited. They may be read with profit and interest in connection with the case at bar. We think that even without the evidence which the plaintiff sought to introduce, the court should have permitted the case to go to the jury; that there was at least a scintilla of evidence tending to sustain the claims of plaintiff's petition, and for the error of the court in arresting the case from the jury and directing a verdict for the defendant, the judgment based upon the verdict is set aside and the cause will be remanded for a new trial at the costs of the defendant in error.

INJURY TO A BOY EMPLOYED NEAR A SAW.

Circuit Court of Hamilton County.

THE QUEEN CITY BOX CO. v. GEORGE DUFFY, AN INFANT.

Decided, February 15, 1908.

Negligence—Pleading—Disclaimer by Defendant as to Claim of Contributory Negligence—Error—Charge of Court—Burden of Proof.

In an action for damages for personal injuries, where the defendant has disclaimed any defense of contributory negligence, a charge of court as to the burden of proving negligence on the part of the plaintiff is misleading, and taken in connection with a misstatement of the plaintiff's age as thirteen to fourteen, when he would have been sixteen on his next birthday, constitutes reversible error.

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

The infant, plaintiff below, was injured by a circular saw while engaged in carrying off short pieces of boards as they were cut by the sawyer. It is charged in the petition that the defendant, well knowing the want of skill and intelligence of said infant to understand the danger necessarily attending his employment about such machinery, failed and neglected to warn him of such danger.

The defendant denied that the injury was in any way caused by its negligence, and averred that it was caused wholly by the plaintiff's own negligence.

The jury returned a general verdict in favor of the plaintiff, and in answer to a special interrogatory found that he had not been sufficiently instructed as to the dangers of his employment, and did not appreciate those dangers; but there was no special finding that this omission was the direct cause of the injury, although it may be inferred from the general verdict. It seems doubtful, however, from the charge of the court upon the question of the burden of proof, whether the jury arrived at such conclusion, because after correctly instructing them that the burden of proving the defendant's negligence and that it was the direct cause of the injury rested upon the plaintiff, the following instruction was given:

"The burden of proof is on the defendant to establish the fact which would constitute plaintiff's negligence, if any, and that such negligence was the direct cause of the accident; but if the evidence offered by the plaintiff raises in your mind a presumption of negligence on his part as the direct cause of the accident, he must, by evidence offered by him, that is, by the plaintiff, remove such presumption before you can find a verdict in his favor."

The record also discloses the fact that defendant objected before the charge was given to any instructions upon the subject of contributory negligence of the plaintiff.

If, therefore, the defendant disclaimed any defense of contributory negligence, it is difficult to understand how the burden of proving negligence of the plaintiff and that it was the direct cause of the accident could be on the defendant, except by a strict construction of the allegation in the answer "that the injuries complained of were caused wholly and entirely by the plaintiff's own negligence."

The charge was liable to mislead the jury to believe that although the plaintiff failed to prove that the negligence of the defendant was a direct cause of the accident, the defendant was still bound to prove that the plaintiff's own negligence wholly caused the injuries, unless the evidence of plaintiff

raised a presumption of negligence on his part as the direct cause of the accident.

The allegation of the answer, considered in connection with the disclaimer made before the charge was given, was equivalent to a general denial that the defendant's negligence caused the injuries.

The court also charged the jury as follows:

"At the time of the accident he (the plaintiff) was a child thirteen to fourteen years of age, and when we consider the question as to whether or not he was negligent we must measure his conduct by what a child of that age, and of ordinary prudence, would do or would not do under the circumstances of the case."

The error in this instruction consisted in assuming that the child was thirteen to fourteen years of age when there was testimony tending to prove that he would be sixteen years of age on his next birthday.

In view of the special finding of the jury we are not disposed to hold that the verdict is not sustained by sufficient evidence, although a careful reading of the evidence does not make it clear that the negligence of the defendant was the direct cause of the injuries.

The judgment will be reversed for errors in the charge of the court, and the cause remanded for a new trial.

Robertson & Buchwalter, for plaintiff in error.

Cogan & Williams, contra.

KNOWLEDGE OF DEFENDANT THAT HIS NAME HAD BEEN FORGED TO A NOTE.

Circuit Court of Muskingum County.

JOHN E. WOODRUFF v. A. D. MONTGOMERY ET AL.

Decided, April, 1908.

Estoppel—When Created by Omission to Speak—Silence not Culpable, Unless—Pleading with Reference to Intendment—Suspended Rights—Forgery of Signature to Promissory Note.

1. Before a party can be estopped, by mere silence, to show that his name attached to a note is a forgery, facts must be alleged showing a duty and an opportunity to speak; that the party to be estopped knew or had reason to believe that the owner of the note would rely on his silence and be injured thereby, and that the owner of the note, relying on said silence, was injured.
2. No intendments are made in favor of a plea of estoppel; but it is incumbent on the pleader to aver all facts essential to its existence, with particularity and precision.

Browning & King, for plaintiff.
J. J. Adams, for defendant.

CRAINE, J.; TAGGART, J., and DONAHUE, J.

John E. Woodruff brought an action in the Court of Common Pleas of Muskingum County against A. D. Montgomery to recover two thousand dollars, with interest at eight per cent. from January 22, 1905, on a promissory note, of which the following is a copy:

"2,000.00. January 22, 1900.

"One year after date we or either of us promise to pay to the order of John E. Woodruff Two Thousand Dollars at eight per cent. interest from date. Value received.

"A. D. MONTGOMERY.
"ARTHUR J. SHEPPARD."

Arthur J. Sheppard was not made a party defendant, and A. D. Montgomery filed a separate answer in which he alleges that he did not sign said note and that his name attached to said note was a forgery.

The plaintiff filed a second amended reply to this answer, in which he denies each and all of the allegations of the answer and then as a second defense in his reply says:

"Further replying, says that for more than a year prior to the bringing of this action, the defendant, A. D. Montgomery, had knowledge that plaintiff held the note described in the petition herein and that his signature appeared as one of the makers thereof, and that said A. D. Montgomery, with full knowledge of the premises as aforesaid and intending to mislead and deceive the plaintiff in that regard, remained silent and failed to notify plaintiff of his claim that said signature was a forgery until after the absconding of the defendant, Arthur J. Sheppard, as hereinafter set forth; that plaintiff, relying upon the conduct of the defendant, Montgomery, in that behalf, as aforesaid and as to the genuineness of said note and believing said signature to be genuine, failed to take the necessary steps to collect said note from the defendant herein until after the said absconding of the said Sheppard, although said Sheppard was all the while, and prior to his said absconding, the owner of certain property not exempt from execution out of which plaintiff could have satisfied his claim in whole or in part, of all of which facts said Montgomery had full knowledge; that on or about the —— day of February, 1906, said Arthur J. Sheppard absconded for the purpose of defrauding his creditors and has ever since and is now without the jurisdiction of this court and in parts unknown and is wholly insolvent."

A demurrer was filed to the second ground of defense set forth in the reply, which demurrer was sustained by the court of common pleas and, after a trial resulting in a verdict for the defendant, plaintiff prosecuted error to this court, alleging that the court of common pleas erred in sustaining said demurrer. The sole question presented to us in this case is as to the sufficiency of the reply in stating facts sufficient to create an estoppel.

The defendant, Montgomery, never having signed said note and never having received any benefits, it was incumbent upon the plaintiff to allege a state of facts which would estop him from denying his liability on this note, notwithstanding the fact that he had never signed the same.

Paraphrasing the reply, the facts were substantially as follows: Woodruff held a note signed by Arthur J. Sheppard and

purporting to have been signed by Montgomery, but as a matter of fact Montgomery's name to the note was a forgery; that more than a year prior to the bringing of this action Montgomery knew that plaintiff held this note and that he appeared on the face of the note as one of the makers; that with intent to mislead and deceive the plaintiff he remained *silent* and did not notify Woodruff that his name was a forgery until after Sheppard had absconded; that Woodruff, relying upon the conduct (silence) of Montgomery and believing Montgomery to be one of the makers of said note, failed to take steps to collect the note until after Sheppard had absconded; that Sheppard before his absconding had certain property out of which Woodruff could have satisfied this note in whole or in part and that Sheppard was now insolvent. The sole question in this case is, does the reply, alleging this state of facts, create an estoppel?

In 82 N. Y., 32-40, a part of the syllabus reads as follows:

"To sustain an estoppel because of omission to speak, there must be both the specific opportunity and apparent duty to speak; the party maintaining silence must have known that someone was relying thereon and was either acting or about to act as he would not have done had the truth been told."

In 189 U. S., 260, a part of the syllabus reads as follows:

"To constitute an estoppel by silence, there must not only be an opportunity but an obligation to speak and the purchase must have been in reliance upon the conduct of the party sought to be estopped."

In 128 N. Y., 270, a part of the syllabus is as follows:

"The mere fact that another may act to his prejudice, if the state of things is not disclosed, does not render silence culpable, or sufficient to estop the true owner; he owes no duty of active diligence to protect the other party from injury. There must be a standing by and encouragement or acquiesence by the true owner in acts inconsistent with his right, knowing that the other party, acting under a false impression, is about to do what will result in his injury."

The above seems to be the settled principles which control the doctrine of estoppel by silence.

Another well established principle of law is that a party attempting to estop another by his acts or conduct must allege with certainty all the facts necessary to create an estoppel. In 102 Ind., 396, a part of the syllabus is as follows:

"No intendments are made in favor of a plea of estoppel, but it is incumbent upon the party pleading it to aver all the facts essential to its existence."

To the same effect is 21 Circuit Court, 710.

According to our idea, the above is the law of estoppel and as to the manner in which it must be plead. Now does the reply meet these requirements? The reply alleges that Montgomery knew that Woodruff had this note and that his name was a forgery. How he acquired that knowledge is not disclosed, neither is there any allegation in the reply that Woodruff knew that Montgomery knew any thing about this note. It is true that the reply alleges that Woodruff relied upon the *conduct* of Montgomery. But the query is, what was the *conduct* of Montgomery? His conduct was mere *silence*. Montgomery did nothing or said nothing which would induce Woodruff to believe this signature was genuine. If Woodruff had shown this note to Montgomery, and Montgomery after having seen the note had walked away without disclosing the forgery and Woodruff were injured by relying upon the genuineness of the signature, a different question would arise than the one before us. The fact that Montgomery remained silent with the intent to deceive Woodruff can be of little importance from the fact that it nowhere appears that Woodruff even knew that Montgomery had the information that the note was in Woodruff's possession or that it was a forgery.

As was said in 82 N. Y., 32, and 189 U. S., 260, there must have been an opportunity for Montgomery to notify Woodruff that this note was a forgery and the reply should in some way have alleged that such opportunity existed. For all that appears in the reply Montgomery may never have had the opportunity of notifying Woodruff of the forgery even if the facts were such as imposed a duty upon him to do so. For all that appears

Woodruff may have been in a foreign land until after the absconding of Sheppard.

There is no allegation in the reply that Montgomery knew that Woodruff was withholding the collection of this note on the strength of anything that he had done or was doing, nor is there any allegation that Montgomery knew that Woodruff knew that Montgomery knew anything about this note.

A case which the plaintiff places great reliance upon as sustaining his position, is found in 117 U. S., 96, in which the facts are set forth in the syllabus as follows:

"When a bank depositor sends his pass book to the bank to be written up, it is his duty, upon its return, either in person or by a duly authorized agent, to examine the account and vouchers returned, within a reasonable time, and give to the bank timely notice of any objection thereto. If he fails so to do, he may be estopped from questioning the conclusiveness of the account."

In this case a certain forged check had been charged to the plaintiff by the bank and the plaintiff brought an action against the bank for the amount due him, claiming in substance that the check was a forgery. The bank, by way of estoppel, claimed that the plaintiff knew of this forged check, or by the exercise of care could have known of it, and remained silent, and that the bank would be damaged if plaintiff were allowed to show the forgery. In that case the bank being ignorant of the forgery until after it had been disclosed by the plaintiff, the bank's right to pursue the forger had been suspended. In such a case as that the forger might escape and might dispose of all of his property before the bank knew of the forgery. In the case at bar, however, there was no suspended right to sue as there was in the 117 U. S., 96. In the case at bar, Sheppard was one of the makers of the note and there was nothing that Montgomery did which for a moment suspended the right of Woodruff to proceed against Sheppard on this note, nor was there any act which tended to induce Woodruff not to proceed against Sheppard. We think the principle involved in the 117 U. S., 96, and the one in this case are entirely different.

Plaintiff has also cited to us Ewart on Estoppel as supporting

his contention. There is no doubt but what the text found in Ewart does support the contention of plaintiff, but if Mr. Ewart undertakes to say that mere silence, irrespective of the facts under which the silence was maintained, creates an estoppel, we are unwilling to accept his theory of the law,

We do not think the facts set forth in the reply in this case are sufficient to hold a man liable on a note which he never signed, and we affirm the judgment of the court of common pleas.

DONAHUE, J.

I agree with my associates as to the proposition of law announced in the syllabus of this opinion, but disagree with them as to the construction of the reply filed by plaintiff. I am of the opinion that the allegations of this reply meet the requirements of the law of estoppel as herein announced.

VACATION OF VERDICT AND NEW TRIAL.

Circuit Court of Lucas County.

THE STATE OF OHIO, EX REL ORLEANO G. BARNES v. ED. L. KIMES, CLERK.

Decided, January 18, 1908.

Amendment of Motion for Vacation of Verdict—Jurisdiction—Error—Mandamus—Sections 5307 and 5308.

1. Mandamus will not lie to compel a clerk of court to enter judgment on a verdict in favor of the plaintiff during the pendency of a motion by the defendant to vacate the verdict.
2. A motion asking that a verdict "be vacated," but not in terms asking for a new trial, may, at the same term, although more than three days after the rendition of the verdict, be amended, by leave of court, by the insertion of the words, "and for a new trial."

C. A. Thatcher, for plaintiff.

Marshall & Fraser and *King & Tracy,* contra.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

The facts involved in this proceeding for a mandamus are, briefly, as follows: An action was brought July 25th, 1906, by

Orleano G. Barnes against the Toledo & Interurban R. R. Co., for damages caused by personal injury, received, as claimed, through the negligence of that company. A verdict for the plaintiff was rendered at the January term, 1907, which was subsequently set aside, upon the ground that the damages were excessive, disclosing prejudice. Subsequently the case was again tried and another verdict obtained by the plaintiff for the sum of $7,200. A motion was filed which asked that this verdict be "vacated," but not in terms asking for a new trial.

The statute first to be considered is Section 5305, of the Revised Statutes, providing, after a definition of the term "new trial," that "the former verdict, report or decision, shall be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes affecting materially the substantial rights of such party." It is contended by the relator that this was not a motion for a new trial and could not be considered by the court as such.

At the same term, on the 23d day of December, 1907, the court by order allowed an amendment of this motion, inserting the words "and for a new trial." It is claimed by counsel for the relator that the court had no jurisdiction or power to do this; and also that the time having passed for the filing of a proper motion for a new trial, it was the duty of the clerk, under another section of the statute, to enter a judgment upon the verdict.

Now it is to be noted that the court has but one duty to do under the statute, if it vacates a verdict—unless, of course, some further proceedings are taken by the parties prior to the judgment, as a settlement for instance, or dismissal of the action.

Section 5307 of the code provides that: "The application for a new trial must be made at the term the verdict, report, or decision is rendered." And Section 5308: "The application must be made by motion, upon written grounds, filed at the time of making the motion."

Nothing has been said in discussion, that I recall, placing any emphasis upon the fact that in this section it is not provided that the motion for a new trial must be in writing. The stat-

ute does not say that the motion or application must be in writing, but that the application must be made by motion, *upon written grounds;* in other words, the grounds or facts upon which the party bases such an application must be presented to the court in writing, to apprise the court and the opposite party of the reasons upon which the application is made; but I am not aware of any provision of the statutes requiring that the application itself shall be in writing. However this may be, there was evidently an attempt here by the party against whom the verdict was obtained to invoke the jurisdiction of the court to set aside the finding of the jury. There is no prescribed form anywhere in the statutes for a motion for a new trial. It is the substance of things and not the superficial form that should determine such controversies, and if there is any irregularity in the form of a motion, it should under another provision of the code be disregarded, unless it cause some prejudice to the person or party against whom the motion is addressed. Every error and irregularity is to be disregarded unless it be a material and substantial one, and unless it inures to the prejudice of the party who complains of it.

We think, then, that the court had a right to permit an amendment of the motion by insertion of the words "and for a new trial," although we doubt much whether an amendment was necessary. This brings us to the question whether the court had jurisdiction to pass upon the motion. The plaintiff below filed a motion to direct the clerk to enter judgment on the verdict, and on another motion by the defendant this motion of the plaintiff was stricken from the files. No error proceeding has been brought to this court to reverse that action of the court, although it is claimed by counsel, upon one side at least, that the order of the court striking from the files the motion for a direction to the clerk to enter judgment, was such a final order as might be made the basis of a proceeding in error. It is not necessary for us to determine whether or not this is so.

The court upon vacating the verdict granted a new trial. It is claimed here again, that the court had no jurisdiction to do this because of the fact that the verdict rendered at the first

trial had been set aside by the court upon the ground, as here insisted, that it was against the evidence, and that the statute does not permit the vacation of a judgment and the granting of a new trial twice for that cause.

On the other side it is claimed that the two orders of the court for new trials were not of the same character; that the first was not the setting aside of a verdict upon the ground that it was against the evidence, but rather, that the verdict for excessive damages was a violation of another clause of the statute as to new trials, "excessive damages, indicating passion or prejudice." We think as to this point that it is not necessary in this proceeding to determine the question. We do not think that the question whether or not the court had power to grant a second new trial upon the cause assigned, was jurisdictional. The court had jurisdiction to pass upon the motion and either grant it or refuse it. The court having the jurisdictional power to make the order one way or the other, the party had the right to except and protect himself by proceedings in error at the proper time. It is true he might not be able to go to the higher court immediately from the court of common pleas upon the granting of a new trial even if such granting was erroneous, but he could preserve his rights, and it might not be necessary for him to go any higher, because upon another trial both verdict and judgment might be in his favor.

The relator is here asking for a writ of mandamus to compel the clerk of the court, Mr. Kimes, to enter judgment upon the verdict as rendered at the September term. We hold that he is not entitled to the writ. It was not the duty of the clerk during the pendency of a motion addressed to the judge asking for a vacation of the verdict, to enter judgment upon it. The statute should not be so narrowly and technically construed as urged by counsel.

The writ sought is refused and the petition dismissed at the costs of the relator.

INJURIES TO A MINOR WHILE FEEDING A MACHINE.

Circuit Court of Cuyahoga County.

THE K. D. BOX & LABEL CO. v. TOMMIE CAINE ET AL.*

Decided, February 23, 1907.

Negligence—Master and Servant—Boy Injured while Feeding a Machine—Alleged Failure to Instruct Him as to the Danger Incurred—Charge of Court as to Ordinary Care—Application of, to the Case of a Minor.

Where an action on behalf of a minor, brought on account of injuries received in a machine which he was feeding, is tried on the theory that the defendant failed to instruct the plaintiff as to the extra hazard arising from a change in the material which he was feeding into the machine, the charge of court is not erroneous because of the omission in the paragraph defining ordinary care to refer to the age of the plaintiff, if it appear from the charge taken as a whole that the jury were not mislead thereby.

Ford & Snyder, for plaintiff in error.

W. C. Ong, contra.

TAGGART, J. (orally); MARVIN, J., and DONAHUE, J., concur (Judges Taggart and Donahue, sitting in place of Judges Winch and Henry).

Error to the court of common pleas.

This case had its origin in the court of common pleas, by the defendant in error, through one Delbert M. Bader, his guardian, filing a petition in said court, in substance alleging that he was a minor, inexperienced in the conduct and control of dangerous machines, and that he entered about the 11th day of May, 1904, into the employment of the defendant to feed a machine which was being operated by said defendant; that the operation of said machine was dangerous and hazardous; that the defendant failed to instruct him as to the dangerous character of said employment and the use of said machine.

* Affirmed by the Supreme Court without report, March 31, 1908.

The answer of the defendant was a general denial and alleged contributory negligence.

The case was tried purely upon the theory that the defendant had failed to instruct the plaintiff upon the extra hazardous situation that came about by reason of the change of the material.

The case was heard only on the testimony in behalf of the plaintiff below.

It appears from this record that there was an exhibition of some appliances used in the court room on the trial, by which the manner of placing slips or pieces of paper-board was being demonstrated before the jury, and much of this record is taken up by the testimony of witnesses apparently demonstrating to the jury the manner in which pieces of the paper-board was placed in, and taken out.

On the day this boy was injured he completed the work that he had left over from the day before with the material that was flat; that in feeding this material, the placing of a piece of paper board within the blocks or guides would be indicated to him, not merely by his sense of sight but by his sense of touch, that it had dropped in its place so that it would pass up and be forced upon the knives; that about 7:30 or 8 o'clock he finished the work with the flat material; that thereupon he was furnished with other material that was oval; that he thereafter attempted to operate his machine with the new material. In attempting to do this he did not succeed, and a fellow-servant noticing his difficulty came and told him how he should roll it the other way, which would have a tendency to flatten it out. He then proceeded to roll or flatten the oval paper-board, and did flatten all that he had upon the table for his use. He had difficulty in dropping this material so that it would fall within the guides and be forced up upon the knives, and as he was putting this oval material in, it would sometimes require him to place his hand down and force the piece of paper-board under the guides in order to get it into position. This he says was much more dangerous than when he used the flat paper, as he was not required to use his hands but little in forcing the flat paper or cardboard in posi-

tion. No instructions were given him in regard to the handling of this oval paper-board. The testimony seems to indicate that in feeding, especially the flat pieces of paper-board, it could be done much more easily, and it only required to be simply dropped within the guides and he would, therefore, have more time to remove his hand; that the oval material required him to reach further down and also to force the pieces of paper-board under the guides in order that it might be properly cut by the knives, and that in so doing his hand was cut.

All of these facts were before the jury, together with the demonstrations upon the apparatus used in the common pleas court illustrating the machine that was used for cutting this paper-board, and showing the character of the machine and the operation of the same. From an examination of the whole case, it appears that it is a case as to which different minds might arrive at a different conclusion.

The jury passed upon the testimony, and found, taking all the circumstances of the case, that the defendants were negligent in not giving proper instructions to the plaintiff as to the manner of using the oval paper, and the operation of the machine with such paper-board, and with respect to the verdict it is not manifestly against the weight of the evidence.

The court in its instructions to the jury was very favorable to the defendants, instructing them very carefully that if the plaintiff understood the character of the dangers incident to the operation of this machine, and appreciated the dangers or should have appreciated them, that then the plaintiff could not recover. It also instructed the jury fully in respect to the fact that if he was informed as to the dangerous character of this machine, he assumed the risk, and that there could be no recovery.

The only objection that is made to the instructions given to the jury are the instructions found on page 126 of the record, as follows:

"I think I have failed to give you a full definition of ordinary care. Ordinary care is just such care as men of ordinary care and prudence are accustomed to exercise under the particular circumstances of the case. Ordinary care, as applied to

the plaintiff in this case, would be just such care as persons of his intelligence, comprehension and ability to know, exercise or ought to exercise under the particular circumstances of the case."

Now it is said that the principle, as found in 46 Ohio State, 283, *Rolling Mill Co.* v. *Corrigan*, of contributory negligence, as applied to children, is not applied in this case, because the court below omitted to state anything, or instruct the jury in respect to anything concerning the age of the plaintiff, and therefore the charge was misleading and erroneous. Taking this whole charge together, we do not believe that this was so misleading that the jury were drawn away from the main questions in this case; we think that it follows that the rule as laid down in 61 Ohio State, page 608, should be applied in this case, which is as follows:

"A charge to a jury is to be considered as a whole, and if, considering the whole charge, the law of the case appears to have been correctly given to the jury and in a way that will reasonably enable them to understand the rules of law which they are to apply to the evidence before them, the charge will not be held to be erroneous simply because every condition to a recovery or a defense is not embraced in each paragraph, and the paragraph excepted to is not in itself calculated to mislead."

We do not believe that after the court had fully instructed the jury, and with great carefulness, and then had given this definition of ordinary care, that this instruction was misleading, and that the verdict ought to be set aside for this reason.

Therefore finding no error in this record to the prejudice of the plaintiff in error, the judgment will be affirmed.

ASSESSMENTS FOR SANITARY SEWERS.

Circuit Court of Lucas County.

JOSEPH W. CLOSE v. PETER PARKER, TREASURER, ET AL.

Decided, January 18, 1908.

Sewers—Improvement Change in Depth of, During Construction—Foot Frontage Assessment for Sanitary Sewer—Not Affected by Proximity of Public Park—Intersections—Rule Placing Cost of, on Municipality—Does not Apply to the Crossing of a Street by a Sanitary Sewer—Burden of Proof as to Negative Fact.

1. Where in the construction by a municipality of a local sewer for sanitary purposes, by the inadvertence of an assistant engineer employed to fix the grade thereof the contract or specifications is departed from as to the depth of the sewer but without affecting its cost or efficiency, and the error is not discovered until after the work of construction is completed, and no substantial injury to the rights of the lot owners is apparent, the assessment against such lot owners will not be enjoined.
2. In an assessment upon lots to defray the cost of a local sanitary sewer, the municipality is not required to make a deduction because of the proximity of a public park which does not directly abut thereon.
3. The provisions of the municipal code as to improvements for which special assessments are made, that "the corporation shall pay the cost of intersections" has reference to the parts of street improvements at the intersection of streets one with another, and has no application to the crossing of a street by a sewer for purposes of local sanitary drainage.
4. One seeking to enjoin an assessment levied by a city council on the ground that a statutory requirement has been omitted, has the burden of establishing such fact by evidence; and it is not incumbent on the city to show affirmatively its compliance with the statute.

B. A. Hayes and *Ralph Emery*, for plaintiff.

C. S. Northup, City Solicitor, and *O. W. Nelson*, for defendants.

WILDMAN, J.; PARKER, J., and HAYNES, J., concur.

Appeal from Lucas Common Pleas Court.

The case below was brought by Joseph W. Close, who sought by injunction to restrain the county officers from proceeding to collect a sewer assessment upon a large number of lots owned by him. These lots are situated in what is known as "Harvard Terrace," near Walbridge Park in this city. The case was tried in the court below and brought here by appeal. Assessments for the construction of two sewers are involved: one, known as sewer 930, designed for the local sanitary drainage of the lots of Harvard Terrace, and the other, No. 898, a main sewer and also a sanitary sewer.

The first substantial claim of the plaintiff to the equitable protection of the court is, that sewer 930 was not constructed according to contract, or according to the bids or advertisements for bids, and consequently that the assessments upon the lots are invalid.

It seems that during the construction of the work and after all that part of the sewer in the southern half of Harvard Terrace had been completed, and while the work was in progress upon that part of the sewer lying northerly of University Boulevard, by mistake of an assistant engineer the sewer was not laid at the depth contemplated by the contract and specifications, but was made several feet shallower. This mistake was not discovered until some time after the sewer was completed, as stated in paragraph 13 of the agreed statement of facts submitted to us. The evidence of witnesses has been taken on the trial before us to the effect that as complete drainage was effected for the benefit of the lots by the sewer as constructed as would have been by a sewer as contemplated and provided for under the contract; and witnesses have testified that in their judgment it was no more costly to construct, so that no more expense has been included in the assessment. It nowhere appears that any injury has been done to the petitioner by reason of this deviation from the contract in the construction of the improvement.

It is urged upon us that bidders should have had an opportunity to bid for the construction of the sewer in the manner and form in which it was constructed, and this may be true; but we have concluded that the irregularity is not such a one

as justifies the setting aside of the assessments. The assessments are made for the actual expense only, and to disturb them upon this ground would result in a reassessment with the same result —unless the court went further and held all assessments invalid and took the position that no further power exists in the municipality to assess at all. We think that this would be inequitable; it would leave the lot owner in possession of all the advantages derived from the construction of the sewer, and throw the entire burden of cost upon the city, upon no better ground than that there has been an inadvertance in the carrying out of a contract, which inadvertance has resulted in no substantial injury to any one. The conclusion at which we arrive is in harmony with our holding in *Kohler Brick Co.* v. *Toledo*, 10 C. C. —N. S., 137.

In the first cause of action in plaintiff's petition and what is styled paragraph 2, it is alleged that the assessment was made according to benefits instead of being by foot frontage, and that by the terms of the assessment it was limited to abutting lots, thereby letting all the property included in Walbridge Park—which is on the other side of Broadway—escape assessment entirely, although it is said that it derives benefit from sewer 930, which is the sewer under consideration in this part of the first cause of action. It does not appear, however, that the property in Walbridge Park is to be considered in any sense as "abutting property." It is true that two connections have been made from structures in Walbridge Park by piping across Broadway to this sewer 930, but the sewer is constructed upon private right-of-way—it is not in the street known as Broadway, but lies in the interior of Harvard Terrace, running along the lot lines mainly, if not entirely, except where it crosses University Boulevard. Now, if in seeking to assess all property benefited we go beyond the abutting property, it is a little difficult to tell where to stop; that is, if the court assumes that other property is so benefited that it was the duty of the assessing authorities to assess such other property, there would seem to be hardly a limit to the jurisdiction of the court as to the boundaries of territory which might be assessed to take care of a sani-

tary sewer like this. But whatever might be the rule if Walbridge Park were private property, it does not necessarily apply to a public park such as this.

There is a provision in the statute for payment of a part of the expenses of such improvement by the public, based upon the principle that the public does derive some benefit. Section 63 of the municipal code of 1902 (96 O. L., 43; Rev. Stat., 2276; 1536-223), may properly be considered as throwing some light upon the intention of the Legislature as to property of the character which we have here. "When the whole or any portion of an improvement authorized by this title passes by or through a public * * * park * * * or any other public * * * grounds within and belonging to the corporation, the council may authorize the proper proportion of the estimated costs and expenses of the improvement to be certified by the clerk of the corporation to the county auditor and entered upon the tax list of all taxable real and personal property in the corporation, and the same shall be collected as other taxes."

Now, if we apply the rule that the expression of one thing is the exclusion of all others of the same general class, we must by implication hold that the municipality may not assess the proportion of such estimated costs and expenses upon a public park, unless the improvement *"passes by or through"* the park. Now, what is meant by the expression "by"? The expression "through" will not apply—as this improvement nowhere passes through the park. That the park is in the neighborhood of the improvement, is true; but, according to the testimony of Mr. Consaul, the city engineer, at its nearest point to the sewer under consideration there is a distance of 150 feet, and the sewer can not be said to run "by" a park unless close proximity is to be so understood. We think, however, that what was contemplated by the legislators is that when an improvement either passes through a public park or the park abuts upon the improvement—when it runs alongside of it or through it—that then the park may be assessed.

Whether the park, if it were a private park, would have any access to this sewer so as to avail itself of the benefits of the sewer

without joining in the expense of construction, might be a very serious question, but one which we think we are not called upon to meet.

Our judgment is that the assessment can not be set aside upon the ground that the park should have been included in the property to be assessed.

It is claimed also in the petition that the assessment is invalid in that there is no deduction for intersections. In order that I may state the position of counsel for the plaintiff fairly, I read from his brief:

"Plaintiff claims that an intersection is formed by an improvement, whether paving, sewer or sidewalk, crossing a street. Counsel for the city claims that an intersection is formed by one street crossing another street, and relies upon the language of this provision as expressed in the Revised Statutes as they existed prior to the passage of the municipal code. That section was 2274, and reads, in part:

" 'That when the council of a city, * * * determines to grade, pave, sewer or otherwise improve a street, alley or other public highway, * * * the council shall levy and assess a tax, * * * for the estimated cost and expense of so much of the improvement as may be included in the crossing or intersection of such street, alley, or highway.'

"This language seems to imply that the improvement intersects the street. If under the Revised Statutes the city paid for intersections only when the improvement was in a street, then we claim that the municipal code enlarges the number of intersections to be paid for by the city.

"From paragraph 8 of the agreed statement it appear that the city was not charged with the cost of any intersection.

"If the crossing of the streets by sewer 930 forms intersections under the terms of the statute, it is conceded in paragraph 7 of the agreed statement that the assessment is excessive by 9.93 per cent."

The provisions of the municipal code of 1902, relied upon by counsel as changing the character of an intersection the construction of which is to be paid for by the city, is Section 53 (Rev. Stat., 2373; 1536-213), which reads, in part:

"In all municipalities the corporation shall pay such part of the cost and expense of improvements for which special assess-

ments are levied as council may deem just, which part shall not be less than one-fiftieth of all such costs and expenses; and in addition thereto, the corporation shall pay the cost of intersections."

It will be noted that the word "intersections" is here used without definition, but by the former statute were clearly contemplated, as counsel agree, improvements extending along or in streets, and the provision was that the city should pay the costs of such improvements in the squares made by the intersections of two streets. The examination that I have given to this matter leads my mind to the conclusion that the word had acquired at the time of the passage of the municipal code of 1902 a familiar meaning, and that it had reference to intersections of the character described in the statute in force up to and at the time of the passage of the municipal code; and although the definition of "intersections" is dropped out, I think that the new section—53 of the code—still had reference to the same class of intersections that had been before known.

In the case of *Northern Ind. Ry.* v. *Connelly,* 10 Ohio St., 159, decided long before the passage of the law providing that the city should stand the cost of such intersections, the courts had under consideration the question as to how their cost should be assessed. A contention arose as to whether the cost should be paid by an assessment upon the property abutting on a street being improved, and it was indicated (p. 165) and in the later case of *Creighton* v. *Scott,* 14 Ohio St., 438, it was held:

"When in making such improvement, squares formed by the intersection of other streets, are crossed and improved, the city council may, if the object of improving the squares is the improvement of such street, assess the whole expense upon the same property on which the other expenses of such improvement are assessed."

This entire legislation and adjudication as to intersections is based upon the idea that the part of the improvement at such intersections is connected with a street improvement to be paid for by assessment. If the property owners are benefited by the general street improvement, assessment is to be made upon such

property owners along the street where the other expenses are being assessed. Upon the same principle, if a sanitary sewer is, at the intersection, still for the benefit of the people whose land it drains, although it crosses the street, the owners of the property drained should equitably pay the expenses. The city derives no benefit from a sanitary sewer at the point of crossing a street. The city does not need it. It is not there to take off the surface water; it is not for the purpose of draining the street, but it is for the purpose of caring for the sanitary drainage of the lots which are assessed. Both upon authorities, so far as we are able to find them, and upon principle, as it seems to us, the cost of the improvement at the kind of intersection we have here should not be paid by the city. To the extent that the city is in any way benefited by this sanitary drainage, as I have already suggested, the city does pay one-fiftieth of the cost.

The assessment for the sewer 898 does include some amount which should be deducted, as is conceded by counsel, it being the amount claimed by plaintiff in his petition.

This would seem to dispose of the substantial questions which are involved in the inquiry. It was claimed in oral argument, as asserted in the petition, that the proceedings were irregular in one respect, to-wit, that the council omitted in the proceedings for the construction of main sewer 898 to assess the sum required to construct an ordinary sewer sufficient to drain the property. It was argued that this omission on the part of the council would necessitate the setting aside of the assessment and the ordering of a reassessment, but as this would not be especially beneficial to the plaintiff, by a paragraph in the brief before me the application to enjoin the assessment, or set it aside upon that ground, is withdrawn.

There is another reason why the relief would be refused—as has been indicated to counsel—and that is, that there is no evidence before us that the council did omit to determine such required sum. It was argued it being a sort of a negative, that plaintiff was not called upon to prove it; that it was sufficient for him to assert a negative in his pleading, making the claim, and then the duty would be devolved upon the defendant to show

the proper action of council in this regard. We, however, in a case in Wood county, *Westenhaver* v. *Hoytsville*, 8 C. C.—N. S., 284, took the opposite view and held that all claims of defects of proceedings of a municipality must be averred and proven; that the burden is still upon the plaintiff; that the court would not presume that the officers had omitted any duty. And in the case of *Bolton* v. *Cleveland*, 35 Ohio St., 319, the same principle was expressly and clearly enunciated:

"Where a party seeks, in equity, to enjoin the collection of an assessment by the city council, on the ground that the improvement was not recommended by the board of city improvements, he must show such fact by averment and proof."

There the question involved a negative, as here. It was just as true there as it can be here, that the knowledge of the facts was in possession of the counsel or of the defendants, and that if a particular action had been taken by the council, it was easy to show it by the records; yet the Supreme Court held that it was not incumbent upon the council to show that it had acted, but that it was incumbent upon the party attacking their proceedings to show the failure to act. On page 322, Judge Boynton, in announcing the opinion, says:

"Where a party seeks, in equity, to enjoin the collection of an assessment standing against him, or his property, on the duplicate of the county treasurer on the ground that it was illegally made, but which it was within the power of the board or tribunal causing it to be placed there to levy, he must show its invalidity by proper averment and proof. The assessment will be held valid until the contrary is made to appear. It, therefore, was not the duty of the defendants to show that the improvement was, in fact, recommended by the board of city improvements."

We think that there are no contentions in the petition that should prevail, and the judgment will be entered accordingly. The petition will be dismissed.

AGREEMENT FOR PROTECTION OF SURETIES.

Circuit Court of Ashtabula County.

GEORGE W. MARTIN ET AL v. FIRST NATIONAL BANK OF GENEVA.

Decided, September, 1907.

Promissory Note—Agreement Making Obligation of Securities Secondary—Parol Testimony as to, Inadmissible—Limitations on Authority of Cashier—Agreements Varying Contracts in Writing.

Parol evidence is not admissible to show that, at the time of taking a promissory note by a bank for the payment of a loan secured by securities, the cashier agreed that he would secure certain bonds as collateral for the payment of the note and that the liability of the sureties should be subordinate to such collateral; neither has a cashier, in the ordinary performance of his duties, authority to make such an agreement.

E. J. Pinney, Hoyt, Munsell & Hall, for plaintiff in error.
Henry Means and *A. J. Turnkey,* contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to Ashtabula Common Pleas Court.

George W. Martin and others made their negotiable promissory note to the First National Bank of Geneva, Ohio, for the sum of two thousand, one hundred and forty-five dollars for money loaned. The note was in the ordinary form. Two of the parties, Clark Martin and George Martin, were sureties and they contested the payment of the note, but at the close of the evidence the court directed a verdict against all the makers, including the sureties, for the full amount due on the note.

It was claimed by the sureties that at the time of the delivery of the note to the bank there was a parol agreement with the cashier that the bank was to obtain from the Ottumwa Telephone Company, of the state of Iowa, in which company, the principals upon the note, as well as the bank were interested, the bonds of that company of sufficient amount to pay the note and that such bonds were to be held by the bank as collateral for the payment of the note and were to be exhausted before any liability of the sureties would attach.

It was further claimed that the bank did not procure the bonds or, if it did, it appropriated them to its own use in payment of other claims that it had against the telephone company.

There was some evidence tending to show that such an agreement was made with the cashier, but there was no evidence that the board of directors of the bank knew anything of such agreement, either before or after the execution of the note, if it was made.

The effect of the agreement as claimed was that the obligation of the sureties was to be secondary; that the bank was to secure these bonds of the telephone company which were to be primarily liable and, if the proceeds of the bonds were not sufficient to pay the note, the sureties were to be responsible for the payment of the residue.

The first question that confronts us is: Can parol evidence be admitted to show such an agreement? A promissory note is a contract in writing and both parties, the maker and payee, are bound by its terms. A want or failure of consideration in whole or in part might be shown the same as in a deed or other written contract, but certainly the time or manner of payment differing from that stated in the note could not be varied by such evidence. As said in the case of *Holsworth and Sebastian* v. *Koch, Mayer & Goldsmith and Doering,* 26 O. S., 33:

"The note contains an absolute and unconditional promise to pay its full amount at the end of six months and the defendants sought by parol proof to change this into a promise to pay on condition the plaintiffs would furnish goods to Doering and to pay at such time or times as he might be able to pay. This they could not be allowed to do, without the violation of one of the first and plainest principles of evidence."

We are of opinion that this parol evidence was not admissible.

But, if this evidence was admissible, what authority had the cashier of the bank to make such an agreement? It is true the cashier is the agent of the bank, but the board of directors has control of the affairs of the bank and, without specific authority from the board, the cashier can not enter into any agreement that does not usually pertain to the duties of a cashier, or such

other acts as the board has by such a uniform custom permitted the cashier to perform. *Sturgis & Co.* v. *Bank of Circleville,* 11 O. S., 153; *First National Bank of Wellington* v. *Mansfield Savings Bank,* 10 C. C. R., 233.

If after making a loan, receiving a note and taking security for the payment of the same he could by an outside agreement provide that the bank was to obtain certain stock and hold it as collateral to the obligation of the sureties, and if the stock was not obtained the sureties would not be liable, then he might by such agreement provide that the sureties were not to be liable at all, which certainly would not be within his power.

We think the court of common pleas did right in instructing a verdict for the plaintiff and the judgment will be affirmed.

RECOVERY FROM HUSBAND'S ESTATE FOR BENEFIT OF WIFE'S ESTATE.

Circuit Court of Hamilton County.

MARY FLORENCE GLENN ET AL v. FRANK EICHER, ADMINISTRATOR.*

Decided, February 15, 1908.

Husband and Wife—Recovery as between the Estates of—Subrogation—Administrator—Limitation of Actions—Rights of Heirs—Section 6113.

Where under the doctrine of subrogation an indebtedness exists in favor of a wife against the estate of her husband, the limitation under Section 6113 of actions by creditors does not operate as a bar against recovery by her administrator of the amount so due.

John J. Gasser, for plaintiff in error.
Closs & Luebbert, contra.

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

We are of the opinion that the judgment of the court below should be affirmed.

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* Affirmed *Eicher, Admr.,* v. *Darby, Admr.,* 5 O. L. R., 102.

In addition to the stock and fixtures set off by the appraisers of the estate of Martin S. Glenn to Bridget Glenn, there was the sum of $500. She also paid debts of Martin S. Glenn out of her own separate estate. The evidence shows that she received no part of this $500, nor was she ever reimbursed for the debts of Martin S. Glenn's estate that she paid.

We see no reason why her administrator should not recover for the benefit of her estate the $500, which was not paid to her, and the amount paid by her to liquidate her husband's indebtedness, to which she is entitled under the doctrine of subrogation. We do not think that Section 6113, relating to limitation of actions by creditors, will bar her administrator from recovering for the benefit of her estate what was due her from the estate of her husband. This might be said to be her separate estate; they are debts due from her husband's estate, and having her administrator receive these amounts is not taking away from the children of Martin S. Glenn any part of their father's estate, for the debts of his estate should be paid.

The other grounds of error complained of by the plaintiffs in error we do not think are tenable.

Judgment affirmed.

INTERFERENCE WITH ACCESS BY THE LAYING OF RAILWAY TRACKS IN THE STREET.

Circuit Court of Hamilton County.

THOMAS J. HALL v. P., C., C. & ST. L. RY. CO.

Decided, February 29, 1908.

Obstruction in Street—Caused by Laying Railway Tracks—Ingress and Egress—Inconvenience which is Common to the General Public—Nuisance—Injunction.

1. Where railway tracks are laid across a street and at a grade which raises the grade of the street at that point, the inconvenience to a dealer in coal and sand located in the same square, who is obliged to haul heavy loads over the obstruction thus created, is of the same kind though different in degree from that suffered by the general public, and does not entitle him to an injunction.
2. But where the mode of construction has been such as to cause the drains and gutters to fill up and turn the surface water into the middle of the street, where gullies have formed in front of plaintiff's property materially interfering with access thereto, a continuing nuisance is created for which there is no adequate remedy at law, and as to which an injunction will lie.

Stephens, Lincoln & Stephens, for plaintiff.
Maxwell & Ramsey, contra.

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

The plaintiff, who is lessee with the privilege of purchase of a certain lot of land abutting on Ludlow street in the city of Cincinnati, seeks to enjoin the defendant from constructing and maintaining certain railroad switches across Ludlow street at the intersection of Front street, and avers in substance that Ludlow street has a descending grade from Front street to the Ohio river and that the tracks already laid, and others to be laid, being considerably above the grade of the street, will cut off his ingress and egress to and from his lot with teams and wagons loaded with coal, sand and gravel in which he deals.

It is manifest that the damages he would sustain are not personal in character, but result from a taking or impairment of

his easement in the street; hence he could not, as claimed by counsel for defendant, bring an action under Section 3283, Revised Statutes, but the remedy would, if damages were asked, be under Section 6448, Revised Statutes, to compel condemnation. *Railway* v. *O'Hara*, 50 O. S., 667; *Railroad Co.* v. *Campbell*, 51 O. S., 328.

Until private property thus threatened with injury is appropriated according to law the remedy may be by injunction. *Railway Co.* v. *Lawrence*, 38 O. S., 41.

The difficulty arises in determining whether the inconvenience the plaintiff will suffer differs in kind from that of the general public, and not only in degree.

The proposed construction is not adjacent to his lot, but about 150 feet north of it, and he also has access to his lot through Lawrence street. The evidence shows that the tracks will inconvenience him, not by impairing immediate access to his lot, but in hauling heavy loads up the grade of Ludlow street and over the obstruction; but the same inconvenience, though less in degree, will be suffered by the public using the street for a like purpose. So far therefore as the tracks themselves as located will constitute an interference with his hauling on Ludlow street, the plaintiff would not be entitled to an injunction. *The Kinnear Mfg. Co. et al* v. *Beatty*, 65 O. S., 264.

But it appears also from the testimony that, by the mode of construction, the mouth of the sewer has been closed up, the gutters filled in, whereby the water is allowed to flow in the middle of the street, causing gullies therein in front of plaintiff's lot. That the west side of the street adjacent to such lot has been filled in about two feet, by all of which the access to the plaintiff's lot is materially impaired. These acts of the defendant are not wholly unnecessary to a proper laying of the tracks, but are specifically forbidden by the city ordinance under which it is acting, and constitute a continuing nuisance to plaintiff for which he has no adequate remedy at law. The defendant will therefore be enjoined from so constructing and maintaining the tracks as to divert the flow of surface water from the gutters into the middle of the street, and from maintaining the fill and

change of grade of the street in front of plaintiff's lot. Permission is granted to the plaintiff to file the amendment to the petition heretofore submitted.

INDEFINITE CONTINUANCE OF CAUSE BY JUSTICE OF THE PEACE.

Circuit Court of Crawford County.

E. AND M. J. MCGINNISS v. FRANK DICKSON.

Decided, January 28, 1908.

Justice of the Peace—Authority of, to Grant an Indefinite Continuance —Judgment—Jurisdiction—Execution.

The continuance of a cause by a justice of the peace for an indefinite period does not work a discontinuance of the cause, where it is done with the consent and at the request of both parties thereto, but the justice retains jurisdiction and is vested with authority at some future time to call the case up and fix a day certain for its trial, although a longer period has elapsed than that fixed by statute.

S. L. Americus, for plaintiffs in error.
B. F. Long, for defendant in error.

NORRIS, J.; HURIN, J., and DONNELLY, J., concur.

This action was commenced on the 16th day of February, 1905, before a justice of the peace of this county, by E. and M. J. McGinniss against one David Yockey. The trial was set for the 25th day of February, 1905. David Yockey filed a counter-claim on the day preceding the trial day. The counsel for the plaintiffs and the counsel for the defendant met at the office of the justice of the peace on the 24th day of February, 1905, and by the agreement of both parties the case was adjourned "indefinitely," says the record of the justice of the peace. Up to about the 1st day of October, 1905, nothing had been done in the case. On this date, on application of counsel for the defendant, the case was by the justice of the peace set

for trial on the 16th day of October, 1905. The justice of the peace, on the 1st day of October, 1905, notified the plaintiffs by letter that he had set the case for trial on the 16th day of October, 1905, at 10 o'clock A. M. It is conceded in the record that the plaintiffs received this letter and were therefore informed. On the 16th day of October, 1905, and at 10 o'clock A. M. of that day, the time fixed by the justice of the peace for trial, the defendant came, but the plaintiffs failed to appear, either in person, or by counsel, at the time set for the trial, or within one hour thereafter. Whereupon the justice of the peace dismissed the plaintiffs' bill of particulars, and, on motion of the defendant, proceeded with the case on defendant's counterclaim, and upon the evidence, and entered judgment for the defendant against the plaintiffs. On the 23d day of October, 1905, the plaintiffs' counsel appeared and ordered a transcript of the findings to be carried up on error, says the record. I make these statements in preface and by way of introduction to the action in error, so that the facts recited hereafter may be more fully understood.

It appears that execution was issued in the aforesaid action from the justice of the peace's court, on defendant's default judgment against the plaintiffs, being obtained on defendant's counter-claim. The constable, Frank Dickson, the defendant in error in this action, levied the execution. Thereupon, the plaintiffs in error commenced this action in replevin before a justice of the peace against Frank Dickson as constable, to recover possession of the property thus taken by Dickson. The case reached the common pleas court on appeal. The petition in the common pleas court does not seem to be an action against Dickson as constable, but against him personally. The petition claims that Frank Dickson wrongfully attached, etc., the property described in the petition to which the plaintiffs have the right of immediate possession, etc. The answer avers that Frank Dickson is constable, etc., and denies. The reply admits that Frank Dickson claims the property as constable and avers that the execution upon which the property was taken is null and void—that the judgment of David Yockey against E. and M. J. McGinniss upon which execution issued is void. These

issues in the action in replevin came on for trial in the common pleas court of this county on its merits and, at the close of plaintiffs' evidence, on motion of defendant's counsel, the court directed the jury to return its verdict for the defendant, and that at the commencement of this action the defendant had the right of possession of the property described in the petition. The plaintiffs' motion for a new trial was overruled and judgment was entered on the verdict for the defendant.

The errors assigned in the petition in error for the reversal of the judgment and findings of the common pleas court, are:

(1) Error in directing the verdict for the defendant; (2) that the verdict is against the weight of the evidence, and contrary to law; (3) error in admitting evidence offered by defendant; (4) in rejecting evidence offered by plaintiffs; (5) in the charge; (6) that the verdict is for defendant when it should have been for plaintiffs; (7) in overruling the motion for new trial; (8) in entering judgment for defendant; (9) other errors apparent on an inspection of the record.

It is conceded that execution issued on a "purported judgment" in favor of David Yockey and against E. and M. J. McGinniss in the justice's court. It is not disputed that defendant took possession of the property in dispute under this execution. It is not disputed that the property levied on as the property of the plaintiffs, and the right of possession of defendant rests on the validity of the judgment and the execution under it. If the judgment is an invalid judgment, the execution and the possession of Dickson under it is improper and his detention of the property is wrongful detention. And this is the case, and the only question in it, as we view the case.

It is not contended but what the action of E. and M. J. McGinniss against David Yockey was properly commenced, and that the justice of the peace had jurisdiction, in the beginning, of the person of the parties and of the subject-matter of the suit. It is however contended that the adjournment of the trial of the case "indefinitely" worked a discontinuance of the action and that the justice of the peace thereby lost jurisdiction.

While a justice of the peace would not have the right to adjourn a case on his own motion for a longer period than that

named in the statute, and would not have the right to adjourn the trial at the request of one of the parties for a longer period than that fixed by statute, and to do so in either instance would deprive him of jurisdiction, and while a continuance for an "indefinite time" and not to a day certain on his own motion, or at the request of one of the parties only, would mark a determination of the suit, we think that we are warranted in saying that at the request of both parties, an adjournment of the trial, or a continuance for an "indefinite period" does not work a discontinuance of the case, but vests the court with such authority that at a later period than that of the day of the original assignment, the court may fix a day certain for the trial. He still has the power to call the case up for the purpose of fixing a definite day for trial. We do not see anything unreasonable in this conclusion. The adjournment is the act of the justice of the peace at the request of both parties. The agreement of the parties that a day certain should not be then fixed did not take from the justice of the peace the power to fix a day at a later period, but was an affirmance of the authority which the justice of the peace then had, to fix a day, and an agreement that he might at some future day name a date certain for the trial of the case.

This being our view, we find no error and so affirm the judgment at the cost of plaintiffs in error. Execution is awarded and the case is remanded for execution.

PAY FOR PUBLIC SCHOOL TEACHERS WHILE ATTENDING TEACHERS' INSTITUTES.

Circuit Court of Lawrence County.

THE BOARD OF EDUCATION OF ELIZABETH TOWNSHIP, LAWRENCE COUNTY, OHIO, v. CORA D. BURTON. *

Decided, March 12, 1908.

Stipulation not to Demand Pay While Attending Teachers' Institute not Enforcible—Purpose of the Legislature in Providing for such Payment—When Benefit of a Statutory Provision may be Waived—Boards Without Authority to Reduce Compensation Fixed by Law Contracts against Public Policy—Section 4091.

In a contract between the B. of E. and C. D. B., under which C. D. B., was to teach an eight months term of school at $45 per month, was included a stipulation that such teacher would not exact, demand or accept pay for attending the teachers institute. *Held:* Such stipulation is against public policy and void, and in an action for the purpose the teacher can recover the sum fixed by statute for such attendance.

L. R. Andrews, for plaintiff in error.

A. R. Johnson and *A. J. Layne*, contra.

CHERRINGTON, J.; WALTERS, J., and JONES, J., concur.

Error to the court of common pleas.

Cora D. Burton brought suit before a justice of the peace in this county to recover $11.25, to which she, as a school teacher, was entitled under Section 4091 of the Revised Statutes, for one week's attendance at the teachers' institute held in Lawrence county, the first week in September, 1906. The trial before a jury resulting in a verdict for the defendant, the board of education, on which judgment was entered against the objection of plaintiff. The case was taken to the common pleas court on error, where the judgment was reversed and cause set down for trial. The only issue in the case was made by the bill of particulars before the justice of the peace, and the evidence intro-

* Affirming *Burton* v. *Board of Education*, 5 N. P.—N. S., 294.

duced on the trial before common pleas and a jury. At the close of plaintiff's testimony, the defendant declining to offer any evidence, the court instructed the jury to return a verdict for the plaintiff for the amount claimed. This proceeding in error is to reverse the judgment entered on the verdict.

There is really no dispute as to the facts in the case. The evidence shows substantially that on the 18th of April, 1906, the plaintiff was hired by the defendant to teach a district school for a term of eight months, at $45 per month, beginning the second Monday in September following, and contemporaneously with the contract to teach she agreed not to exact or accept pay for attending the teachers' institute in the following words:

"Elizabeth Township, 4—18—1906.

"I hereby agree to teach the school assigned me and will not exact or demand in any way or accept pay for attending the teachers' institute.

"CORA D. BURTON."

She taught the full term, receiving pay therefor monthly at the stipulated price. Near the expiration of the term, viz., April 20th, 1907, she presented to the defendant a certificate in due form showing one week's attendance at the teachers' institute, signed by the president and secretary of the institute, requesting pay for the attendance, which was refused.

A number of errors are assigned on the record, which we regard as secondary in importance, and will not touch upon them, but will briefly direct attention to the real question in the case, namely, the character of the stipulation not to accept pay for attendance at the institute, the claim of counsel for defendant in error being that it is against public policy and void. Counsel for plaintiff in error insists that if the contract of employment is contrary to public policy and void, it is unlawful and illegal, and the court should give no relief. It is sufficient answer to that suggestion to say that if the argument could be made available in any possible event it would be in answer to a suit to recover wages for teaching, whereas this is an action to recover a sum fixed by the statute as due her, and in no possible way de-

pendent upon the will or agreement of the board of education.

Section 4091, Revised Statutes, provides:

"All teachers of the public schools within any county in which a county institute is held may dismiss their schools for one week for the purpose of attending such institute, and when such institute is held while the schools are in session the boards of education of all school districts are required to pay the teachers of their respective districts their regular salary for the week they attend the institute upon the teachers presenting a certificate of full regular daily attendance at said institute signed by the president and secretary thereof; the same to be paid as an addition to the first month's salary after said institute by the board of education by which said teacher is then employed, or in case he is unemployed at the time of the institute, then by the board next employing said teacher, provided the term of said employment begins within three months after said institute closes."

It was doubtless the policy of the Legislature to encourage teachers to avail themselves of the opportunities afforded by the institutes and to better fit themselves to instruct the youths committed to their charge. This is a policy commendable in itself, and likely to be a public benefit, and any act or agreement in contravention of it should receive little favor at the hands of courts.

In Cyc., Vol. 9, 480, it is said:

"A person may lawfully waive by agreement the benefit of a statutory provision, but there is an imputed exception to this general rule in the case of a statutory provision where waiver would violate public policy expressed therein, or where rights of third parties, which the statute was intended to protect, are involved."

Id. 481, speaking of contracts as against public policy:

"When a contract belongs to this class, it must be declared void, although in the particular instance no injury to the public may have resulted. In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good, and no injury to the public would result in the particular case. The test is the evil

tendency of the contract, and not its actual injury to the public in a particular instance."

In *Salt Co.* v. *Guthrie,* 35 O. S., 672, McIlvaine, C. J., said:

"Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *People, ex rel F. Leroy Satterlee,* v. *Board of Police,* 75 N. Y., 38, is the following syllabus:

"The provisions of the act of 1866, fixing the salaries of certain members of the Metropolitan Police Department (Chap. 861, Laws of 1866), continued in force and governed as to appointees under the said Charter of 1873. In September, 1873, the relator was appointed police surgeon by resolution of the board, which fixed the salary at $1,500. He accepted the appointment, discharged the duties of the office and drew the amount of the salary as so fixed. In proceedings to compel, by mandamus, the board of police to draw a requisition upon the comptroller for an amount sufficient to pay the difference between the salary so fixed and that fixed by said act of 1866—*Held:* That the board had no power by resolution to fix the salary at a less amount that that prescribed by the statute; that the acceptance, and discharge of the duties of the office, under the appointment, was not a waiver of the statutory provision, and did not constitute a binding contract to perform the duties of the office for the sum named in the resolution. A board of officers having the power of appointment to an office can not reduce the amount fixed by law as the salary of said office, or make a binding contract with their appointee to perform the duties of the office at a less sum."

From these authorities and on principle we hold that the common pleas did not err in directing a verdict for the plaintiff.

Judgment affirmed.

ELECTION OF JUSTICES OF THE PEACE UNDER THE BIENNIAL ELECTION AMENDMENT.

Circuit Court of Cuyahoga County.

THE STATE OF OHIO, EX REL JAMES E. VOTAVA, v. JOHN BROWN; AND THE STATE OF OHIO, EX REL WILLIAM DAVIO, v. ROBERT T. MORROW.

Decided, May 5, 1908.

Elections of Justices of the Peace—Constitutional Amendment Relating to Biennial Elections—Effect of, on Terms of Office of Justices—Section 9 of Article IV, Amended Section 3 of Article XVII, and Sections 567 and 1442, Revised Statutes.

An election of justices of the peace, held in November, 1907, to take effect January 1, 1908, to succeed incumbents who were elected in November, 1904, for terms of three years and took office in April, 1905, was premature and void, and petitions in quo warranto directed against such incumbents will be dismissed.

Harry F. Payer, for relators.
Blandin, Rice & Ginn, contra.

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

By virtue of their alleged election in November, 1907, the relators in these two cases, respectively, claim the offices, as justices of the peace, hitherto held by the defendants, John Brown and Robert T. Morrow, who were elected in November, 1904, for the term of three years, and took office in April, 1905. At that time Section 9 of Article IV of the Constitution provided, with respect to justices of the peace, that "Their term of office shall be three years." On November 7, 1905, while the defendants were in possession of their offices and actually serving, an amendment to the Constitution was adopted, providing, in Section 1 of Article XVII, that, "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November, in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

The same amendment further provides in Section 2 of Article XVII, that, "The term of office of justices of the peace shall be such an even number of years, not exceeding four years, as may be prescribed by the General Assembly." The amendment further provides in Section 3 of Article XVII, that, "Every elective officer holding office when this amendment is adopted, shall continue to hold such office for the full term for which he was elected, and until his successor shall be elected and qualified, as provided by law."

On March 31, 1906, the General Assembly passed "An act to amend Sections 567, 1442," etc., and thereby provided that justices of the peace shall be chosen "for a term of four years by the electors of each township on the first Tuesday after the first Monday in November in the odd numbered years, and their terms of office shall commence on the first day of January next after their election."

The defendants claim that the term of three years for which they were elected did not expire until April, 1908, so that the choice of their successors at the election held in November, 1907, to take office on the first day of January, 1908, was premature; their contention being, that no regular and valid choice of their successors can be made until the general election in an odd numbered year shall be succeeded in the following year by a first day of January subsequent to the regular expiration of their constitutional terms of three years. No such conjunction, they insist, has yet occurred, nor can it occur until November-January, 1909-10.

The contention of the relators on the other hand is three-fold. First: That the term of office of the defendants must be held to have begun not in April, 1905, when they actually took possession of the office, but rather in November, 1904, immediately following their election, since the statutes at that time prescribed no date for their taking the office to which they had been elected, and in the absence of such provision the term commenced at once. *State* v. *Constable*, 7 Ohio, part 1, page 7; *Bushnell* v. *Koon*, 8 C. C.—N. S., 163. An obvious difficulty, however, in the application of this rule arises from the fact

that the predecessors of these defendants were elected for a constitutional term of three years, at a spring election in April, 1902, and their term could not be curtailed by reason of the change in the time of election of justices of the peace from spring to fall. We hold, therefor, that the defendants' terms of office began not in November, 1904, but in April, 1905, and continued thereafter, under the provisions of Section 9, Article IV of the Constitution, as it then existed, and under Section 3 of Article XVII of the Constitution, as since amended, for the full term of three years for which they were elected, to-wit, until April, 1908, and until their successors are elected and qualified, as provided by law.

The relators second contention is that the defendants by submitting their candidacy to succeed themselves at the general election in November, 1907, for the term of four years, beginning in 1908, and having been defeated at said election by the relators, are now estopped to assert that their terms do not expire as contemplated by said election (Throop on Public Officers, Section 394, and cases there cited). But our own Supreme Court has approved the contrary rule in *State* v. *Brady*, 42 O. S., 504, wherein the third paragraph of the syllabus is as follows:

"A's accepting the office in 1883 with the knowledge that the council each year elected a city clerk, and his soliciting a re-election in 1884, do not estop him from claiming the full term; and in April, 1884, while A rightfully insisted on holding the office, for the full term, another person could not be duly elected to such office."

The relators contend in the third place that the constitutional amendment already referred to, having for its object the separation of state and county elections from those at which municipal and township officers are elected, so that the former shall occur in the even numbered years and the latter in the odd numbered years, no necessity would arise for the readjustive extension of the terms of any offices provided for in the amendment, where such terms were to expire during the year succeeding the general election at which such offices might be filled; hence, the terms of these defendants expiring in an even numbered

year, to-wit, 1908, and the election of justices of the peace being fixed for odd numbered years, the amendment as applied to these conditions is self-executing and the time for electing successors to the defendants would regularly occur in November, 1907. *State* v. *Pattison,* 73 O. S., 305.

This contention, however, overlooks the fact that the constitutional term of justices of the peace had been three years, and, under the amendment, the Legislature must provide that it be made thenceforward either two or four years. The amendment was therefore not self-executing with respect to the terms of justices of the peace. Legislation was required to make it effective. Until such legislation was provided, the incumbents of that office at the time the constitutional amendment was adopted would continue for the full term for which they were elected, and until their successors should be elected and qualified, as provided by law. The terms of the defendants could not lawfully be abridged by statute so as to expire January 1, 1908, instead of April, 1908. The General Assembly by amendment to Section 1442, already quoted, fixed the terms of justices of the peace, pursuant to the constitutional amendment, at four years. It was without power, except in cases of vacancies, to provide that any such term of four years should begin before the expiration of the three year term of the previous incumbents of the office. The election of justices of the peace in November, 1907, purported to be for a term of four years, beginning in 1908. No such term could begin in January, 1908. because the defendants were entitled to the possession of their office until April, 1908; neither could such a term of four years begin in April, 1908, because no statute provides for such a term beginning at such a time in the year.

Prior to November, 1909, no election for justices of the peace in an odd numbered year, as required by the Constitution, for a term beginning January first next succeeding such election can be held for the choice of successors to these defendants, whose constitutional terms of three years did not expire until April, 1908, and who should, under the amendment to the Constitution, continue in office until their successors are elected and qualified.

We hold, therefore, that the election for justices of the peace to succeed the defendants, held in November, 1907, was premature and void, and the petitions are dismissed.

EQUALIZATIONS MADE BY BOARD OF REVIEW.

Circuit Court of Hamilton County.

MOONEY, TRUSTEE, v. RICHARDSON, AUDITOR, ET AL.

Decided, May 16, 1908.

Taxation—Complaint Before Board of Review—Authority of Board with Reference to Equalization—Taxes Paid on an Excessive Valuation May be Applied in Payment of Legal Taxes, When.

While the jurisdiction of a board of review, sitting as an annual board of equalization, is ordinarily confined to lots and lands in the immediate vicinity of the parcel as to which complaint is made, it may be exercised over lots and lands in another locality or district within the corporation, if not exercised for the purpose of a general revaluation of property in the district, a purpose which may be inferred if the additions are largely in excess of the reduction.

Burch & Johnson, for Mooney.
Ireton, Collins, Schoenle & Poor, contra.

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

In order to give the board of review, sitting as an annual board of equalization, jurisdiction over the property of plaintiff, it was not necessary that a complaint be filed against the valuation of his property, but only by an owner of real estate interested in a new equalization. *Davis* v. *Investment Co.*, 76 O. S., 407.

The land of such owner may be grossly over-valued as compared with a large number of lots in the same locality or district which are relatively uniform in value, and yet the amount deducted from the valuation of the former may be distributed over the latter so as to make the entire group uniform in valu-

ation. It is this process of equalization that makes the number of parcels of land acted upon so disproportionate to the number of complaints entertained and extends and enlarges the inquiry by the board.

Ordinarily the equalization should be confined to lots or lands in the immediate vicinity of the lots complained of, but as the power of the board is co-extensive with the boundaries of the municipal corporation it may, in a proper case, be exercised over lots or land not in the same locality or district but within the corporation. It may not, however, be exercised for the purpose of a general revaluation of the real estate in any locality or district, and where the additions are largely in excess of the reductions such purpose will be inferred. There is nothing in the evidence to show that the action of the board was unjust or arbitrary to the extent at least of adding to his lot a proportionate amount of the reductions made in the valuation of other lots. Indeed the statement filed by him with the board before action taken shows "our views as to increase" are substantially the same as those finally adopted by the board.

We are of the opinion, therefore, that the plaintiff is entitled to an injunction restraining the collection of the excess over his proportionate share of the additions rendered necessary by the reductions of $— made by the board.

The taxes paid voluntarily can not be recovered; but the taxes paid for the first half of 1906 may be applied to the payment of the legal tax for the whole year. *City of Cincinnati* v. *James et al,* 55 O. S., 180.

Decree accordingly.

PROSECUTION OF LUMBER DEALERS UNDER THE VALENTINE ANTI-TRUST LAW.

Circuit Court of Lucas County.

EDWARD E. ARNSMAN ET AL v. THE STATE OF OHIO.

Decided, March 28, 1908.

Indictment—Attack on, for Duplicity and Indefiniteness—Allegation as to an "Unlawful Trust and Combination"—Failure to Add "of Persons" Immaterial—Numerous Offenses Blended in One Count—Office of Motion to Quash—Defendant Sufficiently Informed as to the Charge he was to Meet—Penalty—Sentence and Resentence—Sections 4727, 4727-4 *and* 4727-10.

1. A motion to quash is the proper procedure to point out the defects of duplicity and indefiniteness in an indictment, and failure to file such a motion and entry of a general plea to the indictment is a waiver of those defects.
2. An indictment which charges that accused and numerous other named defendants, on a day named and continuously between that date and the day the indictment is found, were members of an unlawful trust and combination formed for the purpose of carrying out restraint in trade and commerce, increasing the price and preventing competition in the sale of lumber, and knowingly acted with and in pursuance of, and aided and assisted in carrying out the purposes of such unlawful combination, binding themselves not to sell any lumber for use in a designated locality below the common standard of figures, and agreeing to pool, combine and unite their interests in such lumber trade, states a violation of Section 1 of 93 O. L., 143 (R. S., 4427-1), commonly called the Valentine anti-trust law, which is punishable by fine or imprisonment under Section 4 (Section 4427-4) thereof, and not Section 10 (R. S., 4427-10).
3. A work house sentence having been illegally imposed for violation of the Valentine anti-trust law will be set aside on review and the case remanded to the trial court for resentence, which may be by fine or imprisonment or both, in the discretion of the court as on original hearing.

Barton Smith, for plaintiffs in error.

L. W. Wachenheimer, Prosecuting Attorney, contra.

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

This case has been twice orally argued before this court, once prior to the death of Judge Haynes, and again since Judge Kinkade succeeded to the vacancy. The case is one which has involved so many parties in interest and has been deemed so important as involving some constructions of the statutes known as the Valentine anti-trust law, that we have given it our most careful consideration.

The indictment was drawn under Section 4427-1 *et seq.*, Revised Statutes, and charges the defendants with a trust said to affect the price of lumber. Numerous defendants in the court below, without attacking the indictment by motions or demurrer, entered pleas of guilty, and were thereupon sentenced by the trial judge to imprisonment in the work house of the county for a period of six months, the minimum term of imprisonment prescribed by the statute where imprisonment is a part of the sentence.

In this proceeding in error the indictment is attacked upon several grounds, but mainly that it is fatally defective in not alleging facts constituting an offense against the laws of the state. Some consideration has been given to the question whether the indictment charges numerous offenses in one count and is thereby obnoxious to the charge of duplicity. This matter may perhaps be disposed of by reference to the case of *Jones* v. *State*, 14 C. C., 363, decided by the Circuit Court of Clinton County, Judges Cox, Smith and Swing, in 1897. The fifth paragraph of the syllabus indicates the point applicable to the indictment before us. I read:

"A demurrer to an indictment for blackmail is a waiver of such an objection as that it charged different, distinct and repugnant crimes, and was bad for duplicity. Such irregularity can only be reached by motion to quash."

In *Hughes* v. *State*, 9 C. C.—N. S., 369, decided by this court in Erie county, we had an indictment similar in form, charging an offense as committed upon a certain day and during an entire period to a later day; and in that case we held that the indictment

was not bad for duplicity. There is no particular discussion of that question in the opinion, but as nearly as my memory serves me we arrived at the conclusion that the indictment charged at least one offense, and that really there was no purpose on the part of the grand jury to charge any more than that. The case was treated as charging but one offense by the trial court in that case; and I might say that the accusation in the case at bar has been so treated. There has been, in other words, no assertion of the right under a provision of the Valentine law, to treat every day's violation of the act as an independent offense. The whole of the indictment, so far as it alleged the time of the commission of the offense, beyond the assertion of one particular time, might be treated as surplusage and the indictment in this regard still be deemed sufficient. There is no question under the decisions of this state, however, that different offenses, misdemeanors of the same class or character, may be joined in one indictment. The question is not whether they may or may not be so joined, but whether they may be blended in one count. Without going farther than to recognize the doctrine asserted in *Jones* v. *State, supra*, we are content to rest our decision, so far as the question of duplicity is concerned, upon that case. We believe that the position of the Circuit Court of Clinton County—that duplicity was waived by failure to file a motion to quash—was well taken.

The same thing may be said as to any criticism that the indictment does not definitely apprise the defendant of the offense of which he is accused. This of course does not touch the question whether the indictment is or is not fatally defective in omitting to charge a crime; it relates only to indefiniteness. Not only the statutory law but the Constitution requires that defendants must be charged so definitely as to be apprised of the precise nature of the offense that they are claimed to have committed against the law of the state. The statute provides means by which, if the indictment is not sufficiently precise, the accused may assert their right and obtain the protection of the court; and the same statute provides that failure to file a motion to quash will waive all matters which might be

objected to by such motion. A motion to quash is peculiarly adapted to point out the defects in an indictment, which make it merely indefinite. That is the object of the motion, and if a party does not see fit to avail himself of such procedure, the statute permits the courts to infer that he did not care to do it—that the indictment had sufficiently apprised him of the charge which he was to meet.

In *State* v. *Gage,* 72 Ohio State, 210, decided by the Supreme Court, the indictment alleged the infraction of the law during a continuous period from one day to another, as in *Hughes* v. *State, supra,* and the case at bar. No attack was made upon the indictment by any motion to quash. A demurrer was filed and overruled. What would have been the effect of a motion to quash is not indicated.

It is urged upon us that from the language of the indictment it does not definitely appear whether the pleader is attempting to charge an infraction of Section 4427-10 or some other section of the Valentine law; or, to state the position of counsel a little more precisely, it is contended, without conceding that the indictment charges any offense under the law, that if it does charge such, it charges only an infraction of Section 4427-10, which defines offenses punishable by fine only.

It is also said, in substance, that the indictment ought not to be so drawn as that the court may, at its option, impose a penalty under either section of the statute—4427-10 or 4427-4, which provides a penalty of fine or imprisonment, or both.

These contentions have induced a careful examination of this indictment, in connection with the statute, that we might arrive at the real intent of the pleader as to which section should govern the procedure. Omitting matters not material, the indictment, in substance, charges that Arnsman and numerous other named defendants, on the 8th day of October, 1906, and continuously between said date and the day of the finding of the indictment, at the county of Lucas, were members of, and each of them was a member of and unlawfully and knowingly acted with and in pursuance of and aided and assisted in carrying out the purpose of an unlawful trust and combination of capi-

tal, skill and acts, formed for the purpose of carrying out restraint in trade and commerce in increasing the price of and preventing competition in the sale of lumber, a commodity and article of commerce intended for sale, use and consumption in the state of Ohio of all kinds of timber, sawed or split for use, including beams, joists, planks, boards, shingles, lath and all articles of every kind manufactured from timber and for the purpose of fixing and maintaining uniform and graded figures for the sale of lumber in the city of Toledo in said county, that the prices thereof might be increased, and for the purpose of making, executing and carrying out certain contracts and agreements by which they might keep the price of lumber at fixed and graded figures and establish the same as the prices of lumber in said city, so as to preclude a free and unrestricted competition among the members of said trust and combination in the sale of lumber, and by which they bound themselves not to sell or dispose of any lumber for use in said city below the common standard of figures, and agreed to pool, combine and unite their interests in the sale of lumber in said city that the prices thereof might be increased.

Section 10 of the Valentine act (4427-10) defines specific violations of the statute and imposes a penalty therefor. Let us examine this section for a moment. It is as follows:

"It shall not be lawful for any person, partnership, association or corporation, or any agent thereof, to issue or to own trust certificates, or for any person, partnership, association, or corporation, agent, officer or employe, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article, and any person, partnership, association or corporation that shall enter into any such combination, contract or agreement for the

use aforesaid shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty dollars, nor more than one thousand dollars."

As we construe this section, it prohibits any person, partnership, association or corporation, from issuing or owning trust certificates. That is the first prohibition of this section; and the second is that it shall be unlawful for the directors or stockholders of any corporation to enter into a combination, the purpose of which is to place the management and control of its affairs or manufactured product in the hand of any trustee or trustees, with the intents and purposes subsequently stated in the section.

We do not construe this section as making it unlawful for any person to enter into a combination to prevent, restrain or diminish the manufacture or output of any article. The two things which are prohibited by the section are the acts connected with trust certificates and acts connected with the trustee, and the section does not reach further than that. It does not attempt to prohibit the entering into a combination for the general unlawful purposes which are specified in Section 4427-1, the purposes which are explicitly stated in this indictment as those of the alleged combination or trust, of which it is said these defendants were members. We think, then, that the indictment was not drawn under the tenth section. The question remains whether the indictment is good under Section 4427-4, which provides:

"Any violation of either or all of the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or furnish any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, shall be punished by a fine of not less than fifty dollars nor more than five thousand dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense."

And also the following section, 4427-5, which makes the special provision relied upon by the prosecuting attorney in support of his claim of the sufficiency of this indictment. It provides:

"In any indictment for any offense named in this act, it is sufficient to state the purpose or effects of the trust or combination. And that the accused is a member of, acted with or in pursuance of it, or aided or assisted in carrying out its purposes without giving its name or description, or how, when and where it was created."

So many phases of this question have been presented to us, not only in oral argument, but in the voluminous briefs, that it will be impossible for me in the time which I have allotted to myself for the rendering of this opinion, to review all of the contentions of counsel. We have been much impressed with the plausibility of many of the arguments presented, and if this were an entirely original question in this state, we might be largely influenced by some of the decisions from the courts of other states. But we do not deem it an open question in Ohio. We think that *State* v. *Gage*, *supra*, which determined some other questions in regard to the Valentine law, in effect determined the question of the sufficiency of an indictment so analagous to the one before us as to make it decisive of the case which we are considering. As already stated, *State* v. *Gage*, *supra*, was submitted to the court upon a demurrer to the indictment, and that demurrer was overruled. The defendant entered a plea of guilty and afterwards moved in arrest of judgment upon the same grounds stated in the demurrer. We are not prepared to say, at least I am not, that any rights were lost to the defendants in the case at bar by failing to demur to this indictment; but we may safely say that defendants can make no larger claims after the non-filing of a demurrer, and after the entry of a plea of guilty, than they could have asserted upon the filing of a demurrer. In other words, they can make no larger claims of right, in the case at bar, than were available on demurrer before the trial court and in the Supreme Court in *State* v. *Gage*, assuming that the indictments were upon the same

footing as to sufficiency. On page 211 of *State* v. *Gage,* we find a substantial statement of the form of the indictment as follows:

"The indictment charged 'that Perley W. Gage of said county, on the first day of November in the year of Our Lord one thousand nine hundred and two, with force and arms, in said county of Delaware and state of Ohio, and until this sixth day of January in the year of Our Lord one thousand nine hundred and three, said Perley W. Gage, late of the said county of Delaware, was an active member of, acted with and in pursuance of, aided and assisted in carrying out the purposes of the Delaware Coal Exchange.' "

The word "active" as here inserted is a term not used in the section of the statute defining what shall be a sufficient charge, and so far as the sufficiency of this clause is concerned, we do not deem the allegation that the person was "an active member" as being of more weight than that he was "a member," because either allegation is a compliance with the terms of the statute in this regard, and in *State* v. *Gage, supra,* there is no more statement of fact in the indictment as to how he acted than in the case at bar. The name of the alleged combination is not contained in the present indictment, and it is conceded that no name need be given; the statute so says. I read further:

" 'The Delaware Coal Exchange, an association of persons organized for the purpose of preventing competition in the sale and to maintain a uniform and graduated figure for the sale of coal, and to directly preclude a free and unrestricted competition among the members of said association, purchasers and consumers in the sale and transportation of coal, contrary to the form of the statute.' "

The indictment in *State* v. *Gage* is much more meager than in the case at bar in some respects. Still it does include the statement that the membership was in an association "of persons" organized for certain purposes; the language of the indictment before us is that "they were members of and each was a member of and unlawfully and knowingly acted with and in pursuance of an unlawful trust and combination of capital, skill and acts." It does not state that it was an association "of persons"; and

it is true enough, as counsel in substance urge, that there may be a combination of skill and capital or labor and capital, where there are not two or more persons involved. In other words, an individual may combine his skill and his money, putting them both into some employment, and there is no violation of law, no breach of public policy in that. The law contemplates a conspiracy, a combination of two or more persons, corporations or partnerships, and it does not contemplate as a criminal act the combination of all the faculties, all the resources, of an individual for the carrying out of any lawful purpose.

But the indictment in the case at bar alleges that this entity—this thing, whatever we call it, of which these defendants were members—was an "unlawful trust and combination" and in this word "trust" we have involved so much, after the definition of a trust in the act itself, as to take away the force of very much of the argument that has been made. In the original enactment, which is not at this moment before me, the act is entitled, if I remember aright, "An act to define trusts," etc. In the present compilations of the Revised Statutes the title of the act is omitted; but Section 1 of the act (4427-1) gives the definition "A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them for either or all of the following purposes." It can not be a "trust" within the definition of the statute, unless it be a combination of the sort which the statute describes. It can not be a combination of faculties or resources in the mind or hands of one person to accomplish some purpose, confined to his own breast. It must be a combination of two or more persons, partnerships, corporations or association of persons, and when the pleader here says that these persons were members of "an unlawful trust," he has stated all of those things; he has stated in effect that they were members of a combination of two or more of these several kinds of things mentioned in the statute, persons, firms, corporations or associations; and he has said also that it was a combination of "capital, skill and acts," using the conjunctive conjunction; he says it was formed for all of these purposes mentioned in Section 1 of the act.

Returning to *State* v. *Gage, supra*, we think that the overruling of the demurrer by the court below, and the affirmance of the sentence rendered upon the plea of guilty, because the Supreme Court did affirm the judgment of the court of common pleas, reversing the circuit court, which had set aside the judgment of conviction, is a necessary recognition of the sufficiency of the indictment in that case. The indictment in *State* v. *Gage* did not go so far as to allege that the Deleware Coal Exchange was an unlawful association or a trust. It attempted to allege specifically that it was an association of persons formed for what was claimed to be an unlawful purpose under this law. Here the pleader has adopted the other form, and instead of saying that it was an unlawful association of persons, he says that it was an unlawful trust. He has averments here from which there is no escape, that there was an association of persons or corporations, it matters not which, unless the indictment for indefiniteness was obnoxious to a motion to quash, had one been filed.

The result of this inquiry under the views entertained by our court, must manifestly be the overruling of the contention of the defendants that the indictment is fatally defective. There was sufficient here to apprise the defendants that they were accused of a crime, and that crime the violation of the Valentine law.

The contention of the defendants that the court could not lawfully imprison because, if the defendants were guilty of anything under the indictments, it could only be an infraction of Section 10 of the act, we do not sustain; nor, on the other hand, do we sustain a contention made by the prosecuting attorney, if we understand him aright, that the court below, having once concluded that imprisonment must be imposed, there can now be no departure from that kind of penalty upon reversal. The sentence was imprisonment in the work house instead of in the jail, and it is agreed by counsel that because the sentence to the work house was not authorized, as has been held by the Supreme Court in the ice trust case recently disposed of, this case must go back to the court of common pleas.

The case, as stated, must be remanded. Following the deci-

sion of the Supreme Court, we hold that the sentence was erroneous in that it prescribed imprisonment in the work house at labor as a part of the sentence. Under the statute, as construed by the Supreme Court, no such an imprisonment can be imposed. The sentence of the court below, then, being erroneous, is to be set aside; and when the case is remanded it goes back to the court for the court to take it up at the point which had been reached when the sentence was imposed.

Another contention which was made on oral argument upon the first hearing before us by one of the counsel for the defendants was that the sentence which had been imposed by the court below was unconstitutional in that it was cruel and unusual. This question is not now before us, in view of the disposition which is made of the case in setting aside the sentence. It is enough for us to say that the court below has the same powers and the same rights as it had upon the first hearing after the plea of guilty and before sentence.

It has full discretion to fine or imprison, or both, under Section 4 of the Valentine act.

MILK WAGON STRUCK BY CAR.

Circuit Court of Hamilton County.

CINCINNATI TRACTION COMPANY v. KROEGER. *

Decided, May 16, 1908.

Negligence—Wagon Struck by Car Coming up from Behind—Driver Guilty of Negligence Under Such Circumstances, When—Warrant for Arresting Cause From the Jury.

One driving along the track of an electric car line, with the expectation that a car will come behind him, and an opportunity to turn off the track, and in the full possession of his faculties, is without excuse if he is overtaken by a car and his wagon is wrecked and he is himself injured.

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* For previous opinion in the same case, see 10 C. C.—N. S., 64.

George P. Stimson and *Kittredge & Wilby,* for plaintiff in error.

Jas. R. Jordan and *Geoffrey Goldsmith,* contra.

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

The plaintiff's testimony shows that the team was traveling on the righthand track of the street railroad, that the driver was expecting a car, and that there was nothing to prevent him from turning off the track if a car was discovered approaching.

It was his duty, therefore, to make use of his senses to ascertain if a car was approaching from behind. A prudent man exercising his ears and eyes with ordinary care would have discovered the car in time to avoid it, and the failure of the driver to see or hear anything when in full possession of his faculties, is no excuse if he or his property is thereby injured. *Railway Co.* v. *Elliott,* 28 O. S., 340.

The motion to arrest the case from the jury should have been sustained.

Judgment reversed and judgment for plaintiff in error.

ACTION BEFORE JUSTICE OF THE PEACE FOR UNDETERMINED PROFITS.

Circuit Court of Knox County.

JAMES O'ROURKE v. W. I. EDWARDS.

Decided, October Term, 1907.

Justices of the Peace—Proceedings on Error to—Correctness of Transcript can not be Questioned—Jurisdiction—Where the Action is for Undetermined Profits—Partnership—Accounting.

1. Where a transcript from a justice of the peace is certified as true, its correctness can not be attacked in a court of review.
2. A justice of the peace has no jurisdiction of an action at law to recover earned profits due one member of a joint enterprise, until the amount of the profits have been determined by an accounting either between the parties themselves or by a court of competent jurisdiction.

W. M. Koons, for plaintiff in error.

W. A. Hosack, for defendant in error.

DONAHUE, J.; TAGGART, J., concurs; MCCARTY, J., not sitting.

Error to Knox Common Pleas Court.

This proceeding in error is brought to reverse the judgment of the common pleas court affirming the judgment of the justice of peace rendered in an action before said justice, wherein William Edwards sued to recover from the plaintiff in error, James O'Rourke, the sum of $152.30, upon the following bill of particulars:

"The plaintiff says that on the —— day of May, 1904, he became engaged with the defendant in a certain business by virtue of a certain verbal contract, by the terms of which the plaintiff was to receive one-half of the profits. The plaintiff says that the defendant received in cash out of said business the sum of $1,295.65; that he received from one Bechtol $61.20, and rebate on goods, $262; that the defendant paid out the sum of $1,020; leaving net profit to defendant $588.85. The plaintiff says that he has only received $284.25, making a balance due plaintiff in the sum of $152.30, which amount is due and unpaid."

The plaintiff in error did not appear before the justice of peace at the time named on the summons, nor within one hour thereafter, and thereupon the plaintiff was sworn and judgment rendered in his favor for the amount asked with costs of the action. The defendant sought to appeal said cause. The appeal bond not having been filed, or at least not having been approved within the time limited, no appeal was perfected, and error is now prosecuted to reverse this judgment, together with the judgment of the common pleas court affirming the same.

The first contention of the plaintiff in error is that the amended or corrected record filed in the common pleas court, in the error proceedings in that court, is not a true and correct transcript, and that the docket entries have been changed and mutilated so that such transcript is not a true transcript. With that contention this court has nothing to do at this time. It is certi-

fied to be a true and correct transcript and is binding in an error proceeding upon this court, or any other court having jurisdiction in error only, and the remedy of the plaintiff in error, if any, must be against the justice and his bond for certifying falsely to such transcript.

The second contention is that the bill of particulars filed before said justice shows that the justice of peace had no jurisdiction of the cause; that such bill of particulars shows that the defendants were partners; that no partnership accounting had been had, and therefore no action at law would lie to recover the plaintiff's share of the profits until that share had been fixed and determined either by a mutual accounting between them, or by a court in a suit filed for that purpose. On the other hand it is insisted that because the averments of the bill of particulars do not show that the parties were to bear the loss as well as to divide the profits, that no partnership is stated, therefore no accounting is necessary. We are of the opinion, however, that the question of whether or not there was a partnership is of little or no importance. The plaintiff and defendant were each entitled to a one-half interest in the profits of the concern, and that must be determined in the same manner as if they had been partners to all intents and purposes. In other words, before the rights of either party could be fixed and determined, an accounting must be had. The reasons therefore are just as important and potential as if a partnership were admitted. In fact, the principle underlying this case is the same principle that controls partnership accounting.

This case, we think, is on all fours with the case of *Eagle* v. *Bucher,* 6 Ohio St., 296. There an association was formed by the subscription of stock and the adoption of a constitution to procure gold from the mines of California, and it was agreed that eight persons should be selected and sent to the California gold fields, furnished with outfits and money for their expenses, and upon their return they should account. Upon reaching California the eight persons failing to agree, partitioned their effects and each worked out in his own way and by his own efforts the purpose of the association. It was held that the per-

sons thus selected to labor for the association, though members of the association, stood also in the relation of employes of the association, and their refusal after arriving in California to work together, and the partitioning among themselves of the property of the association, without its knowledge or consent, and with the view of doing their separate and independent labors, did not work a dissolution of the association and discharge them from their obligation to it under their contract, and that it was competent for the association to compel an accounting and payment by either of the eight of his earnings, while thus working separately, in favor of the other members of the association, or to sue either of them for a breach of his contract, at its election.

Conceding then that the plaintiff below, William I. Edwards, was an employe of this plaintiff in error, and that he was to receive for his services one-half of the profits of the business in which they were engaged, then it became, and was, necessary to determine what those profits were just as much as if they had been in fact full partners in profit and loss, and the partnership had earned profits and there had been no mutual accounting between the partners as to the amount of such profits, and until this profit is determined by an accounting, either between the parties themselves, or by a court of competent jurisdiction, no action will lie at law to recover either's share thereof from the other.

Therefore, we are of the opinion that the justice of the peace had no jurisdiction of the subject-matter of the suit, and the judgment of said justice is reversed, and the judgment of the common pleas court affirming the same is reversed, with costs. And coming now to render the judgment that the common pleas court should have rendered, said action of the plaintiff is dismissed without any order or judgment as to the costs in such action, and exceptions of the defendant in error are noted.

DISTRIBUTION OF TAXES LEVIED AS COMPENSATION FOR SERVICES.

Circuit Court of Hamilton County.

STATE, EX REL EUGENE L. LEWIS, v. CHARLES C. RICHARDSON, AUDITOR, AND C. E. ROTH, TREASURER.

Decided, January 4, 1908.

Mandamus—To Compel Distribution of Tax Levy—Premature, When—County Auditor—Decennial City Board—Section 2816.

A special tax levy to provide compensation for services by a county auditor while serving as a member of the city decennial board of equalization can not be paid except as provided by law, after the amount collected has been ascertained at the semi-annual settlement.

Thorndyke & Capelle, for relator.
Ireton, Collins, Schoenle & Poor, contra.

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

Heard on petition in mandamus.

Certain levies were made by the several school boards of the county to pay certain fees, which, properly belonging to Lewis, auditor of Hamilton county, and are now in process of collection. Lewis seeks by mandamus to have the same paid now, the December taxes having been paid. The petition should not prevail at the present time. Upon settlement between auditor and treasurer the amount collected on the levy made for this purpose should be paid to the auditor on the warrant of the auditor drawn on the treasurer. The only fund available for the payment of this amount is what is collected by taxation, and when collected, and not until then, it should be paid as above stated, and the amount can not be ascertained until the semi-annual settlements (Sec. 2816, Revised Statutes).

The action is premature.

DAMAGES FOR FAILURE TO DELIVER TELEGRAM.

Circuit Court of Lucas County.

LAFAYETTE S. SULLIVAN ET AL v. WESTERN UNION TELEGRAPH CO.

Decided, October 26, 1907.

Telegrams—Failure to Deliver—Presumption of Negligence—Burden on Telegraph Company to Rebut—Company Liable for Nominal Damages, When—Evidence Warranting Compensatory Damages—Cause Improperly Arrested from the Jury.

1. Where in an action against a telegraph company for the non-delivery of a telegram entrusted to it for transmission and delivery, such non-delivery is shown, the burden is on the company to remove the presumption of negligence thereby raised. *Western Union Telegraph Co.* v. *Griswold*, 37 Ohio State, 301, followed.
2. A telegraph company negligently failing to deliver a telegram, entrusted to it for transmission and delivery, is liable for nominal damages; and in a case where such failure is shown, it is error to arrest the case from the jury and direct a verdict for the defendant company. *First National Bank* v. *Telegraph Co.*, 30 Ohio State, 555, followed.
3. A telegraph company receiving a telegram for transmission and delivery is bound to take notice of such facts as are brought to its attention by the telegram in connection with all known circumstances; and for unexcused failure to deliver such telegram, the company is liable for such damages "as naturally flow from a breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties at the time the contract was made."

Seney & Thurstin, for plaintiffs in error.
Smith & Beckwith, for defendant in error.

WILDMAN, J.; HAYNES, J., and PARKER, J., concur.

Error to the Common Pleas Court of Lucas County.

The plaintiffs in error here brought suit in the court of common pleas against the Western Union Telegraph Company, for damages to the amount of $600, claimed to have been sustained by them in consequence of the non-delivery of a telegram. The facts disclosed by the pleadings and evidence, so far as a state-

ment is essential to an understanding of our views, are as follows:

Lafayette Sullivan and his co-complainants, on December 2, 1905, were the owners of a steamer called the David W. Rust, then lying, unloaded, in the port of Buffalo in the state of New York. Sullivan was the managing owner of said vessel, and, on the day named, at 9:45 P. M., gave to the defendant, at its Toledo office, the following message, to be by it delivered to the addressee:

"To Capt. Wm. J. Leaver, Stmr. D. W. Rust. Com. Minnesota Dock, Buffalo, N. York. Will wire you in the morning about coal. Collect. L. S. Sullivan."

This message was received at the defendant's Buffalo office at 11:10 P. M., Buffalo time, which was equivalent to 10:10 P. M., Toledo time, the time changing at Buffalo from central to eastern standard time. The message was never delivered. It is alleged in the petition, and although denied in the answer, the averment is supported by evidence, that at the time of sending this message, negotiations were in progress, between Sullivan and Mr. S. C. Schenck, of Toledo, for the charter of the boat to carry a load of coal from Buffalo to Toledo to be delivered at one of the docks in the city of Toledo. Mr. Sullivan testified, as disclosed by the bill of exceptions, that at the time this telegram was sent to Captian Leaver an arrangement for the transfer of a cargo of coal had been completed except as to the insurance of the cargo, by him—Sullivan. It is claimed by the plaintiffs that the purpose of sending this message to Captain Leaver was to detain the boat at the Minnesota dock in Buffalo until further directions could be given in the morning concerning said cargo. On Sunday morning, December 3, Sullivan wired the captain as follows:

"To Capt. Wm. J. Leaver, Stmr. David W. Rust, Buffalo, N. York. Schenck has wired Russell 'Load Rust for Toledo.' Have arranged with Schenck about insurance. Be careful coming up. I insure cargo. Have key your room. Wire when leave. Collect. L. S. Sullivan."

Schenck was agent of the coal company in Toledo and Russell was the agent of the same company in Buffalo. Schenck did wire Russell, on the same day, the 3d:

"To D. E. Russell, Buffalo, N. Y. Sullivan agrees to carry insurance on cargo Steamer Rust; confirming same in writing to-day. Can you load her nut or egg for Wabash dock? S. C. Schenck."

The second telegram from Sullivan to Captain Leaver and the telegram from Schenck to Russell were sent in ignorance of the fact, which then existed, that the boat had left the city of Buffalo at 3:15 o'clock on the morning of December 3, the captain of the boat, as I have already stated, not having received the first telegram attempting to inform him that he would be wired in the morning about coal.

At the close of the plaintiff's case, upon motion of the defendant, the trial judge arrested the case from the jury and directed a verdict in favor of the defendant.

We have discovered no substantial errors in the admission or rejection of evidence to the prejudice of the plaintiffs, and our attention has been directed to the vital claim of error arising upon the action of the court in arresting the case from the jury and directing a verdict. It is said to us in argument, and it sufficiently appears, that the court based its action upon substantially two grounds: First, the failure of the plaintiff to establish the alleged negligence of the defendant; and, second, that the damages claimed were not such as could be recovered upon any basis of the circumstances alleged and proven.

As to the first of these claims, we think the court was very clearly in error. Whether or not the evidence sufficiently disclosed negligence in the defendant company to warrant a verdict, we are not called upon to decide. There was, clearly, evidence tending to show negligence, and our Supreme Court has established a rule that even in the absence of all evidence upon the subject, the defendant, so far as this question is concerned, must fail. In the case of *Western Union Tel. Co.* v. *Griswold,* 37 Ohio St., 301, it is held:

"Where, in an action against the company for damages resulting from an inaccurate transmission of a message, such inaccuracy is made to appear, the burden of proof is on the company to show that the mistake was not attributable to its fault or negligence."

Counsel for defendant in error seek to draw a distinction between the facts in the case cited and those in the case at bar. In that case the alleged negligence was in the failure to transmit the message accurately. In the present case the facts disclose that the message was not transmitted to the person to whom it was addressed at all, and it seems to us that if the principle decided in *Western Union Tel. Co.* v. *Griswold,* is correct, *a fortiori* the burden must rest upon the defendant company to explain the total non-delivery of the dispatch entrusted to it.

In 2 Thompson, Negligence (1880 Ed.), page 843, I find this language:

"In the leading case in Iowa, in which the rule is laid down, it was held that it operated to cast upon the sender of the message the burden of proving negligence or other fault in the company. It was there held that the mere proof of a mistake in an unrepeated message, without other evidence that the company has been guilty of negligence, will not render it liable. But this conclusion by no means follows from the rule. It is contrary to the weight of authority, and destitute of support in legal analogy. If A, for a consideration, undertakes to do a certain thing for B, and fails to do it, B's case is ordinarily made out by showing the undertaking, the consideration, and the failure. It is a case for the application of the rule, *res ipsa loquitur.* The failure of A to fulfill his contract speaks for itself, and makes out a *prima facie* case for B, and the burden is upon A to show a legal excuse for his failure, if he can. Moreover, this rule is one of necessity; for it is seldom or never possible for the sender of a dispatch to show negligence in the company beyond the mere fact that it failed to deliver the message as written. If its failure was not due to negligence, the means of showing that fact is exclusively within its own possession, and, from the nature of the case, the plaintiff will seldom be able to produce evidence in rebuttal."

This reasoning is just as applicable to the case of non-delivery of a message as to the inaccurate transmission of one.

Referring again to *Western Union Tel. Co.* v. *Griswold, supra,* page 313, we find this language:

"We are also of the opinion that the failure to transmit and deliver the message in the form or language in which it was received, is *prima facie* negligence, for which the company is liable; and that to exonerate itself from the liability thus presumptively arising, it must show that the mistake was not attributable to its fault or negligence. This rule not only rests upon sound reason, but is well sustained by well-considered cases."

And this statement is followed by the citation of numerous cases. We are, then, satisfied that the court erred in this regard, and the question as to whether or not the defendant company committed negligence, is, for the purpose of our present inquiry, disposed of.

Was the court correct in its other view upon which it sustained the motion? Are the damages claimed here remote or of such character that the plaintiff is not entitled to recover, although they were caused by the defendant's negligence? We have found much confusion and conflict in the adjudications of the different states upon the question of the extent to which a telegraph company is required to be enlightened by the wording of a telegram, or other circumstances, as to the character of the business involved. The current of authority seems to hold that a company is not liable for the non-delivery or incorrect transmission of a cipher message which is unintelligible to it. It has been held by the courts that, with regard to messages involving no pecuniary business, as, for instance, messages informing one of the approaching death of a near relative, or some matter of such concern, where its non-receipt might be attended with great mental pain merely, no recovery can be had for damages. Our own Supreme Court has so held, but with regard to telegrams based upon business involving moneyed interests, the authorities are by no means uniform—as I have said, they are confusing and in conflict. We have had no decisive adjudication in this state disposing of the controversy in this respect.

In the case of *First Nat. Bank* v. *Telegraph Co.* 30 Ohio St., 555, our Supreme Court held, however:

"In case of a breach of contract, actual damages not being proved, nominal damages may be recovered."

And that conclusion of the court, as expressed in the syllabus, was made the ground of reversal of the judgment of the lower court which had not awarded such nominal damages. I read from page 568:

"The plaintiff asked the court to charge that, if the non-delivery of the message was by reason of defendant's negligence, plaintiff was entitled to nominal damages, if there were no actual damage. This was refused, and the court did charge that there was no right of action, unless injury was shown. This was error, for which the judgment must be reversed."

Probably the Supreme Court deemed the matter of sufficient importance to justify a reversal in view of the fact that it might affect the question of costs, or, possibly for some other reason, as establishing the legal rights of the parties and as affecting their future conduct in other cases. Had the view entertained by the trial judge in the present case been correct—that the plaintiff's case must fail because no negligence was shown—the court would have been justified in directing a verdict for the defendant. It is only where negligence appears or is presumed that even nominal damages are recoverable. But we have already indicated that the judge was in error upon this first proposition, and it necessarily follows that he was likewise in error in directing a verdict for the defendant. Under this decision of the Supreme Court, if there was unrebutted evidence tending to show or raising a presumption of negligence, the case should have been submitted to the jury with an instruction that if no actual damage resulted, the jury should award a verdict for nominal damages. For this reason, then, the judgment must be reversed; and as a new trial will be necessary in the court below, it is proper that we should advise the court of our views as to the more important question bearing upon the right of the plaintiff to compensatory damages under the circumstances disclosed.

The adjudications in the different states and in England nearly all seem to lead back to the case of *Hadley* v. *Baxendale*,

9 Exch., 341 (26 Eng. L. & Eq., 398). Our own Supreme Court, in line with the numerous other courts of the country, sought to derive instruction from this leading case, and in *First Nat. Bank* v. *Telegraph Co., supra*, substantially adopted the rule enunciated in the English case referred to. In the syllabus, our Supreme Court say:

"In case of failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties, at the time the contract was made."

In one of the reports which we have examined, the court of another state has changed this conjunction "or" to the conjunction "and." But we have in Ohio the adoption of an alternative rule, and if the damages claimed can fairly be brought within either of these two classes—such as naturally flow from a breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties at the time the contract was made—then such damages are recoverable. On page 565 of *First Nat. Bank* v. *Telegraph Co., supra*, Judge Wright, who announces the opinion, after quoting a statement of the rule made by Judge Earl, in *Leonard* v. *Telegraph Co.*, 41 N. Y., 544, offers a more precise statement of his own views, in the following language:

"A more precise statement of the rule is, that a party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts."

This may or may not be the principle which was favored by the entire court, but it is at least safe for us to rely upon the language embodied in the syllabus. We have arrived at the conclusion, from an examination of the authorities, and without much effort to reconcile them—because it is impossible to do that—looking at what seemed to us the just principles that should govern cases of this character, that the defendant company is bound to take notice of such facts as are brought to its atten-

tion by the telegram or other circumstances within its knowledge.

In 2 Thompson, Negligence (1880 Ed.), page 828, is an extended and instructive chapter on the liability of telegraph companies for negligence, in which he collates numerous authorities and offers his own judgment as to what should be the correct rule. On page 849, after referring to the leading case of *Hadley* v. *Baxendale, supra,* and some other authorities, which were manifestly examined by our Supreme Court in *First Nat. Bank* v. *Telegraph Co., supra,* he uses this language, quoting Chief Justice Earl in *Leonard* v. *Telegraph Co., supra,* to which our own Supreme Court refer:

"It is not required that the parties must have contemplated the actual damages which are to be allowed; but the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the fact."

It will be noticed that this is the same phraseology used by Judge Wright in *First Nat. Bank* v. *Telegraph Co., supra,* and which he undoubtedly borrowed from Judge Earl in *Leonard* v. *Telegraph Co.* Mr. Thompson continues:

"In actions *ex delicto,* the damages to be recovered must be the natural and proximate consequences of the act complained of, unless there be circumstances of aggravation, when exemplary damages will be awarded. By these rules, then, the liability of the owners of telegraphs, in actions against them, must be measured. The statement of the adjudicated cases will indicate the manner in which the courts have applied them."

It is hard to derive from the wording of the dispatch in the case at bar much information beyond the facts that the person to whom it was sent was the captain apparently in charge of the steamer named "The Rust"; that it was at the time supposed to be at the Minnesota dock in the city of Buffalo, and that this dispatch would be followed by another in the morning, and that both had some relation to coal. We are of the opinion, however, that the telegraph company could not blind its eyes to such other circumstances as may be assumed to have been within its knowledge concerning the character of the port; concerning the ordinary work of a steamer at that port, and the course of traffic, and such other circumstances as might naturally lie within the purview of a telegraph company like the Western Union, engaged in the transaction of business which would naturally attract its attention to such matters as these.

It is claimed by counsel for defendant in error that the principle of *First Nat. Bank* v. *Telegraph Co., supra,* should apply in another respect to the case at bar and prevent the plaintiff's recovery, to-wit, that this plaintiff will not be permitted to recover for the negligence of another where that negligence would not have caused the damage except for the intervention of some independent cause. We think, however, that the case at bar is to be distinguished from the one cited, and that in the conditions before us the evidence tends to disclose that the plaintiff did directly sustain the damage asserted, whereas in the case cited, it does not appear that any damage was so sustained. The matter is one for a jury, guided by proper instructions from the court; and both in this connection and in support of our view as to knowledge of the defendant of the business character of the telegram, I wish to quote some language from a case decided by the Illinois Supreme Court, *Postal Telegraph Cable Co.* v. *Lathrop,* 131 Ill., 575. I read the second and third paragraphs of the syllabus:

"The question whether or not telegraph dispatches are sufficient to inform the operator of their meaning, and of the possible risk of loss by mistake, is not to be determined solely by the dispatches themselves, but all the facts and circumstances,

including previous messages sent by the operator for the same parties, may be considered.

"Where enough appears in a telegraph message to show that it relates to a commercial business transaction, it is sufficient to charge the company with damages resulting from its negligent transmission, although the operator may not be able to understand its meaning as to quantity, quality, price, etc., as the sender and the party to whom it is sent understand it."

On page 577, in the opinion of the judge, I find this language:

"Therefore, in determining whether or not the messages were sufficient to inform the operator of their meaning, and of the possible risk of loss to appellees by a mistake in transmitting them, the jury should have been left free to consider all the facts and circumstances proved in the case bearing on that question, whereas the instruction limits the inquiry to that which appears in the dispatches themselves, and to such facts as may have been disclosed by the plaintiff to the defendant or its agent at the time they were sent. * * *

"On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential damages against a telegraph company, the decisions can not be said to be harmonious. Counsel for appellant contends that the better line of authorities sustains the rule announced in this instruction, viz., that the operator who transmits a message must be able to understand its meaning as to quantity, quality, price, etc., as the sender and the party to whom it is sent themselves understood it; otherwise it is said he can not reasonably be supposed to have contemplated damages as the probable consequence of a failure to correctly transmit it. While some of the cases cited go to that extent, especially where the message is in cipher, another line of decisions, and we think founded on the better reasons, hold that where enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it is sufficient to charge the company with damages resulting from its negligent transmission."

And on page 578:

"It certainly can not be contended that the agent must be informed of all the facts and circumstances pertaining to a transaction referred to in a telegram, which are known by the parties themselves, to make his company liable for more than nomi-

nal damages. If it should be so held, the telegraph would cease to be of practical utility to the commercial world.

"It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which will probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is that where a message as written, read in the light of well known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused."

Our adjudications in Ohio are so meager upon these precise points, that it is interesting to examine as one of the pioneer cases a case tried before Judge Starkweather in the court of common pleas in 1853, *Bowen* v. *Telegraph Co.*, 1 Dec. Re., 574 (10 W. L. J., 415; 1 Am. Law Reg., 685), in which he enunciates as follows substantially the doctrine which I have just quoted.

"But if it (the telegram) was sufficiently plain to be understood by Bowen & McNamee, the plaintiffs in this case, the merchants to whom it was addressed, though not intelligible to others, that it was appreciable, and if changed to the injury of the plaintiffs, such a change was a proper subject of damages."

We are not quite disposed to say that it was the duty of the court below to find as a matter of law that this telegram sufficiently apprised the company of its importance and the danger of financial loss which might arise from non-delivery, but we are of the view that the case should fall within the general class of those which involve mixed questions of law and fact, and that it was one to be submitted to a jury for its consideration under proper instructions from the court. We do not desire to go further than this at present, and for the purpose of this inquiry it is enough to say that we have concluded that the judgment should be reversed and the cause remanded for another trial. Such will be the judgment.

INJURY FROM EXPLOSION OF A BLAST.

Circuit Court of Columbiana County.

MERCER, ADMINISTRATOR, v. WHITE ET AL.

Decided, October Term, 1907.

Blasting—Resort to, in a Populous District—Precautions Against Injury Disregarded—Explosion of Blast not Negligence per se, When —Use of Streets in Erection of New and Removal of Old Buildings —Nuisance—Verdict Properly Directed for Defendants.

Where the owner of a burned building situated in a populous city, desiring to demolish a wall with dynamite—for the purpose of erecting a new building, that being the only practicable means—secures the consent of the street commissioner to such dynamiting and before putting off the blast stretches ropes across all streets leading to the building for the purpose of keeping all pedestrians at a safe distance, and a young man knowing the object and purpose of the ropes goes with others under the ropes and up the street through curiosity to a point much nearer the building and is hit with a flying brick and is killed, when if he had kept outside the ropes he would have been in perfect safety, the owner of the building and his contractor who put off the blast are not liable in damages for his death.

Charles Boyd and *George D. Ingram*, for plaintiff in error.
C. S. Speaker and *F. E. Grosshans*, for defendants in error.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to Columbiana Common Pleas Court.

Lewis E. Moore, a young man, was killed at East Liverpool, this county, by a flying brick caused by dynamiting a wall in that city. There had been a large fire and there was one particular wall that was left standing that was difficult to demolish. Jack screws were used without effect. Water was tried but, in consequence of the low pressure, it was also ineffective, and from the evidence it is apparent that the only practical way to remove the wall was by blasting with dynamite. No formal permit was obtained from the city government to resort to blasting,

but the officers in the control of the streets were informed that such resort would be had and they consented thereto.

Before the blast was put off ropes were stretched across all streets and alleys at such a distance from the wall as was supposed to preclude the possibility of there being any danger beyond the ropes. The rope was stretched across Drury lane, the street upon which young Moore was killed, one hundred and ninety-five feet from the wall. No part of the wall or debris was thrown any material distance from the wall but this single brick; and the evidence by persons used to blasting with dynamite shows that is was a very unusual occurrence; that they had never heard of a similar case of a brick or a piece of brick being thrown such a distance before.

The street commissioner who had control of the streets was upon the ground at the time of the blasting, as were also a number of the city police and fire department, at the request of defendants in error—who were the owners of the building and the contractor in control of the work—for the purpose of warning all persons to keep beyond the ropes, which they did to the best of their ability; so that every precaution was taken to prevent injury from the blast. But it is claimed that blasting in a populous city is a nuisance and that whoever does so, does it at his peril, and that no amount of precaution will avail anything in case of injury.

In support of this position much reliance is placed by counsel upon the case of *Munro* v. *Pacific Coast Dredging & Reclamation Company,* decided by the Supreme Court of California, 24 Pacific Reporter, 303. In the opinion in that case it is said:

"The giving of the following instruction by the court is likewise excepted to: 'It is no defense or answer to an action of this character that defendant, in exploding the blast in question, used and employed skillful and experienced men, and in everything appertaining to blasting it used and exercised the highest degree of care; and I charge you that defendant is liable to damages for the death of said Michael Stanton, if you find that his death resulted from the firing of the blast in question, even if it used the highest and utmost care and skill in firing and explod-

ing it.' We preceive no error in the above direction. The evidence shows clearly that this blast was exploded in a thickly settled portion of the city. We are of opinion that no degree of care will excuse a person, where death was caused by such explosion, from responsibility for it. It is said that the above instructions ignore the doctrine of contributory negligence. As there was no evidence of contributory negligence in the cause, the doctrine of such negligence was properly ignored."

We are not informed of the circumstances of the blasting in that case—whether it was being done in the erection or demolition of a building. Possibly it was being done in the prosecution of some character of business by a manufacturer or other person, which it seems to us would make a material difference.

In this case the old wall was being removed in order that a new building might be erected.

It is well settled that streets may be used temporarily by abutting proprietors in the erection of a building where due care is used in guarding the obstruction so that pedestrians are fully warned, and we can not see why the same may not be done when proper caution is used in taking away the debris for the purpose of erecting a building.

In the case of *Graetz* v. *McKenzie*, 35 Reporter, 377, the Supreme Court of Washington held :

"1. Blasting, in excavating for a building, so as to throw rocks on the street and adjacent property, is a nuisance; but giving fair warning of an impending blast absolves the excavators from damages for personal injuries, if the injured person failed to heed it.

"2. Where warning of an impending blast was given to a pedestrian on a street before it occurred, and he was advised to take a place of safety along the wall of a building, the fact that he was seized with a sudden panic when the crash came, and rushed into the building, where he was killed by a stone hurled through the window, will not render the persons exploding the blast liable."

Although this case was decided by a divided court yet it is certainly in harmony with reason. To the same effect is *St. Peter* v. *Denison,* 58 N. Y., 416.

In the case before us plaintiff's intestate had full knowledge that the blast was about to be put off, and that he should keep out of danger. The rope, as we have before said, was stretched across Drury lane one hundred and ninety-five feet from the place of the blast. It was notice to all persons to keep beyond the rope. Furthermore, the people were cautioned by the policemen and firemen to keep outside of the ropes, and yet plaintiff's intestate with others, through curiosity, went under the rope on Drury lane and up the street for a distance of fifty-five feet nearer the wall where the blast was being put off, and while standing at that point was struck with the brick and killed. Had he been outside of the rope he would not have been struck. It was his own carelessness and recklessness that directly contributed to his death, and although defendants in error may have been guilty of creating a nuisance, yet they could not be held responsible for his death.

Something is claimed by counsel for plaintiff in error on the authority of *Railroad Company* v. *Kassen,* 49 Ohio State, 230. There is no evidence that defendants in error knew that young Moore was within the ropes before they caused the blast to be put off, hence that case does not apply. The court did right in directing a verdict for defendants below, and the judgment is affirmed.

DECREE FOR SPECIFIC PERFORMANCE DENIED.

Circuit Court of Hamilton County.

MULLEN v. KENNEDY ET AL.

Decided, June 15, 1907.

Specific Performance—Of Contract to Sell Realty will not be Decreed, When—Equity.

Equity will not decree specific performance to a purchaser of three separate lots, where he brings an action for recovery of one of them, and later, after the value of the property has materially increased, offers to take all three lots.

C. M. Leslie, for plaintiff.
Cogan & Williams, for defendant.

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

This is an action for specific performance. It appears that Kennedy, as executor, employed Theo. Mayer & Bro. to sell certain real estate in the city of Cincinnati. It was bought as one tract of land, but was offered and sold in separate lots on the same day to the same person, to-wit, the plaintiff. Suit is brought to complete the sale of only one of the lots bid off.

This is an action in equity and the relief asked for is not to be granted as a matter of right, but only on equitable principles. We do not think it would be equitable to compel the defendant to convey one lot to the plaintiff, and relieve her from taking the other two lots. She should not be permitted to pick out one lot, and say she would take that, but not the others. This is in effect what she did on the trial of the case in this court. Plaintiff testified that she was willing and able to take the other two lots, but this comes too late. This action was brought more than two years ago and since then the value of these lots are probably greatly enhanced, and this may be the reason why she is now ready to take the other two lots. If she wanted to insist on carrying out the contract of sale as alleged to have been made between the parties, it was only right that she should have demanded that the whole contract should be performed, and not a part, for while the tract of land was sold in different lots, it was really one piece of property and sold at one time.

The petition will be dismissed.

FREE BAPTISTS LEGAL SUCCESSORS OF FREE WILL BAPTISTS.

Circuit Court of Scioto County.

CHARLES O. GRAHAM ET AL, TRUSTEES, v. FREDERICK F. RANSAHOUS, GENERAL CONFERENCE OF FREE BAPTISTS OF THE UNITED STATES, ET AL.

Decided, March 23, 1908.

Religious Societies—Status of the General Conference of Free Baptists —Claim of, to be the Successors of the Free Will Baptists Confirmed—No Change in Faith and Tenets, and No Schism—Litigation between Church Factions—Unreversed Judgment is Res Adjudicata as to, When—Not Affected by Change in Trustees and Membership.

1. The General Conference of Free Baptists of the United States has been duly and legally organized and incorporated under the laws of the state of Maine, and is the legal successor of the General Conference of the Free Will Baptist Connections of the United States.
2. There has been no substantial or material departure by said General Conference of Free Baptists of the United States from the faith and tenets of said General Conference of Free Will Baptist Connections of the United States, and there has never existed a schism in said General Conference of Free Will Baptist Connections of the United States nor in its said successor, the General Conference of Free Baptists of the United States.
3. The said incorporation of the General Conference of Free Baptists of the United States and the change of name from that of the General Conference of Free Will Baptist Connections of the United States to said corporate name were duly and legally authorized by said General Conference of Free Will Baptist Connections of the United States, and what is known as the new constitution and by-laws of said Free Baptist Church were duly and legally adopted by said General Conference of Free Baptists of the United States.
4. Where one of two existing factions in a church society, or the trustees or representatives of said such faction obtains a judgment of a court having jurisdiction of the parties and subject-matter against the other faction, determining the rights and interests of said parties in and to the church property of such society, such judgment if unreversed is *res adjudicata* as to all matters so determined in

all subsequent suits between said two factions so long as they continue substantially the same, and this is so notwithstanding the trustees, representatives and individual membership of said factions may change.

Evans & Crawford and *N. J. Dever*, for plaintiff.

Frank B. Finney and *J. C. Milner*, contra.

WALTERS, J.; JONES, J., and CHERRINGTON, J., concur.

Charles O. Graham et al v. F. F. Ransahous et al is in this court on appeal from the court of common pleas. The plaintiffs in the court of common pleas filed their petition, alleging in substance that in the year 1880 there was a church society existing in the town of Sciotoville, this county; that it has continued in existence up to the present time; that it was known as the Free Will Baptist Church Society; that in 1880 Henry Towne and wife, and Samuel McConnell and wife, by deed executed to certain trustees of said church, conveyed a lot in the village of Sciotoville to them in trust for the uses and purposes of a church. They further allege that the defendants are unlawfully keeping them out of possession, and that they are claiming to be the legal trustees of the church, whereas they are not; and alleging that the plaintiffs are the successors of the trustees who were mentioned and named from the organization of the church down to the present time; they further allege that in 1905 the defendants attempting to act as such trustees made a conveyance of the church property to the general conference of the Free Baptist Church; that the Free Baptist General Conference deeded the property back to the trustees at Sciotoville, upon certain conditions—that they should pay the taxes and keep the property insured for half its value, thus giving the property back to the trustees for religious purposes.

The prayer of the petition is that the plaintiffs may be restored to the possession of the property and their rights as the lawful trustees of the property and church, and that their title may be quieted to the same, and that the two conveyances to the trustees of the General Conference of the Free Baptist and from the General Conference of the Free Baptist back to the

trustees be set aside as fraudulent and void, and contrary to the original trust.

The answer is a substantial denial, first of the allegations in the petition; and second, it sets up that the matters and things complained of in the petition have been adjudicated in a former suit filed in the court of common pleas in this county, in 1889, substantially between these same parties, and that the judgment of the court thereon still remains unmodified and unreversed and in force.

A long reply is filed to that answer in which the plaintiffs declare that the General Conference of the Free Baptists attempted to form an organization and take over the property of this church; but that they didn't adhere to the original doctrines and tenets of the church, and that they have gone away from the original church, leaving the plaintiffs the original church people and entitled, therefore, to this property.

There has been a large amount of documentary evidence introduced in this case, and it presents two or three questions, and in order to a presentation of the same it will be necessary to dwell somewhat upon the history of this organization.

It seems from the papers and exhibits in this case that the church was organized in 1780, as a Free Will Baptist—a denomination, and that it was a voluntary association; that it continued in existence until 1827, when a General Conference was organized. In 1841 it adopted a constitution and by-laws. Article X of the constitution provides:

"This constitution may be amended at any regular session of this conference by a vote of two-thirds of the members present, provided such amendment has been proposed at a previous session, and approved by at least three-fourths of the yearly meetings belonging to the conference."

It seems this church had, in the first place, what they denominated local churches, who by prescribing to certain forms came into the association. That they had certain rules which they followed in the local church organizations; that they then had a quarterly meeting, which quarterly meeting was composed of two or more of the local churches; they then had what they

styled yearly meetings, which was composed of two or more of the quarterly meetings.

I would say the history of the church shows in their general conference, previous to 1889, there arose a discussion in the general conference as to the change in the name of the church. And in the conference that was held in 1886, appears this on page 190 of the Free Baptist Faith:

"The conference instructs the conference board to take immediate steps to secure the incorporation of the general conference." Twenty-Sixth Conference, p. 508, 1886.

The name and title of the general corporate body shall be, "The General Conference of Free Baptists." Twenty-Seventh Conference, pp. 36, 38, 1889.

It will appear, therefore, that the General Conference of the Free Will Baptists had under discussion in 1886 and 1889 the incorporation of the general conference, and directed the name by which it should be incorporated. Following that general conference, in 1889, it appears from the proceedings that in 1891 certain persons belonging to the Free Will Baptist church procured a charter from the Legislature of the state of Maine; that charter is a very comprehensive one, and is embraced in a special act passed by the Legislature which gives to these incorporators certain special privileges and provides in the act what they shall do, and what their jurisdiction and authority shall be. And it gives to the incorporation the name of the General Conference of Free Baptists. In the act there is an authority to certain designated persons therein to give a certain notice to the members of the church—a public notice—before the call of a meeting for the purpose of taking such steps on the act as they may see fit. That notice appears in the records. Pursuant to that notice on the 3d of October, 1892, the incorporators—the incorporation you might say met at Old Orchard, Maine; there they attempted to perfect a corporation under the special act. They adopted unanimously the charter provided in the special act, and they also adopted a constitution and by-laws. After having done that they then adjourned to meet at Paige Street Church, in Lowell, Mass., where at the same time the Triennial General Confer-

ence of the Free Will Baptists was being held. It seems from the record that the incorporators went into the church—the place where the Free Will Baptist Conference was being held, and took possession practically of the whole proceedings. And they organized under the incorporation articles in the church where the Free Will Baptists were holding the conference. They elected a presiding officer and a clerk, and they adopted the roll of the delegates that had been presented to the Free Will Baptists Conference, as the roll under the incorporation articles, and proceeded to business.

Among other things, the following resolutions were adopted:

"Resolved, That whenever the clerk of the General Conference of Free Baptists shall certify to the treasurer of the conference that yearly meetings and association representing three-fourths of the membership of this denomination have approved of the organization and incorporation of the General Conference of Free Baptists, then the treasurer of this conference be and hereby is directed and authorized to give, transfer, deliver, set over and assign to the treasurer of the General Conference of Free Baptists, a corporation duly created in the state of Maine, all property of every name, kind and nature held by said Free Will Baptists Connection in North America, to be held by said treasurer of the General Conference of Free Baptists under the same conditions, powers, and privileges as held by the treasurer of this conference."

That was unanimously adopted. There is also another resolution which provides that, under the same conditions—when three-fourths of the membership of this denomination have approved of the organization and incorporation of the General Conference of Free Baptists, then the treasurer of this conference be and hereby is directed to transfer the aged and needy ministers' fund, now held by him to the Conference Board of the General Conference of Free Baptists, to be held by it for the same purpose as now held by the treasurer of this conference.

At the same general conference, the following resolution was adopted:

"Resolved, That the General Conference of Free Baptists hereby recommend the yearly meetings and associations consti-

tuting the General Conference of Free Will Baptists of North America to consider the organization and incorporation of the General Conference of Free Baptists as effected at Ocean Park and perfected at Lowell under instructions given by general conference at Harper's Ferry, and if approving the same to express their approval by formal action, to be reported at once thereafter to R. Deering, clerk of the General Conference of Free Baptists, at his office in Portland, Me.; and,

"Resolved, That the various benevolent societies connected with the denomination which are expected to become merged into the General Conference of Free Baptists are advised for the time being to continue their work as at present constituted; and,

"Resolved, That when the Yearly Meetings and Associations representing three-fourths of the resident membership of the denomination shall have approved of the organization of the General Conference of Free Baptists it shall be understood as the will of the denomination that the various benevolent societies aforesaid transfer their funds and merge their interests into and with the General Conference of Free Baptists."

This appears in the proceedings of the twenty-eighth General Conference of Free Baptists, and of the Free Will Baptists Conference, partaking of the nature of both organizations.

The next triennial conference was held at Winnebago, Minn., by special appointment of those authorized to fix the time and place. In the proceedings of that triennial conference, being the twenty-ninth of the Free Baptists, appears the following:

"On motion of Webb of Maine the clerk was directed to read the records relating to the adoption of the constitution, and of the transactions affecting it, made since the Lowell Conference. The records having been read accordingly, on motion they were approved."

That, we take it, relates to the former provisions of resolutions passed in 1892, providing for the consent of three-fourths of the yearly meetings be directed to the clerk, and that when he shall have received the consent of three-fourths of the members of the yearly meetings, then these articles of incorporation of this new body should go into effect.

His report is not given there. The report is referred to as

having been read accordingly, and on motion was approved. His report in detail nowhere appears in the records submitted here in evidence. On page 11 is the report of the conference board, which was read by H. M. Ford, who is the recording secretary, and in that report appears the following:

"For the first two years the work of the board was sadly hindered while it waited for the necessary three-fourths vote of the resident membership of the denomination, which turned over to them the business of the three benevolent societies, and this took place only just one year ago, so that the board has actually had but one year to formulate and carry out its plans. Only a mere beginning could be made in so brief a time."

Though we have a reference in the official procedings of the report of this executive and financial board, yet a year before that in 1894 the necessary three-fourths of the members of the yearly meetings had been obtained.

There appears in the proceedings of this conference a correspondence betwen Rev. Thomas E. Peden and the conference—being a letter—a general letter, addressed by Mr. Peden to the conference in which he protests against any action being taken by the conference under the corporation, and the answer to that letter was referred to a special committee. The special committee drafted a letter and it was laid before the conference and adopted. In that letter appears the following:

"The experience of other denominations, while making such changes, led to expectations of this kind, but to the credit of Free Will Baptists it can be truly said that their forbearance and kindness in the premises have exceeded that of any other denomination in like circumstances. Out of a resident membership of 58,847 the large number of 49,563 voted in favor of the changes proposed before said changes were made."

It is true, we do not have the official ballots or votes, or the official report of the secretary in detail showing this vote. It is nowhere in evidence; but it is referred to in the documents from which I have just read extracts, as having been done—as having taken place—and gives the vote which constitutes more than three-fourths vote of the members of the yearly meetings.

Therefore, we take it that so far as the question presented by this record, one of the chief questions that the constitution was not changed or the incorporation was not perfected by the necessary three-fourths consent of the members of the yearly meeting is not correct; that there is nothing in the records to show that the Article X of the Constitution of 1841 was complied with. It provides that the amendment shall be proposed at a previous session. The records show that in 1892 at the regular session the proposed change was already laid before the general conference. The act of incorporation under the state of Maine was laid before the corporation. The proceedings of the corporators thereunder in their organization, the adoption of the new constitution and by-laws, and a change of the name were all three years before its adoption and at the previous triennial conference laid before the general conference. The records show that on the vote it was adopted by the three-fourths of the members present and more. The records show that three-fourths of the yearly meetings belonging to the conference had voted to accept the new constitution. The new constitution was adopted under the corporate name, and the name was changed from the Free Will Baptists to the General Conference of the Free Baptists. That was a part of the change of the constitution, because the old constitution provided that the name shall be the General Conference of the Free Will Baptist Connection. Therefore, from these records we can see that the constitution of 1841, Article X, was strictly complied with, and the new constitution was adopted and a corporation formed for the purpose of taking over by a resolution all the property of the Free Will Baptist Connection, and that by such incorporation and three-fourths consent of the yearly meetings, and a two-thirds vote of the conference, together with the proposal of all that was being done made before the previous triennial general conference have been complied with, and that by the act of incorporation and these steps having been complied with, it *ipso facto*, turned over all the property and effects of the church to the new corporation.

In the Northwestern Reporter, No. 9, Vol. 76, March 23, 1906,

on page 707, the learned counsel for the complainants in this case have given us the decision which there appears. The sixth syllabus of the case is as follows:

"Property conveyed to the trustees of an incorporated congregation vests on its incorporation in the corporation."

In this case there seems to have been just about the difference that there was between the two different factions in regard to the name. The one contending for the name of Christian Church and the other for the Church of Christ. In this case the difference between Free Will Baptists and the Free Baptists. And in the opinion the court say they incorporated under the name of the Church of Christ of Sand Creek. By that act of incorporation all the property of the Sand Creek congregation became immediately vested in that corporation, and its title thereto was not divested by the act of the defendants in error in subsequently incorporating as the Christian Church of Sand Creek.

It will be observed that these proceedings show that the local church at Sciotoville, in 1905, incorporated, and that these complainants are the trustees under the corporate act, and are now seeking as such trustees to obtain the title and the quieting of the same and possession of its church property in Sciotoville. Under that decision—under the rules, and under the constitution adopted in 1841—we must therefore hold that the incorporation was regular; that the constitution was changed by the change of name regularly—that the name was regular and authorized in 1886, and also in 1889, and that they were adopted by the necessary consent of three-fourths of the members of the yearly meetings. That would seem practically to dispose of this case; but there is another question presented and argued strenously by counsel for complainants.

Counsel for the complainants claim under the general rule of law in regard to church associations that where there is a schism in the church, or a division, the property of the church will belong to that faction or division of the church which holds to the original doctrines and tenets of the church. And coun-

sel claim that the organization to which complainants belong, the Free Will Baptists, maintained the original doctrines and tenets of the Free Will Baptist Church Connection, as an original organization. And that the General Conference of Free Baptists is an offshoot and a seceder from the original doctrine, and therefore, that all the property of the church remains with those who stick to the old methods and doctrines and faith of the church.

At the twenty-fourth general conference, page 405, of the record, held in 1880, the following appears:

"Each religious body connected with the conference is at liberty to use in its title 'free' or 'free will' as may be preferred."

At the twenty-fifth triennial conference, page 457, of the records, held in 1883, appears the following:

"The names 'Free Will Baptists' and 'Free Baptists' are to be regarded as synonymous."

"The name and title of the general corporate body shall be 'The General Conference of Free Baptists.'" Twenty-seventh triennnial conference, pp. 36 and 38, held in 1889.

Mr. Peden, while on the stand testifying in this case, testified among other things that the doctrines of the Free Will Baptists and the Free Baptists are substantially the same. And in going through the record of the publication of the Book of Faith, and the Conference of Faith, or Articles of Faith, or whatever it may be called in ecclesiastical language, there appears no difference in the Articles of Faith of the Free Will Baptist Church as it has always stood and the Free Baptists, with the exception of one article of faith, and that appears in a little pamphlet, styled Free Will Baptist Faith, being a treatise, it is said, containing the leading points of the doctrine and principles of the Free Will Baptists, and on page 32 appears the following:

"Washing the Saint's feet. This teaches humility, purity of body as well as soul, willingness to serve every Christian in any way we possibly can to promote his spiritual welfare and

advance the Cause of Christ. It is the duty and happy prerogative of every believer to observe this sacred ordinance."

In this record objections to this section or article of faith appear. It was published in 1905, and for aught that appears in this record this article of faith was adopted long after the schism took place in 1892, and ten years after the final adoption of the new constitution under the corporate name in 1895. And so far as we know from this record this washing the saint's feet faith article was passed by the Free Will Baptists themselves long after all these injuries are alleged to have occurred. If that be so, then the Free Will Baptists have changed faith and doctrine, if it be a change. If it be, as counsel claim, a radical change and in the nature of a sacred sacrament, then the Free Will Baptists, as I say, ten years after this change occurred, made the change from the original doctrine themselves, and that they are the ones that have perverted and receded from the original doctrine instead of the corporate Free Baptists. And they certainly can not allege as a predicate that the original doctrine had been changed and that they represent the original doctrine, when from all that we know, this change occurred a long, long time after all these things took place. There is nothing in this whole record from the beginning to end in the view that we take of it, that will prevent the complainants in this case attending the church in Sciotoville, as now organized under the Free Baptists, and worship God according to the doctrine of the Free Will or the Free Baptists. And that is the foundation of all rights in a civil court that the complainants can have, and with their doctrines and faiths and their eclesiastical rules of law we have nothing to do, excepting that if their rules and courts as they have them provide for the doing of a certain thing that is lawful and it is done, it precludes the civil courts from afterwards taking jurisdiction and passing upon the question. It seems that this church has had different ascending functionaries and judicatories to determine the different matters; the local church, the local matters; the quarterly church, the quarterly matters; the yearly meetings, the yearly matters; and the general con-

ference general supervision of all matters—constituting general courts of judicatory so far as ecclesiastical questions are concerned and for determination. And if they have determined them, this civil court has nothing whatever to do with it.

In a well considered case that was affirmed by the Supreme Court, appearing in Vol. 6, Ohio Circuit Court, p. 128, the court says:

"That where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, custom or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it."

Having found that the ecclesiastical courts, the General Conference of the Free Will Baptists, if you please, having provided in their articles—in their constitution, Article X—how it shall be amended, or how abrogated, finding as we do that the steps provided there have been carried out, this court has nothing further to do.

There has been cited to us here a very learned case from the House of Lords, England. The holding appears in the law reports in this pamphlet containing some eight hundred pages, where a church question arose, and was decided after long and learned discussion. And the book really is a symposium of learning and eloquence in polemics and scholasticism, but so far as the merits of this case are concerned, as we view it, it is not decisive and really does not apply. The first syllabus is:

"The identity of a religious community described as a church consists in the identity of its doctrines, creeds, confessions, formularies and tests."

As we have seen and found from this record the Free Baptist Church and the Free Will Baptist Church in all their doctrines and confessions of faith are alike, except as to washing feet; and that, from this record, appears to have been introduced by the complainants themselves.

Now, there is another question (this opinion is already getting

long), as to matters and things herein having been adjudicated. It seems in 1899 a suit was brought in this court and that the suit was between indentically the same parties that bring this suit, or their predecessors or successors. It was the same principle exactly—to obtain possession of this church; the one faction claiming they had been put out by the other, and the other claiming that they had not. Why wasn't it an adjudication? Because they are different parties here succeeding to the title of trustees in trust doen't alter the case; it must be considered as the same parties; the subject-matter is the same; the factions representing the Free Will Baptists and the Free Baptists are the same; their successors are the same; and the trust is the same and the same question was made in the subject-matter and practically between the same parties.

So far as the case being an appealable one, we adhere to our former decision, and the motion to dismiss the appeal will be overruled. The petition of the complainants will be dismissed.

Finding and decree will be entered in favor of the defendants.

ACTION FOR INJURIES SUFFERED BY NON-RESIDENT WARD.

Circuit Court of Mahoning County.

THE PENNSYLVANIA COMPANY v. WALTER W. RAUB, BY HIS GUARDIAN, WILLIAM H. RAUB.

Decided, October Term, 1907.

Guardian and Ward—Action for Injuries to an Infant—Guardian and Infant Non-residents—Comity Between States—Action for Injuries Distinguished from Action by a Guardian Demanding Money from a Trustee—Dilatory Objections to Jurisdiction—Sections 6279 and 6290.

An action may be maintained in this state by a minor to recover damages for personal injuries, through his guardian, appointed in the state of Pennsylvania, although such minor lives in such foreign state. *Smith* v. *Madden*, 37 Weekly Law Bulletin, 291, not followed.

Arrel, Wilson & Harrington, for plaintiff in error.

Anderson, McNab & Anderson, for defendant in error.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to Mahoning Common Pleas Court.

The action below was by Walter W. Raub, by his guardian, William H. Raub, to recover damages for injuries sustained while a passenger upon the railroad of plaintiff in error by a head-on collision.

A judgment was obtained in the common pleas court and error is prosecuted in this court. Two grounds of error are relied upon by plaintiff in error:

First. The guardian being appointed in a foreign state, Pennsylvania, and the ward continuing to live in that state, the action could not be maintained in this state.

Second. Raub was guilty of contributory negligence.

As to the second ground it is sufficient to say that we have examined the evidence carefully and we are of the opinion that the claim of contributory negligence is not maintained. Indeed we see little, if any, evidence to sustain such a claim, and we therefore come to the first ground relied upon.

May a minor, through his guardian appointed in a foreign state, bring an action in this state to recover damages for a personal injury? Even if there was no statute in this state upon the question, it seems to us that as a matter of comity between the states, a minor by his guardian appointed in another state in such case should be permitted to sue in this state. It is not a case of a guardian demanding money or personal property from an executor, administrator or other trustee, or even from persons not trustees, but simply the attempt to reduce to judgment an undetermined demand which the guardian claims to have in favor of his ward; and if after judgment there are any reasons why the foreign guardian should not come in possession of the money, the court has ample authority to require the guardian to qualify under the provisions of Section 6279 of the Revised Statutes.

But has not the Legislature specifically provided that a foreign guardian may bring such an action?

Section 6290 of the Revised Statutes, found in chapter 3 of

title 2, which provides for the government and direction of guardians and other trustees, provides:

"Section 6290. [*Foreign minors and guardians; their rights in this state, etc.; sale of their lands; additional security.*] Minors living out of this state and owning lands within the same shall be entitled to the benefit of this act; and guardians of minors residing out of this state, who have been appointed according to the laws of the state or territory where they may reside, shall have the right to bring and maintain actions and enforce the collection of judgments, rendered in such cases in their favor, in the same manner and to the same extent that they could do if they had been appointed under the laws of this state, upon giving security for the costs which may accrue in such actions, in the same way other non-residents are obliged to do under the laws of this state. All applications for the sale of real estate by guardians of minors who live out of this state shall be made in the county in which the land is situate; or, if situate in more counties than one, then in one of the counties in which a part of such real estate is situate; and additional security shall be required from such guardian or guardians when deemed necessary, and such as may be approved by the probate court of the county in which such application is made. (55 v. 54, Sec. 32; S. & C., 677.)"

It is claimed that all the provisions of this section apply alone to the disposition of the lands of a minor situated within the state. We do not think so. If there had been a period instead of a semi-colon after the words, "shall be entitled to the benefit of this act," the section would no doubt be less ambiguous, but when we take into consideration the fact the Legislature was intending to cure any supposed defect in our law that militated against foreign guardians by closing the doors of our courts against them, punctuation should have little effect.

Something is also claimed for the words, "rendered in such cases in their favor." What cases? Certainly the cases in which the actions have been prosecuted. We repeat that if there had been a period instead of a semi-colon after the word "act," there could be little if any, doubt but that language was intended to be used in its broad sense and applicable to all actions.

It is also claimed that the language of Section 6279 tends to show that it was not intended that the provisions of 6290 should apply to all actions.

It seems to us that the provisions of this section apply to a different subject entirely, to cases as we have heretofore intimated, where money or other property is in the lawful custody of a trustee or other person, and which the foreign guardian desires to obtain possession of and remove it from the state. In such a case he must proceed under Section 6279. *Banning, Executor,* v. *Gotshall, Administrator,* 62 O. S., 210.

We should not be inclined to sustain the contention of plaintiff in error in this case without it was absolutely necessary to do so, as it waited until the case was ready for trial and the jury in the box before it made the objection that plaintiff below had no right to maintain the action by objecting to any evidence being introduced.

We are not unmindful of the fact that Judge Ricks, of the United States Circuit Court of the Northern District of Ohio, in the case of *Smith* v. *Madden,* 37 Weekly Law Bulletin, 291, came to a different conclusion than that to which we have arrived.

Judgment of common pleas court affirmed.

FOREIGN EVICTIONS.

Circuit Court of Morgan County.

P. SMITH SONS' LUMBER CO. v. KENNARD ET AL.

Decided, April 22, 1908.

Liability of Sheriff—For Failure to Index Foreign Execution Docket Attaches, When—Non-feasance—Amercement—Plain Language of a Statute Must be Followed, Irrespective of Results or Intention of the Legislature—Sections 1212 and 5596.

A judgment creditor can not maintain an action against a sheriff for failure to execute a foreign writ of execution, or for failure to index his foreign execution docket, or to do other things enumerated in Section 1212, Revised Statutes, unless such judgment creditor has made a deposit of the sheriff's fees with the clerk issuing the writ, as required by Section 5596.

Ivers & Danford and *Kibler & Montgomery,* for plaintiff.
Weber & Fouts, contra.

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

Error to Morgan Common Pleas Court.

The P. Smith Sons' Lumber Co. filed an amended petition in the Court of Comon Pleas of Morgan County, in which it alleged, in substance, that the plaintiff was a corporation under the laws of Ohio; that R. A. Kennard was the sheriff of Morgan county, Ohio, and that the other defendants (L. S. Holcomb, J. L. Bailey and G. B. Dougan) were his bondsmen as such sheriff; that at the September term, 1905, of the Court of Common Pleas of Licking County, Ohio, plaintiff recovered a judgment against L. H. Campbell and Dollie Campbell in the sum of $162.97, with interest thereon at 8 per cent. from September 21, 1905, and for costs of suit; that on November 16, 1905, an execution was issued by the clerk of Licking county to the sheriff of that county, which execution was returned unsatisfied for want of property whereon to levy; that on December 18, 1905, the plaintiff had a foreign execution issued by the

clerk of the Court of Common Pleas of Licking County, directed to the defendant, R. A. Kennard, as sheriff of Morgan county; that on December 21, 1905, the sheriff of Morgan county received the writ and entered upon his foreign execution docket the time when said writ was received by him, from what county it issued and the amount of the judgment, and that said sheriff of Morgan county, then, for want of goods and chattels whereon to levy, levied on certain real estate of said L. H. Campbell and Dollie Campbell, situated in Morgan county, Ohio, being of the value of $1,500, and that after making such levy, said sheriff entered in his foreign execution docket, a full description of the real estate levied upon, and entered said description, in full, upon said writ and also copied in said execution docket as shown by said writ, and indorsed his fees on said writ in the sum of $1.50; but said sheriff then and ever afterward omitted, neglected, and failed to make any indexing of said acts, either direct or reverse, on his execution docket, and that he neglected, failed and omitted to enter on said foreign execution docket the court from which said execution issued, and failed to enter in said execution docket the date of the execution and the date of the judgment, contrary to Section 1212, Revised Statutes; that on February 16, 1906, said execution was by the direction of plaintiff, through its attorney, duly returned to the Court of Common Pleas of Licking County; that at the time of the issuing of said writ and the levy of the same upon said real estate, L. H. Campbell and Dollie Campbell were the owners in fee simple of the same, and that they continued to be such owners until June 26, 1906, at which last named date they sold said real estate to Harriet W. Glass; that Harriet W. Glass at the time of the purchase of said real estate was ignorant of any levy having been made by said sheriff and that she, being a *bona fide* purchaser, took said real estate free from said levy. Plaintiff further avers that by the failure of the sheriff of Morgan county to do the things omitted by him, as aforesaid, it was damaged in the sum of $162.97 together with interest at 8 per cent. from September 21, 1905, together with costs, and asks

judgment against the defendant for the amount that it was so damaged.

R. A. Kennard, the sheriff, filed an answer in which he sets up three defenses to the amended petition. The first of which was a denial of many things set forth in the amended petition. The second defense alleged in substance, that the real estate levied upon was only worth the sum of $1,000 and was covered by a mortgage to the extent of $800, and that L. H. Campbell and Dollie Campbell were entitled to the difference between the value of said property and the mortgage upon the same, as an exemption. The third defense and the only one which need be considered in this case, reads as follows:

"The defendant, R. A. Kennard, for a third defense herein says: that said execution so issued from said Court of Common Pleas of Licking County, Ohio, had indorsed thereon in substance—'Fees deposited for service of this writ'; that said plaintiff caused and procured said indorsement to be made by the clerk of said last named court for the purpose of causing this defendant to believe that funds were then on deposit in said court to pay his fees on said writ; that in fact no funds had been deposited with said clerk to pay said fees, as plaintiff then well knew, and this defendant never received any fees for the execution of said writ and the making of said levy; that plaintiff so caused and procured said false indorsement to be made on said writ for the purpose of deceiving this defendant and thereby causing this defendant to accept and undertake the due execution of said writ; and this defendant, believing and relying upon said indorsement being true, and that funds had been so deposited, accepted said writ and levied the same upon said lands, which, had it not been for said false indorsement, he would not have done."

The plaintiff filed a reply to the second and third defenses of the answer. The reply to the third defense reading as follows:

"Plaintiff admits that said execution so issued from said Court of Common Pleas of Licking County, Ohio, had indorsed thereon in substance, 'Fees deposited for service of this writ,' and admits that no funds had been deposited with said clerk to

pay said fees; but avers that said fees were deposited in the office of the clerk of courts of said Licking county for him, and before this action was commenced. Plaintiff admits that said defendant accepted said writ and levied the same upon said lands, and plaintiff denies each and every allegation in said defenses contained, not herein expressly admitted to be true."

A demurrer was filed to the reply and sustained, and the plaintiff, not desiring to amend, judgment was rendered for the defendant, and error was prosecuted by plaintiff to this court, asking this court to reverse the judgment of the court of common pleas.

Section 5594, Revised Statutes, prescribes the duties of a sheriff and provide that upon his failure to perform said duties, the court shall amerce him. Section 5596, Revised Statutes, reads as follows:

"If an officer fail to execute any summons, order, execution, or other process, directed to him, or to return the same, as required by law, unless he make it appear, to the satisfaction of the court, that he was prevented by unavoidable accident from so doing, he shall be amerced, upon motion and notice, as provided in Section 5594, in a sum not exceeding one thousand dollars, and be liable to the action of any person aggrieved by such failure; but he shall not be liable to an action or amercement for a failure to execute any such process directed to him from any county other than that in which he was elected, unless his fees are deposited with the clerk who issued the process, and an indorsement of that fact is made and subscribed by such clerk on the process, at the time of its issue, in these words: 'Funds are deposited to pay the sheriff on this process.'"

It will be observed by this statute that before a sheriff will be liable to an action by a judgment creditor on a foreign execution, there must be: first, a deposit by the judgment creditor of the fees with the clerk who issued the execution; second, the clerk must indorse on the writ, the fact that the fees have been deposited in the following words: "Funds are deposited to pay the sheriff on this process."

The right of a judgment creditor to have a foreign execution issued and the duty of a sheriff to execute such writ is a

pure matter of statutory law, and the Legislature in granting such right to a judgment creditor had a right to provide on what conditions the sheriff in the foreign county should be liable for failure to execute such writ. If the judgment creditor desires to avail himself of the right to hold the sheriff liable for non-performance of duty, he must make the deposit of the necessary fees with the clerk issuing the writ. It is his duty to act first, in making the deposit, and he can not consistently complain of the sheriff for the non-performance of his duties, when he himself has failed to observe the law on the same subject. We think that under the statute the deposit of the necessary fees by the judgment creditor was a condition precedent to his right to hold the sheriff for his failure to execute the writ.

It is claimed by the plaintiff, however, that the fees were deposited in the office of the clerk of court of Licking county before this action was commenced, and hence the sheriff had been made secure as to his fees. This, however, in our judgment, does not satisfy the statute. In *Duncan* v. *Drakeley*, 10 Ohio, 45, a writ had been issued to the sheriff of another county, without the indorsement required by the statute. The sheriff refused to execute the writ, notwithstanding the fact that the judgment creditor tendered to the sheriff an amount more than was sufficient to satisfy all fees, yet the court refused to amerce the sheriff and the case having been carried to the Supreme Court, it was held:

"A sheriff can not be amerced for not executing a *capias ad satisfaciendum* from another county, unless such an indorsement ('funds deposited'), be made on the writ, and tender of his fees can not be substituted in the place of such indorsement."

It is true that in the case just mentioned, a motion had been made to amerce the sheriff and an amercement is a pecuniary penalty imposed by the court upon an officer for non-performance of his duty. In that case, however, the sheriff pled the statute as a defense and the courts construed the statute according to the letter. Where the language of a statute is plain, courts must follow it, irrespective of the results or intention of

the Legislature. In *Woodbury* v. *Berry,* 18 Ohio St., 456, a case of an attempted amercement, the first paragraph of the syllabus reads as follows:

"Where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning, although from considerations arising outside of the language of the statute it may be convinced that the Legislature intended to enact something different from what it did in fact enact."

In *Slingluff* v. *Weaver,* 66 Ohio St., 621, a part of the syllabus reads as follows:

"But the intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

And again:

"The language of the act of May 12, 1902, entitled, 'An act to amend Section 6710 of the Revised Statutes,' is plain and free from doubt, and effect must be given to its clear import without regard to the consequences which may result."

The statute in question having expressly stated that the sheriff should not be liable, except on certain conditions, and the plaintiff having admitted that those conditions had not been complied with, there could be no liability without violating the very letter and spirit of the statute.

Counsel for plaintiff contend that although the sheriff was not required to execute this writ without the fees being first deposited, yet if he undertook to execute the writ and did it negligently, he would be liable; that is to say, that if he undertook to execute the writ without the fees having been deposited, he must do everything required by Section 1212, Revised Statutes,

and if he failed and the plaintiff was damaged, a recovery might be had against him. If the sheriff of Morgan county was liable to the plaintiff, it must be by reason of some duty the sheriff owed the plaintiff, and our opinion is that the sheriff owed the plaintiff no duty from the fact that the plaintiff had failed to do the thing which would have created the duty, viz., the deposit of the necessary funds with the clerk. If the sheriff was under no obligation to take *any* steps or do *anything* in the way of executing this writ, he certainly would not be liable for a failure to do *some* of the things required by statute. If he was under no obligation to execute the writ, we think it clear that he could not be liable for executing the writ defectively, or putting it in other words, if he was not required to do any of the things enumerated in Section 1212, Revised Statutes, he could not be liable for omitting to do *some* of them. We think the court of common pleas was right in sustaining the demurrer to the reply of the plaintiff to the third defense of the answer, and the judgment of the court of common pleas will be affirmed.

INJURY FROM A FALL ON A DANGEROUS SIDEWALK.

Circuit Court of Lucas County.

SMITH v. CITY OF TOLEDO.

Decided, March 6, 1908.

Defective Sidewalks—Degree of Care Required of Pedestrians—Negligence—Municipal Corporations.

A pedestrian must exercise ordinary care both in the selection of a route and in its use after selecting it; but a pedestrian on a city street, desiring to go from one residence to another on the same side of the street, is not negligent as a matter of law in attempting to pass over a defective sidewalk, where his only alternatives are to take a very circuitous route by another street or to cross through deep mud the street he is on to a more dangerous sidewalk on the other side.

C. A. Aten and *C. K. Friedman*, for plaintiff in error.

C. S. Northup and *C. H. Masters*, contra.

WILDMAN, J.; PARKER, J., and KINKEADE, J., concur.

Error to Lucas Common Pleas Court.

The plaintiff in error sued the city of Toledo for damages caused by its claimed negligence in permitting a sidewalk on the north side of Woodland avenue in said city to become and remain in a dangerous and defective condition. On October 8, 1906, the plaintiff, while passing along said sidewalk going from his residence to the residence of his daughter on the north side of said street, fell and was injured by stepping upon a decayed plank.

Upon the trial in the court below, at the close of plaintiff's evidence, the court arrested the testimony from the jury and directed a verdict for the defendant. For this and other claimed error this proceeding is brought here.

There is little, if any, dispute that the evidence offered and received in the court below tended to establish the negligence of the municipality. The sidewalk was an old one, which had been suffered to fall into decay. During the year 1903, a resolution had been passed by the city council for its repair. At some time, whether before or after the passage of this resolution does not very clearly appear, some repairs were made; but in the making of them, as the testimony indicates, the original materials were again used. The stringers and some of the planks had been weakened by reason of the lapse of years, and at some places in the sidewalk spaces had been made by the removal of planks. At the particular point where the injury was received, the sidewalk, according to the testimony of the plaintiff, appeared to be in fair condition. A plank broke under one of his feet, and he was precipitated forward and into an opening where two or three planks had been removed.

It is claimed on behalf of the defendant in error, in support of the ruling of the court below, that the danger was obvious; that the hazard was voluntarily encountered by the plaintiff; and that he was guilty of such contributory negligence as would bar recovery. Reliance is placed upon two or three recent decisions of the Supreme Court in cases of claimed defective sidewalks, and brief reference may be made to some of them. One of them

is the case of *Dayton* v. *Glaser,* 76 Ohio St., 471, in which a very familiar principle is enunciated in the syllabus, as follows:

"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."

The syllabus does not touch upon the question of contributory negligence of the plaintiff, and really affords not very much aid to our present inquiry; because, as I have already stated, there is not much dispute in the case at bar as to the asserted negligence of the defendant. The other question as to contributory negligence of the plaintiff in going upon and using the defective sidewalk is not touched in the decision.

Another case is that of *Norwalk* v. *Tuttle,* 73 Ohio St., 242, a case with which I have some familiarity, because on one of its trials I sat as common pleas judge. This is one of a class of cases growing out of an accumulation of ice and snow upon sidewalks in cities, rendering them more or less dangerous. Mr. Tuttle had slipped and fallen upon an icy sidewalk in Norwalk, and claimed that the city was negligent in permitting the sidewalk to be and remain in that condition. The Supreme Court held otherwise, announcing in the syllabus the result of its examination of the case. I quote:

"One who voluntarily goes upon a sidewalk of a city which is obviously, and by him known to be, in a dangerous condition, can not recover on account of injuries which he may thereby sustain, even if the negligence of the city is admitted or shown. (*Schaefler* v. *Sandusky,* 33 Ohio St., 246, and *Conneaut* v. *Naef,* 54 Ohio St., 529, approved and followed.)"

Counsel for the defendant in error and possibly the court below may have inferred from this broad statement in the syllabus that some departure was intended from the qualified rule which had theretofore been held in the state, to-wit, that one could not recover who went upon such a defective sidewalk with knowledge of its defective condition when he might easily have avoided such use of it by going by some other road to his destination.

Whether or not the court intended to abandon this qualification of the earlier rule becomes an important question in the present case, in view of the testimony of the plaintiff, Smith, corroborated to some extent by the testimony of another witness, that there was no other convenient route to his destination. I have said that his residence and that of his daughter were situated on the north side of Woodland avenue. He was going from his daughter's residence to his own, and to avoid the defective part of this sidewalk he would either have had to take a very circuitous route, greatly lengthening his journey, or would have been compelled to cross the street and then recross it, having passed the defective sidewalk. He testifies that along the north side of the sidewalk and only six or eight inches from it was a barbed wire fence or a picket fence with barbed wires strung along the top leaning toward the sidewalk; and on the other side of the sidewalk was a row of trees, some three trees, which were close to the sidewalk, indeed encroaching upon it; south of the trees was a ditch; the street was an unpaved one and at the time of this occurrence was in a very muddy condition; one of the witnesses testifying that a person walking along there would sink in at places almost to his knees, the soil being a mixture of clay and muck and sand. Mr. Smith testifies that the sidewalk on the opposite side of the street was worse, so far as the defective condition was concerned, than the sidewalk along which he was passing and on which he received his injury.

Now, assuming the correctness of these statements, and that the evidence tended to prove the facts asserted there can be no dispute, can it be said that the plaintiff failed to exercise that care which is ordinarily used by prudent people, and has the Supreme Court, in its somewhat general statements in two or three of the recent cases, laid down a rule which will hold a pedestrian to a higher degree of care than that which had been deemed to devolve upon persons of prudence, as ordinarily exercised by them?

To determine what is intended by the Supreme Court in the two cases to which I have referred, *Norwalk* v. *Tuttle, and Dayton* v. *Glaser, supra,* we may have recourse to the reference in

the opinions to the earlier cases. As already said, it appears in the second paragraph of the syllabus in *Norwalk* v. *Tuttle, supra,* at page 242, that the cases of *Schaefler* v. *Sandusky,* 33 Ohio St., 246, and *Conneaut* v. *Naef,* 54 Ohio St., 529, are approved and followed. *Dayton* v. *Glaser, supra,* does not refer to these earlier cases by titles or otherwise, but as already suggested this case bears rather upon the asserted negligence of municipal corporations than upon the claim of contributory negligence of a plaintiff, and so has little relevancy to our present inquiry. I have in my hand *Schaefler* v. *Sandusky, supra,* and read from the syllabus:

"A person who voluntarily attempts to pass over a sidewalk of a city, which he knows to be dangerous by reason of ice upon it, which he might easily avoid, can not be regarded as exercising ordinary prudence, and therefore can not maintain an action against the city, to recover for injuries sustained by falling upon the ice, even if the city would otherwise have been liable."

The other case said to be approved and followed in *Norwalk* v. *Tuttle, supra,* is *Conneaut* v. *Naef, supra.* In it is stated without qualification, in the syllabus, that:

"One who goes voluntarily upon an accumulation of ice on a walk of a village can not maintain an action against such village for a personal injury resulting to him, if the source of danger is plainly visible."

There is nothing said here as to the opportunity to avoid such accumulation of ice; but on pages 530 and 531, in the reasoning of Judge Shauck, speaking for the court, we find that reliance is placed upon *Schaefler* v. *Sandusky, supra,* in which that qualification is asserted. He says, in speaking of a certain instruction and certain evidence with regard to it:

"The only question is whether it imposed upon the plaintiff, as a condition to recovery, a higher degree of care than the law requires. If it did not, it is not objectionable because it stated the rule definitely instead of leaving it as a matter of inference to be drawn by the jury from a statement of general principles. This is determined in *Schaefler* v. *Sandusky,* 33 Ohio St., 246,

where it is held, as matter of law, that one who voluntarily attempts to pass over a sidewalk of a city, which he knows to be dangerous by reason of ice upon it, which he might easily avoid, can not maintain an action against the city to recover for injuries sustained by falling upon the ice. The precise question left undetermined by the case cited is whether in cases of this character a recovery will be denied on account of the plaintiff's failure to avoid a source of danger that is plainly visible as well as one that is actually known."

The matter that was specially in the mind of the judge rendering the opinion, is the distinction between a claim that the plaintiff had knowledge of a dangerous condition and a claim of the obvious character of the dangerous condition, so that the inference ought to be drawn that he had knowledge, and the court is not paying very much attention to the other question as to whether he would be excused for going upon a sidewalk more or less dangerous by reason of defects, by his having another ready route to his destination. The adoption of the language of *Schaefler* v. *Sandusky, supra,* without criticism, leaves in the mind the inference that the court does not intend to change the rule therein expressed. It seems to be left in Ohio, as it is in other states, as a recognized rule that the plaintiff is held to the exercise of ordinary care, and that in the exercise of that ordinary care he must avoid choosing a dangerous route in preference to a safe one which he might take without inconvenience.

But in the case at bar we have evidence tending to show that he could not avoid the route selected without very great inconvenience to himself by going around upon another street, or possibly incurring greater danger by selecting a more dangerous sidewalk on the other side of the street. Surely the Supreme Court does not intend to hold him to the latter alternative. Several adjudications have been had in the circuit courts of the state touching the question. It was held in the case of *Ohlinger* v. *Toledo,* 20 C. C., 142, in the fourth paragraph of the syllabus, that:

"It is not negligence, as a matter of law, for a person to attempt to pass over a sidewalk which he knows to be out of re-

pair to the extent of having a board out of it. Such person is at liberty to use the walk, but must exercise such care as the nature of the walk requires."

Of course the pedestrian must exercise ordinary care both in the selection of the route and in its use after he has selected it. Smith testifies here that he did not deem the sidewalk dangerous at the point where he was injured; it had apparently been repaired within seven years, perhaps, and possibly at a still more recent time; that there was nothing in its appearance at that particular place that indicated to his mind its danger. He says, however, that he was walking with care and that he was walking very slowly, because he was expecting some members of his family to meet him on the sidewalk.

Schaefler v. *Sandusky, supra,* has been so often cited in other jurisdictions as to become a somewhat leading case, and reference may be made to some of the cases in other states, where the rule has been followed, sometimes perhaps with slight modifications, but in the main as announced. Without express citation of them I refer to the annotations of *Schaefler* v. *Sandusky,* Cent. Anno. Ed.; and also invite attention to the decision of our own court in *Toledo* v. *Fuller,* 7 C. C.—N. S., 598. And the case cited by counsel in argument, *Kendall* v. *Albia,* 73 Iowa, 241, 247 (34 N. W. Rep., 833), especially the language on page 248. We think that the rule of contributory negligence is not so exacting as counsel for the defendant in error contend, and our judgment is that in view of the evidence tending to disclose the difficulties and dangers attendant upon the choice of another route than that by which the plaintiff traveled and on which he was injured, the court was in error in arresting the case from the jury. The questions as to the asserted negligence of either party should have been submitted to the jury.

Another point, somewhat relied upon by counsel for plaintiff in error, that the court erred in the exclusion of evidence, is not well taken for two reasons—first, there is no formal offer of proof on the face of the record in response to question asked; and, second, plaintiff in error was not prejudiced thereby if

the court erred, because of the fact that the witness did testify quite fully upon this subject in another part of his examination.

The judgment of the court below will be reversed and the case remanded for a new trial.

THE LIEN OF AN INNKEEPER.

Circuit Court of Hamilton County.

JOSEPH S. THOMA v. REMINGTON TYPEWRITER COMPANY.

Decided, June 6, 1908.

Consitutional Law—Statute Granting Liens to Innkeepers Valid—Lien Attaches to Property Left by a Guest Regardless of his Want of Title.

1. Section 4427*b*, relating to the lien of an innkeeper, is merely declaratory of the common law, and does not violate any constitutional provision.
2. The lien of an innkeeper attaches to a typewriter, left at the inn by a guest who departed without paying his bill, notwithstanding the guest had no title to the machine, and had obtained possession of it by false pretenses.

James R. Jordan and *Geoffrey Goldsmith*, for plaintiff in error.

Burch & Johnson, contra.

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

The undisputed facts in the evidence disclose that on or about the 21st day of April, 1905, the defendant company delivered to one B. L. Wendelborn a certain typewriter, belonging to defendant in error, upon said Wendelborn's statement that he was acting as agent for an amusement company; that said company desired to rent a typewriter from the Remington Typewriter Company, and that said amusement company had authorized him to rent the typewriter for it. Thereupon said typewriter was delivered to said Wendelborn on the agreement that for each and every month said typewriter was so rented said amusement company was to pay therefor a rental of five

dollars per month, but no rent was ever paid for the use of the same.

Upon the delivery of the typewriter to said Wendelborn, the latter took it to the Newmarket Hotel, at which hotel he was and had been a guest since the 1st of February, 1905, stating to the proprietor of the hotel that the typewriter belonged to him. A few days later said Wendelborn left said hotel without paying his account of forty dollars for board and lodging, leaving said typewriter in the possession of the proprietor of the hotel, who claims a lien upon the machine for the unpaid bill incurred by said Wendelborn.

Thereupon an action in replevin was brought by the defendant in error to recover possession of the typewriter. The undisputed facts further disclose that the statement made by Wendelborn to the Remington Typewriter Company that he was authorized by the amusement company to rent said typewriter for it, and also his statement to the proprietor of the hotel that he was owner of said typewriter, were false. The value of the typewriter was placed at seventy-five dollars.

Upon a hearing of the case in the court of common pleas, at close of all the testimony, the court instructed the jury to return a verdict for the defendant in error, and entered judgment thereon, and this case is now brought to reverse the action of said court.

Under these facts the relation between the plaintiff in error and Wendelborn at the time of the above transaction was that of innkeeper and guest. This being the relation, the plaintiff in error was entitled at common law to a lien upon the baggage and other property of the guest brought by him into the hotel, and said plaintiff in error was entitled to detain any property brought into the hotel by the guest as security for the payment of an amount due by the guest for lodging, board and accommodations furnished.

This lien became a part of the law of this state, as our courts administer the common law of England, in so far as its principles are not inconsistent with our own institutions, or opposed

to the habits, customs and policies of the people of our state. *Railroad Co.* v. *Keary*, 3 O. S., 202.

This being so the plaintiff in error could retain the typewriter in question for the unpaid amount of his guest's bill, unless Section 4427*b* would deprive said innkeeper of his lien. The section in question provides, that the keeper of any inn shall have a lien on the baggage and other property in and about said inn belonging to or under the control of his guest for the proper charges due him from said guest, for the accommodation, board and lodging furnished said guest, and said innkeeper shall have the right to retain said baggage and other property until the amount of such charges is paid.

It is urged in argument, that while the possession of the typewriter passed to Wendelborn, the title to the same did not pass, and therefore said typewriter did not belong to and was not under the control of said Wendelborn, and consequently the innkeeper's lien would not attach thereon.

We believe that this section is declaratory of the common law and does not enlarge or extend an innkeeper's lien, so far as it relates to the property of a third person in the possession of the guest, and that said section is not in violation of any constitutional right. Under the facts in this case, Wendelborn was possessed of the typewriter in question, and it was under his control. The words "under the control of the guest" we think, should be construed in the light of the common law decisions, and while the title to the typewriter in question may not have passed to Wendelborn, yet the innkeeper had a lien on the typewriter superior to the right of the defendant in error to retake possession of the same.

A very full and able discussion of this matter is set out in the case of *Watters* v. *Gerard*, 189 N. Y., 302 (82 Northeastern Reporter, 143).

The judgment of the court below will be reversed, and upon the undisputed facts in the case, judgment for plaintiff will be entered in this court.

JUDGMENTS OF REVERSAL NOT CONCLUSIVE IN OTHER JURISDICTIONS.

Circuit Court of Lucas County.

UNITED STATES MORTGAGE & TRUST CO. v. ANDERSON ET AL; AND UNITED STATES MORTGAGE & TRUST CO. v. MESSENGER ET AL.*

Decided, April 4, 1908.

Foreclosure—Outstanding Claimant a Proper Party—Judicial Sales—Appraisement—Title—Judgment—Effect of a Reversal in Another Jurisdiction—Where the Cause is Remanded for Further Proceedings—Final Order—Res Judicata—Judgment Embodied in Mandate, not in Opinion—State Court not Bound by Adjudication in Federal Court, When.

1. Foreclosure proceedings under the Ohio statutes contemplate an appraisal and sale of the entire land mortgaged, and not merely the equity of redemption; and in order that title may be conveyed without cloud to a purchaser at judicial sale, all persons having claims against the property are made parties, including an outstanding claimant, although such claimant derives no title and makes no claim to title from the defendant in possession or his immediate predecessors in title.
2. A judgment by a federal circuit court of appeals, reversing the federal circuit court having original jurisdiction of the controversy and remanding the cause for a new trial, is not a final order or conclusive adjudication binding on a state court.

B. A. Hayes, for plaintiff.

O. B. Snider, for Emily O. Butler.

C. H. Trimble, R. P. Cary and *C. A. Thatcher*, for Anderson.

King, Tracy, Chapman & Wells and *C. W. Everett*, for Messenger.

WILDMAN, J.; PARKER, J., concurs; KINKADE, J., dissents.

Appeal from Lucas Common Pleas Court.

* For other opinions in the same litigation see, *Anderson* v. *United Realty Co. et al*, 9 C. C.—N. S., 473, and *Anderson* v. *Messinger*, 4 O. L. R., 361.

In these two cases, which were consolidated, two mortgagees, the United States Mortgage & Trust Company and Miss Emily O. Butler, seek to foreclose mortgages upon property with regard to which there has been much controversy in the courts; the rival claimants for the property being Rosewell E. Messenger, at present in possession, and Peter Anderson.

The question was made before us early in the consideration of the cases in this court, to which they were brought by appeal from the court of common pleas of this county, as to whether Peter Anderson, who is not in possession of the property, but who claims to be the owner, may be a party in a suit to foreclose mortgages and marshal the liens and sell the property. The demurrers to the petitions setting up this misjoinder were overruled by the court, the majority of the court entertaining the opinion that an outstanding claimant, although deriving no title from Rosewell E. Messenger and not claiming such, was a proper party in a suit to foreclose the mortgages and sell the land. Recognizing the difference of view entertained by the courts of various states, the judgment of a majority of this court has been, and still is, that our statutes contemplate the appraisal and sale of the entire land in a foreclosure proceeding, and not merely the equity of redemption; that it is the policy of the Ohio law to convey a title to the purchaser at a judicial sale without clouds upon it, if it be possible to avoid them, by bringing into court all parties who have claims against the property. The court united in overruling the demurrers to the petitions, but one of the members of the court based his view upon another ground.

Passing, then, this question as to whether Anderson was a proper party to these suits, we come to the consideration of the various matters which are made contention between Anderson and Messenger, and also between the one defendant or the other or both and the plaintiff.

We are none of us disposed to accept the view of Anderson that there has been an unlawful collusion between these mortgagees, or either of them, and Messenger, to retain the adjudication of the important controversy which has arisen in the state

court. That there is a desire on the part of Messenger, and perhaps those claiming under him, to conduct this litigation in the state court, may be entirely true; and it is equally true that Anderson is evidently solicitous to conduct it in the federal court, each party relying to some extent upon favorable decisions which have been already obtained, in one court in favor of Messenger, and in the other in favor of Anderson.

In the case between these parties, *Anderson* v. *Messenger*, 146 Fed. Rep., 929, there is a substantial recital of the history of transactions involving the title to this property, and in a decision rendered by this circuit court, *Anderson* v. *Realty Co.*, 9 C. C.—N. S., 473, reference was made to the recital in the federal court as to such history. It is not necessary for this reason to attempt any resume of the facts involved in the controversy.

Some new evidence has been offered upon the trial before us, but I will not take time to review it. It bears especially upon the question whether or not a certain indebtedness from Charles Butler to Henry Anderson was ever entirely paid; and also, whether a deed made by order of court to Henry Anderson was designed to convey an absolute title, or whether he held the property in trust as his security for the payment of the indebtedness referred to. There is no evidence newly offered that I now recall that bears upon any other controversy between the parties.

Prior to the former consideration of the controversy between Messenger and Anderson by this court, the judgment of the United States Circuit Court of Appeals, *Anderson* v. *Messenger*, *supra*, had been rendered, but no claim was made to us at that time that such judgment in the federal court in any way precluded our consideration of the case before us. This was a proceeding in error to reverse a judgment which had been rendered in favor of Messenger and against Anderson in the court of common pleas, and involved an examination of the facts disclosed to the court of common pleas to determine whether the judgment of that court in favor of Messenger was justified. We have now before us two claims of prior adjudication: On the one hand, a claim in behalf of Anderson that the judgment in the federal court to which reference has been made was a

final adjudication of the questions of law now litigated, and that this court is estopped on the principle of *res adjudicata* from entertaining the claims of Messenger or those of his mortgagees; while on the other hand, it is insisted by counsel for the mortgagees and for Messenger that the original judgment rendered by the court of common pleas of this county on March 31, 1906, a date prior to the judgment of the federal circuit court of appeals, was itself a final adjudication of the controversy and that that judgment has never been disturbed but, on the contrary, was affirmed by this court so as to be preserved in full force and validity. As to this last contention, we are not altogether satisfied with the condition of the pleadings to support the claim of Messenger as to *res adjudicata.*

We are quite clear that the judgment of the federal court of appeals was not a final judgment. The nature of that judgment and its effect constitute the most important of the questions which have remained for our consideration. It was not a final judgment, because the proceeding was in the federal court of appeals to review a judgment which had been rendered in the United States Circuit Court, and upon the conclusion of the consideration of the case by the court of appeals the cause was remanded to the circuit court for a new trial. We entertain no doubt that when so remanded the circuit court had full jurisdiction, not only to receive evidence which had been received under the issues presented to the circuit court of appeals, or any other relevant evidence, but also to permit amendment in its discretion of the claims of the litigants; and indeed it has been said to us that a new issue was made in the United States Circuit Court—an issue which has not yet been there determined, to-wit, the claim of Messenger that the judgment of the Court of Common Pleas of Lucas County, Ohio, constitutes a final adjudication of the controversy between Messenger and Anderson. Inasmuch also as new evidence has been offered to us, as already stated, it may be deemed highly probable that new evidence will be offered in the United States Circuit Court as to the nature of Henry Anderson's title, upon the question whether the deed to him was a trust deed or conveyed an absolute fee simple, and

also whether, if it was a trust deed, the conditions attaching to it had been fully satisfied. It is possible that in the United States Circuit Court there may be new evidence in aid of the construction of the will of Henry Anderson. So that all these matters have been preserved for contention between the parties and the introduction of evidence and the amending of pleadings, by the judgment of reversal and the mandate of the circuit court of appeals returning the cause to the circuit court for a new trial.

Counsel for Anderson, among citations which I will not take time to review, cites the case of *Haley* v. *Kilpatrick*, 104 Fed. Rep., 647, in which it was held, as appears by the first paragraph of the syllabus:

"A second appeal or writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question, either of law or fact, which was considered and determined on the first appeal or writ of error, notwithstanding a contrary decision of such question in the meantime by a state court in a different case."

Much reliance is placed by counsel upon this case, and in courtesy we should give attention to it with a view to see what bearing it has upon our action.

What was "considered and determined" in the federal court of appeals in the case which I have cited? And, I might add, in a hearing of a second like proceeding to reverse the circuit court's judgment, in which again the circuit court of appeals sustained the contention of the plaintiff in error, Anderson, and again remanded the cause to the circuit court for a new trial.

There is no lack of decisions of the federal court, and we have examined a number of them in addition to those cited by counsel, holding substantially that a reversal of the judgment of a lower court, either by the Supreme Court or by the court of appeals, is not a final adjudication of the controversy. It does seem to be held in some of these adjudications, as indicated in the case of *Haley* v. *Kilpatrick, supra,* that the question which

was in fact considered and determined in the judgment of the appellate court will be binding, not only upon that court in any future adjudication, but also upon the subordinate courts, and that it is not merely a matter falling under the principle of *stare decisis,* a principle enunciated which is to be received and considered with respect, but not having a conclusively binding authority.

It is urged by counsel for Anderson that the language of the mandate of the circuit court of appeals conclusively makes the opinion rendered by the court, showing certain conclusions as to the facts and law, a part of the judgment of the court. The language of the mandate in each of the two cases wherein the circuit court of appeals rendered judgment, so far as this question is concerned, was as follows:

"On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby reversed with costs, and the cause is remanded to the said circuit court with directions to award a new trial. You therefore are hereby commanded that such proceedings be had in said cause in conformity with the opinion and judgment of this court as according to right and justice and the law of the United States ought to be had, the said writ of error notwithstanding."

Emphasis is placed upon the use of the word "opinion" in the mandate. It is contended that by the phraseology used the opinion was made a part of the judgment; that the lower court was bound to follow the opinion as well as the judgment, and upon any attempted litigation of the cause in any other court, whether of the United States or any state, that opinion must be deemed to express the law of the case and the conclusion of the court as to all facts in controversy, unless such conclusion as to the facts should be disturbed by additional evidence upon any rehearing in the court below. This contention has been of sufficient interest and importance to justify our search of some of the federal authorities to determine whether the views entertained by counsel for Anderson in this respect are well founded.

The case of *Smith* v. *Adams,* 130 U. S., 167, gives as the holding of the federal court of last resort that:

"A judgment of a lower appellate court which reverses the judgment of the court of original jurisdiction, and remands the case to it for further proceedings, is not a final judgment."

On page 177 Mr. Justice Field, as reported, used these words, speaking of the judgment of the lower appellate court:

"It not merely reversed the judgment of the district court, but remanded the cause to the court for further proceedings according to law and the judgment of the appellate court. A judgment of a lower appellate court which reverses the judgment of the court of original jurisdiction, and remands the case to it for further proceedings, is not a final judgment. A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case."

No express language is used in the mandate, so far as appears, connecting the opinion rendered by the judge of the appellate court with the judgment of the court, but we have some cases where there is some such indication. The case of *Tampa Waterworks Co.* v. *City of Tampa,* 124 Fed. Rep., 932, seems to have been a case in which a contention somewhat similar to the one at bar was urged. A brief statement of this case as embodied in the first paragraph of the syllabus seems essential to a full understanding of the views entertained by the court, which was the Circuit Court of Florida, Southern Division:

"Plaintiff brought suit in the state court to restrain defendant from enforcing a certain city ordinance fixing the maximum rates which plaintiff should charge for water supplied to patrons in defendant city, on the ground that the passage of the ordinance was a violation of plaintiff's contract rights. A demurrer was filed to the bill, which was overruled, and a final decree of injunction rendered. On appeal the judgment was reversed, and the trial court directed to sustain the demurrer and permit further proceedings. On remand of the case the bill was dismissed, and a final decree rendered, from which plaintiff appealed, in order that the Supreme Court might render a final decision, from which a writ of error might be prosecuted to the Supreme Court of the United States. Pending such appeal plaintiff sued in the federal court to restrain the city from enforcing such ordinance, on the ground that the rates fixed were unreasonable, and operated as a taking of plaintiff's property without due process of law. *Held:* That the prior suit, while still pending, was not *res judicata* or a bar to the second."

On page 935, Judge Pardee, who rendered the opinion, says:

"The Supreme Court having remanded the cause for further proceedings, the decision was not final, and although a federal question was clearly involved no writ of error to review the same in the Supreme Court of the United States was permissible."

And towards the bottom of the same page he uses this language:

"The decree of the Supreme Court on the former appeal was as follows—

" 'The interlocutory decrees granting the primary injunction and overruling the demurrer to the bill, as well as the final decree perpetuating the injunction and awarding costs against the city, are reversed, and the cause is remanded with directions to sustain the demurrer to the bill and *for such further proceedings* as may be agreeable to equity practice and consistent with this opinion.' "

And then the judge having made this quotation, says:

"It is not necessary to cite further authority to the effect that a decree of an appellate court remanding a cause for further proceedings is not a final decree, and can not be sustained as *res judicata* in any other court. Certainly, the views of judges, as expressed in opinions and not embodied in a decree, are not *res judicata.* Such views may be conclusive on the court which announces them, and on inferior courts of the same jurisdiction, but they are subject to doubt and denial in other courts."

As long ago as 1840 in a decision in which Taney, J., delivered the opinion of the court, we have an indication of the extent to which the Supreme Court of the United States deemed that the opinion of a judge expressed in connection with a judgment rendered by the court might be considered and used by the court to which a cause was remanded. The case is *West* v. *Brashear,* 39 U. S. (14 Pet.), 51:

"The mandate of the Supreme Court to the circuit court must be its guide in executing the judgment or decree on which it issued."

I invite especial attention to this language:

"The mandate is the judgment of the Supreme Court, transmitted to the circuit court; and where the direction contained in it is precise and unambiguous, it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning. But when the circuit court are referred to testimony to ascertain the amount to be decreed, and are authorized to take more evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the mandate; and in such a case, the court below have unquestionably the right to resort to the opinion of the Supreme Court, delivered at the time of the decree, in order to assist them in expounding it."

An examination of the case will show that embodied in the mandate was a somewhat uncertain statement of what was to be done in the court below, and that it was almost imperatively necessary for the guidance of the court to which the cause was remanded, that it should have recourse to the opinion for a thorough understanding of the mandate, but we can not escape the conclusion of the Supreme Court that the judgment of the appellate court was not the opinion or any part of it, but that it was the mandate itself, and the Supreme Court held clearly that if a mandate is unambiguous and precise, it is the duty of the lower court to carry it into execution, and not to look elsewhere for authority to change its meaning.

If that be true, *a fortiori* it would seem that the opinion is not a conclusive adjudication to be followed and obeyed by courts of other jurisdictions, as for instance, the court of a state as distinguished from the federal court.

The case of *McComb* v. *Knox Co.*, 91 U. S., 1, is a case which went to the Supreme Court from this state, in which the Supreme Court of Ohio had reversed the decision of a lower court and remanded it. The lower court followed the views of the Supreme Court, rendering the kind of judgment indicated in the opinion, and an attempt was then made to carry the case, which involved some federal question, to the Supreme Court of the United States, and it was there held as I read:

"The judgment of the Supreme Court of a state reversing that of the court of common pleas and remanding the cause for further proceedings according to law is not final; nor can the judgment subsequently rendered by the inferior court be re-examined here."

Of course that last clause is based upon the fact that a case can not be carried to the Supreme Court of the United States to reverse the judgment of a court which is not of final resort in the state. On page 346, Waite, J., says in his opinion:

"The court of common pleas is not the highest court of the state; but the judgment we are called upon to re-examine is the judgment of that court alone. The judgment of the Supreme Court is one of reversal only. As such, it was not a final judgment. * * * The common pleas was not directed to enter a judgment rendered by the Supreme Court and carry it into execution, but to proceed with the case according to law. The Supreme Court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the common pleas to permit the parties to make a new case by amendment. In fact, the cause was sent back for further proceedings because of the suggestion by McComb that he might want to present a new defense by amending his answer."

It seems that he did not amend his answer and that the judgment of the Supreme Court was followed and respected by the court below.

I cite, also, *Clark* v. *Kansas City*, 172 U. S., 334, a case which went to the Supreme Court of the United States from the Supreme Court of the state of Kansas. The syllabus reads:

"As the laws of Kansas permit an amendment of the plaintiff's pleadings in the court below after the overruling by the Supreme Court of a demurrer to them, and as the Supreme Court of the state, in deciding this case, did not take that right away, it follows that the judgment of the state court was not final and that this case must be dismissed for want of prosecution."

On page 336, McKenna, J., speaking for the court, says:

"The defendants in error, however, object to the jurisdic-

tion of this court, and urge that the judgment appealed from is not a final one, and is not therefore reviewable in this court.

"It is further urged that the record does not show that anything was done in the lower court after decision in the Supreme Court, but that error is prosecuted directly to the judgment of the Supreme Court, and that that determined only a question of pleading, and that its direction has not yet been acted on, and that no judgment of any kind has been entered against Wyandotte township or school district No. 9.

"The law of Kansas prescribing action on demurrer is as follows: 'If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct.'

"In *Bostwick* v. *Brinkerhoff*, 106 U. S., 3, it was decided that 'the rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on tween the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered,' for the support of which many cases were cited; and further: 'If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, can not be brought here on writ of error.'"

With the view which we entertain that the judgment of the federal court of appeals can not be deemed a final adjudication so as to bind us, it is not necessary that we should pay attention to the contention of counsel for Messenger that even if it be final it is so only as to the legal title and right to possession of the property and does not affect any equitable claims of Messenger, a contention which was ably argued, and supported by the case of *Witte* v. *Lockwood*, 39 Ohio St., 141.

Although as I stated at the outset some new evidence has been offered to us which was not disclosed in the record when we originally passed upon the title in *Anderson* v. *Realty Co.*, *supra*, we are not thereby led to abandon the conclusions as to the facts and law which we then entertained. On the contrary, at least so far as concerns the nature of the title originally

taken by Henry Anderson, we feel fortified in the opinion which was then expressed and the judgment thereon rendered. We are not disposed to depart from those conclusions. Our view is now, as then, that Henry Anderson took this title in trust to secure the payment to him of the indebtedness from Butler; that by the will of Henry Anderson, Peter Anderson, his grandson, took no title; and also that the trust has been discharged by full payment of the indebtedness from Butler to Henry Anderson, and that the title should be made absolute in Messenger by reason of the intermediate conveyances from the trustees and heirs of Henry Anderson to Bronson, and from Bronson's heirs to Messenger.

In the suit, as it has been presented to us at this time, we have been somewhat embarrassed by the fact that injunctions have been allowed by the federal circuit court to restrain the litigation in the state court as to a large part of the property described in the mortgages. We feel quite clear that neither the United States Mortgage & Trust Company nor Emily O. Butler are bound by those restraining orders, and it has seemed difficult in attempting to enforce the mortgages by foreclosure, by marshalling the liens and sale of the real estate and distribution of the proceeds, to avoid any interference with the questions sought to be litigated in the federal court. We entertain the highest respect both for the federal circuit court and court of appeals, and have no wish or disposition to enter into any controversy with either, or any difference of view, and from all that has been said and done by counsel upon either side in the litigation before us, we have gathered the impression that there is no disposition to commit any breach of the order which has been made to restrain the parties against whom the order was directed.

Our finding will be as I have indicated. The judgment will be that the mortgages of the United States Mortgage & Trust Company and Miss Emily O. Butler be foreclosed; that the liens be found according to their dates; the land appraised and sold according to law; that the proceeds of such sale be distributed first, to the payment of taxes and costs and the pay-

ment of the mortgage lien, and that any residue thereof be held to abide the further order of this court, and that the plaintiffs and Messenger have judgment for costs against Anderson.

MR. EVERETT: How about the quieting of title?

THE COURT: And as to the prayer of Messenger to have his title quieted, the same is granted so far as it concerns the parcels of property not in litigation in the federal court, and as to appeals and writs of error, must terminate the litigation be- the residue of the property, the court reserves its decision, and the cause as to all matters now undetermined will be continued.

KINKADE, J., dissenting.

I do not concur in the finding by the majority of the court that Peter Anderson is a proper party defendant in this case. In my opinion neither the plaintiff nor any of the cross-petitioners in this action can compel Peter Anderson against his will to come into this case and here try out his adverse title with Messenger or with any other party to the action. If Peter Anderson can be compelled to do this in this action, then I agree with the conclusions reached by the court as now stated in the opinion on all other questions which were presented by counsel at this hearing of the case for our consideration. For the reason stated I desire it noted that I dissent.

BREACH OF WARRANTY AS A DEFENSE.

Circuit Court of Hamilton County.

CINCINNATI & COLUMBUS TRACTION COMPANY v. JEWETT CAR COMPANY.

Decided, June 20, 1908.

Pleading—Error—Breach of Warranty—Contracts—What the Parties Had in Contemplation at Time the Contract was Made—Final Order.

That portion of an answer which seeks affirmative relief must be treated as a cross-petition, and if the facts therein set forth entitle the defendant to any relief, the defense thus set up is good as against a general demurrer.

C. B. Matthews, for plaintiff in error.
Wright & Wright, for defendant in error.

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

The Jewett Car Company as plaintiff in the original action set up a contract for the construction of certain railroad cars, alleged full performance, and prayed judgment for the balance due.

The defendant admitted the contract and that it received the cars, but denied each and every other allegation of the petition; and as a second defense and by way of cross-petition pleaded an express warranty and breach thereof, for which it asked damages.

A demurrer to the second defense was sustained and an amended answer and cross-petition being presented to the court for filing, permission was denied, and thereupon the original cross-petition was dismissed at defendant's cost.

The second defense must as a whole be treated as a cross-petition because affirmative relief is demanded therein (Section 5055, Revised Statutes; *Kloun and wife* v. *Bradstreet et al*, 7 O. S., 322). Hence, if the facts stated entitled the defendant to any relief against the plaintiff, the general demurrer was improperly sustained. The defendant averred in substance that the plaintiff agreed to construct the car of good materials and workmanship and warranted the same and its several parts fit for the purpose of operating the same on its interurban line; that while so operating the car with due care the brake rod broke, by reason of a defective weld, and the car was precipitated down an embankment and damaged in the amount of $200 in addition to certain necessary repairs amounting to $167.07, and defendant was deprived, by reason of said breach of warranty and damages to said car, of its use for the period of thirty-nine days, estimated at $25 a day.

The express terms of the warranty show that the parties had in contemplation, at the time the contract was made, that the brake rod was fit for the use to which it was put, and was expected to be so used. The car would be of little value to the defendant while deprived of the use for which intended. The

amount of the damages claimed, and whether the defendant had another car to use in place of the disabled car while being repaired, are questions of fact to be submitted to the jury. It does not appear how much of the damage to the car occurred before, and how much after the car was precipitated down the embankment, nor does it definitely appear that such precipitation was caused by the fracture of the defective brake rod. Enough appears, however, to show some injury to the car, and some loss of its use by reason of such defect, thereby making a pleading good against demurrer. *Ice Manufacturing Co.* v. *Iron Co.*, 68 O. S., 229.

We entertain some doubt whether the order complained of is final within the meaning of Section 6707, Revised Statutes, as it does not in effect determine the action nor prevent a judgment, but as the question was not raised by counsel we have so treated it. *Holbrock* v. *Connelly*, 6 O. S., 199; *Carpenter* v. *Canal Co.*, 35 O. S., 307.

The judgment will be reversed for error in sustaining the demurrer to the second defense of the answer and in denying leave to file amended answer.

The cause is remanded for further proceedings.

PROCEEDINGS IN ATTACHMENT.

Circuit Court of Cuyahoga County.

THE HENRY & SCHEIBLE COMPANY v. THE COLLINWOOD FURNACE COMPANY.

Decided, May, 1908.

Attachment—Motion to Discharge Overruled—Duty of the Common Pleas upon Reversal of the Ruling Below—Sections 6524, 6726 and 6733.

Upon reversal by the common pleas court of an order of a justice of the peace overruling a motion to discharge an attachment, the common pleas court should retain the matter for trial as upon appeal.

E. H. Tracy, for plaintiff in error.

C. B. Robinson, contra.

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

Error to the Court of Common Pleas.

Plaintiff in error sued defendant in error before a justice of the peace and caused an attachment to be issued against the defendant's property.

The defendant moved to discharge the attachment and, his motion being overruled, filed a petition in error in the common pleas court to reverse said ruling, under favor of Section 6524, Revised Statutes.

The common pleas court reversed the ruling of the justice of the peace and discharged the attachment, without retaining the case for trial and final judgment, as in cases of appeal, as provided in Section 6733, Revised Statutes.

We think this was error. Section 6726, Revised Statutes, provides, that "when a judgment or final order is reversed, either in whole or in part, in the common pleas court, the circuit court or the Supreme Court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment," but the last clause in the section reads: "but this section shall not apply to judgments of justices of the peace."

There is no other statute authorizing the common pleas court, upon reversing the judgment of a justice of the peace, to either render the judgment the justice should have rendered or to remand the cause to the justice for further proceedings, so we hold that Section 6733 applies to error predicated to a ruling on a motion to discharge an attachment the same as to error proceedings generally, from a justice of the peace. This conclusion finds some support in the cases of *Bradley* v. *Wacker*, 13 C. C., 530, and *Tombow* v. *Haskins*, 15 C. C., 656.

Evidently the point here made was not called to the attention of the court in the cases of *Hoyman* v. *Beverstock*, 8 C. C., 473, and *Seville* v. *Wagner*, 46 O. S., 52.

For error in rendering final judgment instead of retaining the case for trial, as upon appeal, that part of the judgment of the common pleas court is reversed and the cause remanded to that court for further proceedings.

REASONABLENESS OF REQUIREMENT AS TO INSURANCE COVERING CHATTEL PROPERTY.

Circuit Court of Hamilton County.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, v. JOHN KNEIDEL, JR.

Decided, June 20, 1908.

Fire Insurance—Covering Chattel Property—Failure to Endorse Mortgage on Policy—Reasonableness of Such a Requirement—Policy not Enforcible in the Absence of Fraud or Mistake.

The provisions in a policy of fire insurance covering chattel property, that the policy is rendered void by the encumbering of the property with a mortgage, consent to which on the part of the company is not endorsed thereon, is a reasonable and binding provision, and in the absence of evidence that the omission of the endorsement was through fraud or mistake, an action for recovery on the policy can not be maintained.

W. T. Porter, for plaintiff in error.

M. C. Lykins, C. D. Robertson and *Burch, Peters & Matthews*, contra.

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

This action is here on error to the judgment of the superior court. Kneidel brought his action in that court against the National Fire Insurance Company on a fire insurance policy, and recovered a judgment. To the petition is attached a copy of the policy of insurance sued on. The policy contained these provisions:

"If the subject of insurance be personal property and become encumbered by a chattel mortgage the policy shall be void. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer or agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreements, may be endorsed hereon or added hereto,

and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under the policy exist or be claimed by the insured unless so written or attached hereto."

The defendant filed an answer alleging that at the time the policy was issued there was a chattel mortgage on the property covered by the policy and that it was not endorsed on the policy. Plaintiff filed a reply admitting the existence of the chattel mortgage, and that it was not endorsed on the policy, but alleged that at the time the policy was taken out that plaintiff had informed the agent of the company that there was a chattel mortgage on the property, and on the trial the plaintiff introduced evidence tending to prove this allegation.

It is settled law that the conditions contained in this policy are reasonable and are binding on the parties when made. So that the case presented by the record is one where plaintiff sues on a policy which contains a provision that if the property insured is mortgaged, it is to be void, unless the fact of the mortgage is endorsed on the policy. There was a chattel mortgage on the property, and it was not endorsed on the policy. By the express terms of the policy such a state of facts rendered the policy void. No claim was made, and no evidence was introduced tending to show that the endorsement provided for in the policy was omitted by the fraud or mistake of the defendant company, or that the company agreed to place such an endorsement on the policy. It is not sought to reform the policy, but a recovery is sought on the terms of the policy, and it is admitted that the terms of the policy are reasonable and binding on the parties. By the terms of the policy it was to be void if there was a chattel mortgage on the property insured, unless the fact was endorsed on the policy, and it is admitted that there was a chattel mortgage on the property and that it was not endorsed on the policy. It follows that the plaintiff, Kneidel, can not recover.

Judgment reversed, and the facts being admitted, judgment will be entered for defendant.

PURCHASE OF SUPPLIES FOR SCHOOLS.

Circuit Court of Lucas County.

GOSLINE v. TOLEDO BOARD OF EDUCATION ET AL.

Decided, February 29, 1908.

Schools—Purchase of Coal for the Use of—Neither Advertising for Bids nor Acceptance of Lowest Bid Necessary—Nor is Advertising for Trivial Supplies Required—Discretion—Good Faith—Sections 3987, 3988 and 4017.

1. Neither Section 3987, Revised Statutes, specifically empowering boards of education, among other designated things, to provide fuel; nor Section 3988, prescribing for bids for certain designated supplies and contracts, but omitting mention of fuel; nor Section 4017, requiring the director of schools, where one is chosen, to advertise for bids, etc., without providing when or how he shall advertise therefor requires advertising for bids for coal or purchase from the lowest responsible bidder.
2. A broad discretion is reposed in boards of education regarding the purchase of necessary supplies for schools; and in the purchase of fuel, gradation of quality of coal, heating capacity, adaptability to heating apparatus, and experience or skill of janitors and other persons managing school furnaces are essential facts to be considered in making selection therefor, which may render it inadvisable to accept the lowest priced coal offered; and where it appears that the board has complied with the requirement that it act in good faith for the best good of the schools according to the light and understanding of its members, acceptance of other than the cheapest coal will not be enjoined.
3. A director of schools is not required, under Sections 3988 and 4017, to go to the expense of advertising for bids for every trivial thing in the way of supplies which may have been ordered by the board to be purchased.

Marshall & Fraser, for plaintiff.

C. S. Northup, C. H. Masters and *J. H. Tyler,* contra.

WILDMAN, J.; KINKADE, J., concurs; PARKER, J., concurs in a separate opinion.

Appeal from Lucas Common Pleas Court.

This cause was brought to this court by appeal from the court of common pleas. It was a suit by a tax-payer in behalf of himself and other tax-payers to enjoin the board of education, director of the public schools and the A. G. Blair Company from entering into a certain contract for the purchase and sale of six thousand tons of Jackson coal for the use of the schools in the city of Toledo. It is claimed in behalf of the plaintiff that although the board of education had accepted the bid of the A. G. Blair Company to furnish such coal they were not authorized to do so; that the acceptance of the bid and any contemplated contract in accordance with such acceptance were invalid, as not authorized by the statutory provisions relating thereto; and, also, that the members of the board, in the acceptance of the bid, acted arbitrarily, and not in view of the welfare of the schools.

As to the first claim, it becomes essential to examine to some extent the sections of the Revised Statutes authorizing the purchase of fuel for public schools. The three sections which have some pertinency are Sections 3987, 3988 and 4017, Revised Statutes. The first mentioned section, 3987, empowers the board of education of any district first to "build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights-of-way thereto, or rent suitable school rooms, provide all the necessary apparatus and make all other necessary provisions for the schools under its control"; and, second, to provide fuel for the schools and to do certain other things with regard to the fences and shade and ornamental trees of school house grounds; and to "make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

It is to be noted that this authority relates to two classes of acts or proceedings, the one the making of permanent improvements or repairs of school houses and furnishing the same, and the other the making provision for supplies, especially the furnishing of fuel for the schools. Section 3988, Revised Statutes, provides that: "When a board of education determines to build,

repair, enlarge or furnish a school house or school houses"—using substantially the phraseology in Section 3987, Revised Statutes, as to the first of the two classes comprised therein—"or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts fifteen hundred dollars, and in other districts five hundred dollars, except in cases of urgent necessity, or for the security and protection of school property, it shall proceed as follows: 1. The board shall advertise for bids," and after the bids are opened and examined shall accept none but the lowest responsible one. Nothing is said in this section about the purchase of fuel. The provision stops short of any requirement that advertisements shall be made for bids for the supply of coal or other fuel for the schools, and our judgment is that for this reason Section 3988, Revised Statutes, does not apply to the proceeding adopted by the board of education in the present case. Nothing in Sections 3987 or 3988, Revised Statutes, requires the purchase of coal from the lowest responsible bidder.

By Section 4017, Revised Statutes, the management and control of public schools of whatever name or character in the district are given to the board of education, with provisions for the appointing of certain subordinate officers or employes. The act provides that, "A board of education in a city district may, at its discretion, elect a director of schools, who shall serve as such for the term of two years, unless earlier removed, * * * and any vacancy in this office shall be filled for the unexpired term of such director of schools." Following this authority for the election of a director of schools are specific provisions as to his powers and duties, and a careful examination of the section discloses that he is given quite broad discretion and large power in the carrying out of the purposes of this act. Among other things, he is charged with the care and custody of all the property of the school district, real and personal, except moneys. He is required to oversee the construction of buildings, in the process of erection, and the repairs of the same. Then comes the provision, which is claimed to relate to the transactions involved in this case:

"He shall advertise for bids and purchase all supplies and equipments authorized by the board. He shall report to the board monthly and oftener if required, as to all matters under his supervision, and report to the board a statement of its accounts, exhibiting the revenues, receipts, disbursements, assets and liabilities of the board," etc.

There is no provision in this section as to when or how advertisements for bids shall be made. We have only the general direction that he shall advertise for bids and purchase all supplies and equipments authorized by the board.

We are not inclined to think that the Legislature contemplated that for every trival requirement in the way of supplies by the board, the director of schools should go to the expense of advertising for bids; because, in many cases, such expense would be greater that the entire cost of the supplies needed. Taking this clause of the statute in connection with Section 3988, Revised Statutes, a construction not unreasonable would require that he should advertise for bids under such circumstances as are contemplated by that section; in other words, that where bids are required by law, the director of schools is to do the advertising for them.

There is, however, in this section no requirement as in Section 3988, Revised Statutes, that the board shall accept none but the lowest responsible bid. There is no provision fixing the duties of the director of schools, after the advertising for bids, except the duty that he shall purchase all supplies and equipment authorized by the board. We take it that the board may signify to the director of schools the amount and kind of supplies required, whereupon it becomes the duty of the director to make the proper purchases, and for this purpose he is empowered to close the contract with the seller. And if the conditions of Sections 3987 or 3988, Revised Statutes, would require the board of education to advertise for bids, it is altogether likely that under the same circumstances, where there is no emergency and the amount and kind of property require a letting to a bidder, then the director of schools may likewise be required to advertise for bids. But, as already suggested, there is nothing in Sections 3987 or

3988, Revised Statutes, that requires any advertising for bids for fuel; and we are unable to find anything in either of these sections in connection with Section 4017, Revised Statutes, that requires anything of the kind.

But assuming for the moment that this construction may not be the correct one, we have no doubt that the board of education may select the kind of fuel which it desires; it may seek to purchase wood, or it may prefer coal; the heating apparatus in the school house may be adapted to either anthracite or bituminous coal. Surely a broad discretion is permitted to the board to determine what kind of fuel it will adopt. In the present case the board of education seems to have concluded that Jackson county coal was better adapted to the uses of the schools than either of the other classes of coal, with regard to which testimony has been given and the furnishing of which was offered in bids.

It sometimes becomes an exceedingly nice question as to how far a discretion is preserved to public bodies or officers to avail themselves of the privileges possessed by individuals to buy the best that there is in the market, or on the other hand, as to how far that power is limited by the intent of the Legislature to guard the public against improvidence and corruption. In the case of permanent structures or the repair thereof, it has apparently been deemed not a difficult matter to obtain definite plans and specifications so that the public body may avail itself of the lowest offer made by a competent builder to construct according to such plans and specifications. But when it comes to the furnishing of supplies like fuel for schools, a far more difficult question arises. There are so many gradations of quality or convenience of adaptability to heating apparatus or the experience of janitors or other persons who manage the furnaces, that to require a board of education or director of schools to buy only that which is apparently the cheapest in price, would, in many cases, draw too narrowly the lines of discretion in enabling public officers to obtain that which is best adapted to the uses of the schools.

In the case at bar we have had much discussion and consider-

able evidence as to what was best adapted to the use of these schools, and which kind of coal was the most economical, considering its heating capacity and the price at which it was offered. It seems that there was but one bid for Jackson coal, that of the A. G. Blair Company. There were other bids for Pocahontas and Coshocton coal and some others; and after a consideration of all, and acting in the light of such experience as the board had had in the use of all these different classes of bituminous coal, a majority of the board concluded that it was better to purchase the Jackson coal offered by the A. G. Blair Company than to accept any one of the bids which had been offered for other qualities, kinds or grades. We think that they might legally do his, not losing sight, however, of that just requirement that they should act in good faith and for the best good of the schools, according to their light and understanding.

And this brings us to the consideration of the second question here, whether the claim in the petition has been borne out by adequate proof that they acted arbitrarily, and without regard to the good of the schools. It has been held with almost complete uniformity by the courts, that there is no judicial power to interfere with that discretion which is given to public bodies like city councils and boards of education in the discharge of their duties, unless there is apparently an abuse of such discretion. In the present case it appears that there was more or less discussion upon the question of the acceptance of one or another of the bids, and a majority of the members of the board decided in favor of the bid of the A. G. Blair Company for Jackson coal. They had been furnished with a detailed statement made by the director of schools showing certain tests by experience with different kinds of coal, upon the basis of which he seems to have claimed that the Jackson coal was not the cheapest. Among the witnesses called here was Homer T. Yaryan, a gentleman who has had a very large experience in the use of fuels in the conduct of heating plants. He had used in many of these plants not only the Jackson coal, but the other kinds of bituminous coal, and he expresses his decided view that no reliable test can be made in the manner in which the tests were made by the director of

schools, as is claimed to have been done and to be shown by the tabulated statement submitted to the board of comparisons one season with another of coal consumption. Mr. Yaryan says that a drop of ten degrees in the temperature may cause an increase of 50 per cent. in the consumption of coal to produce a desired temperature; and, although less coal of one kind might be consumed in a long continued cold season in a particular school, that still the changes of temperature in the one season or another might so decidedly affect the extent of the consumption of the coal as to destroy the value of such comparison. It would also seem from the testimony that the skill of the manipulator of the heating apparatus has something to do with the problem. And Mr. Yaryan says that the use of Jackson coal is attended with less difficulty, requires less experience and skill than does the proper heating of a structure with Pocahontas coal. The board of education might well take into account such matters as this in making their choice of fuel.

I might elaborate very much more along this line, in considering the question of whether the board of education acted in good faith. The party attacking their proceedings takes upon himself the burden of establishing his claim, and we think that the evidence here falls far short of establishing that the board of education acted in bad faith. Indeed, the petition does not quite charge in terms that there was any corruption or bad intent. It rather charges, somewhat vaguely, perhaps, that they were careless in the discharge of their duties, regardless of the good of the schools; that they were arbitrary in the selection of the bid that was not the lowest responsible one. The evidence, however, does not lead our minds to the conclusion that they have been so regardless, so careless of the good of the schools as to justify the finding that there has been an abuse of the discretion confided to them. They are not held to a knowledge of the heating capacity and economy of the Coshocton coal which they may have subsequently acquired in the use of that coal in the schools after their purchase of the Jackson coal offered by the A. G. Blair Company had been prevented by injunction in the court below. They are held only to such knowl-

edge as they may fairly be supposed to have had or might reasonably have obtained at the time when they accepted the bid of the A. G. Blair Company; and holding them only to that knowledge, our view is that the burden resting upon the plaintiff to establish his claim has not been sustained. Our judgment, then, is that the injunction should not have been allowed.

There is another reason why at the present time there should be no injunction. The evidence discloses that there is no longer any intention on the part of either the board or the director of schools to close any contract with the A. G. Blair Company. The court below rendered a permanent injunction against the entering into of any contract upon the basis of the acceptance of the Blair bid. Both the A. G. Blair Company and the board of education appealed to this court; at least an official and attorney claiming to represent the board of education filed an appeal bond; but the board of education has disavowed his act and upon its application its appeal has been dismissed. There is here offered in connection with the evidence in the case a very clear indication that the board of education does not intend to enter into any contract with the A. G. Blair Company, and, so far as we are advised, the A. G. Blair Company is not pressing its claim to a contract.

There is no reason to apprehend the doing of the things the preventing of which was the object of the suit; and the only aim of the inquiry before us is to determine whether a judgment for costs which has been rendered against the defendants, including the A. G. Blair Company, should stand, and incidentally, whether the plaintiff as a tax-payer was entitled to an injunction at the time of the filing of the suit.

Our conclusion, on an examination of the whole matter, is that he was not so entitled to an injunction; that his petition should be dismissed, and that the defendant now in court, who has come to this court by appeal, is entitled to a judgment for its costs. The judgment will be entered accordingly.

PARKER, J., concurring.

I want to add a word to give my own views about the construction of these sections of the statute that have been referred to by Judge Wildman.

Upon looking into the statutes we find that Section 3988, Revised Statutes, in substance, if not precisely in its present form, has been upon the statute books a great many years. I have not gone back beyond 1873, but it was there then, requiring that boards of education should advertise for bids in certain cases. The earliest provision that I find for a director of schools is in the statute passed April 25, 1904, 97 O. L., 360. My view of the functions of this officer or employe is that he has certain clerical duties to perform, and that he may exercise certain authority by virtue of the statute, and he may do certain other things under authority derived from the board of education. He shall purchase supplies and equipments as authorized by the board of education, and he is to attend to the clerical work incident to advertising for bids, in cases where bids are required by the statute, *i. e.*, Section 3938, Revised Statutes.

As to the construction to be put upon Section 3988, Revised Statutes, much light is given by the case of *Board of Education* v. *Andrews,* 51 Ohio St., 199. My view of the matter is that advertisement for bids was not required in the purchase of fuel, and that the director of schools in purchasing this coal was under the control of the board of education, and that it was a purchase by the board, or a purchase by a director of schools under authority derived from the board. According to the record submitted he does not seem to have been vested with authority to make the purchase, but only to solicit proposals; and that he should first advertise for bids was not required by the board nor by the statute. His action amounted to simply soliciting proposals. When these bids or proposals came in, it became the duty of the board to consider them, and in considering these proposals they were not in any way hampered or controlled by the provisions of the section respecting the acceptance of the lowest responsible bid. Of course they were bound to execute their trust with honesty and fidelity, notwithstanding the absence

of such requirement; but we agree that to impeach or invalidate their action in the premises, it is not sufficient to show that the board may have blundered, may have fallen into some error, or that it may not have done the wisest thing possible under the circumstances. Certain members of the board admit on the witness stand that if they had had the light upon the subject at the time of this transaction that has been thrown upon it since, they would probably have voted for the acceptance of another proposal, either a proposal to furnish smokeless coal, or the proposal that they did afterwards accept. But it is not evident to us that such information was presented to them, or that they were aware that such information was within their easy reach, as would have apprised them that other of the bids were more advantageous to the board of education than the one accepted. The evidence submitted upon that subject is not so clear that it can be fairly said that by failing to avail themselves of this information they abused their authority to an extent that would render the transaction void, or that it ought to move a court of equity to enjoin the contract made.

LIEN AGAINST INTEREST OF HEIR IN PROPERTY SOLD TO PAY DEBTS.

Circuit Court of Hamilton County.

ESTATE OF OTTILIA SEITZ.

Decided, May 16, 1908.

Sale of Property of Decedent to Pay Debts—Judgment Lien Asserted against the Interest of One of the Heirs—Nature of the Proceeding—Can not be Attacked Collaterally—Distribution—Sections 5357, 5358 and 6145.

The lien of a magistrate's judgment may be set up in a proceeding in the probate court to sell the property of a decedent to pay debts, where the party against whom the lien was obtained has an interest in the property as an heir; such a proceeding is not one requiring the issuance of summons for the party against whom the lien was obtained, and an order directing the administrator to pay the claim can not be collaterally attacked.

W. J. Davidson and *Harry R. Weber.*

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

The judgment recovered against Minnie Flesher by William F. Wagner and the lien acquired upon her real estate inherited from her mother, Ottilia Seitz, under Sections 5377 and 5378, were not improperly set up in the probate court in the suit to sell the real estate of Ottilia Seitz to pay debts.

Section 6145 provides for the determination of the equities between parties as well as the priorities of liens, and the order of the probate court merely found that the judgment of Wagner was a lien upon the interest of Minnie Flesher in the premises to be sold, and the administrator was ordered to pay the same from the balance due Minnie Flesher.

This was not such a proceeding on a cross-petition asking affirmative relief as would require the issuance of a summons to bring a party into court, nor on the other hand can this finding or order be collaterally attacked.

Judgment affirmed.

WHEN A TITLE BY DEVISE TAKES EFFECT.

Circuit Court of Hamilton County.

DAVID W. MILLER ET AL v. HOWARD DOUGLASS, EXECUTOR, ET AL.

Wills—Title by Devise—When it Takes Effect—Action to Set Aside Conveyance Made by Devisee After Death of the Testator but Before Probate of his Will.

A title in a devisee relates back from the probate of the will, and takes effect as of the date of the death of the testator; or if not at the death of the testator, the devisee takes upon probate of the will no more than a naked legal title, and where he has made a conveyance of his interest during the interim between the death of the testator and the probate of the will, he takes the legal title upon probate of the will as trustee for his grantee.

It appears from the evidence in this case that John M. Miller, the father of David W. Miller, died on March 21, 1894, leaving a will by which he bequeathed and devised the one-ninth part of his estate, consisting of personal and real property, to David W. Miller. This will was read to the children on March 24,

1894, and thereupon on that day David W. Miller executed a paper writing whereby he set over all his right, title and interest in his father's estate to Matilda G. Miller, his wife, "in consideration of certain accounts and notes" due by him and at that time transferred to him. Two days later he executed the following deed:

"Know all men by these presents, that David W. Miller, of Cincinnati, Hamilton county, Ohio, in consideration of one dollar ($1.00) and the indebtedness which he owes to Matilda G. Miller, does hereby grant, bargain, sell and convey to said Matilda G. Miller, her heirs and assigns forever, all his right, title, interest and demand of every kind whatever, in, to and concerning the personal and real estate belonging to the estate of John M. Miller, late of Hamilton county, Ohio, being all the share and portion of said estate, both real and personal, which was devised to the said David W. Miller by the last will and testament of said John M. Miller, deceased, to have and to hold the same to the said Matilda G. Miller, her heirs and assigns forever."

The one dollar consideration was paid by Matilda G. Miller to David W. Miller, and the deed was duly delivered to Matilda G. Miller, and filed for record on the same day. Five days thereafter, on March 31, 1894, the will of John M. Miller was admitted to probate in the Probate Court of Hamilton County.

Soon thereafter the plaintiff obtained a judgment for $2,770 and costs against David W. Miller, and caused an execution to issue on said judgment and levied on the real estate devised to David W. Miller under said will as the property of David W. Miller, claiming that the deed was made without any consideration and was fraudulent and void for want of consideration, and that it cast a cloud on the title of David W. Miller in said real estate so that it could not be sold on execution; that it was made for the purpose of defrauding the plaintiff and other creditors, and for the purpose of hindering and delaying them in the collection of their claims, and asking that the cloud on the title be removed and that the instrument be held to be void.

This raised the question as to what was transferred by the instruments executed by David W. Miller to Matilda G. Miller,

after the death of John M. Miller and the reading of his will, and the subsequent probate of the will. The common pleas court answered this question as follows (3 N. P., 220):

"That when David W. Miller executed the transfer of March 24 and the deed of March 26, 1894, he had no title unless by inheritance from his father; that his title as devisee was a new title acquired subsequent to the deed on the probate of the will; that the deed conveyed such interest as he then had, and did not convey his title as devisee, and which title he or his judgment creditors may assert as against the grantee under the deed. Therefore the plaintiff and such other judgment creditors as obtained a lien after the title vested may subject the interest of David W. Miller, as devisee under the will, to payment of their liens."

The case was thereafter taken to the circuit court by David W. Miller et al, where it was heard by Judges Marvin, Douglass and Caldwell, sitting in place of the judges of the first circuit, and on July 8, 1898, a decree was entered reversing the judgment of the common pleas. The ground of the decree was that upon the ripening of the legal title in David W. Miller by the probate of the will, it took effect by relation as of the date of the testator's death. This case was not reported (an opinion on another branch of the case may be found two or three times repeated), but the decree answers the purpose of a report, and is here subjoined:

"This cause came on to be heard upon the petition in error, the transcript and the original pleadings and papers from the Court of Common Pleas of Hamilton County and was argued by counsel and submitted to the court.

"And the court, being fully advised, finds that there is error apparent upon the record prejudicial to the plaintiff in error, as follows:

"The court having found the facts and the law separately in the decree rendered in the court below, erred in matters of law in finding that said David W. Miller, at the time of the execution and delivery of a certain conveyance set forth in the decree, to Matilda G. Miller, had no interest in the property mentioned and described therein, under the will of his father, John M. Miller, deceased, and that said Matilda G. Miller took no interest nor title in said property by virtue of said conveyance as

against David W. Miller and the other parties to said action.

"The court below also erred in finding that said defendants in error herein, or any of them, acquired any lien upon said property by virtue of the judgments set forth in said action against said David W. Miller, and erred in decreeing said conveyance to be set aside and in ordering any money paid into court.

"This court holds that David W. Miller had an interest in said property under said will at the time of the execution and delivery of said instrument to his wife, Matilda G. Miller, that might be then conveyed; that said instrument affected such conveyance; that upon the ripening of the legal title in David W. Miller by the probate of said will, by relation the title took effect as of the date of the testator's death and therefore instantly devolved upon said Matilda G. Miller. Even if it did not thus take effect by relation, David W. Miller acquired no more than the naked title, and all ownership and beneficial interest were in said Matilda G. Miller, for whom he held such legal title in trust, and that the defendants in error, by their judgments and levies, obtained a lien upon no more than such naked legal title, and that therefore said Matilda G. Miller is entitled to the real estate devised to David W. Miller, or the proceeds arising from a sale thereof, and said defendants in error have no right or interest therein.

"It is therefore adjudged and decreed that the decree of the court of common pleas be reversed and set aside as to the findings of law and the orders based thereon, as herein set forth.

"And it is further ordered that this cause be and is hereby remanded to the Court of Common Pleas of Hamilton County for a decree in favor of the plaintiff in error and such further proceedings, in accordance with the decree, as may be required in the premises.

"And it is adjudged that the defendants in error shall pay the costs of the proceedings, taxed at $——, and it is ordered that a special mandate be issued herein to said court of common pleas to carry the foregoing judgment into execution.

"And said defendants in error except to the finding and decree of the court herein."

DE FACTO OFFICERS.

Circuit Court of Lucas County.

DAVID T. DAVIES, JR., AUDITOR OF LUCAS CO., v. STATE, EX REL WILLIAM H. SCHERER; AND WILLIAM H. SCHERER v. ARTHUR H. RINE ET AL.

Decided, June 2, 1908.

Assessors—Failure to Qualify—How to be Treated by County Auditor—De Facto Officers—Mandamus—Injunction—Appointment of Assistants—Approval of Bonds—Ministerial Duties—Sections 1518, 1536-3, 1536-998 *and* 1536-999.

1. Failure of an assessor in a municipality to qualify within the period after election prescribed by law, is deemed a refusal to accept the office which becomes *ipso facto* vacant, to be filled by appointment by the county auditor.
2. A writ of mandamus will not lie at the instance of a mere *de facto* assessor, to enforce his claims to be invested with evidence of a legal title to the office.
3. Injunction is the proper remedy by a *de facto* officer to prevent his being disturbed in the performance of the duties of the office until the legal title thereto has been determined.
4. Two persons can not, at the same time, be *de facto* officers of an office for which one incumbent only is provided by law.
5. Approval of official bonds of assessors and of the appointment of assistant assessors are acts not merely ministerial, but require the exercise of judgment and are not within the legal powers of a deputy county auditor.

L. W. Morgan and *H. B. Thompson,* for Davies and Arthur H. Rine.

L. W. Wachenheimer, Ben W. Johnson and *Karl A. Flickinger,* for plaintiff.

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

The two cases of David T. Davies, Jr., v. State, on the relation of William H. Scherer, and the case of William H. Scherer v. Arthur H. Rine will be disposed of in one opinion. The case of David T. Davies, Jr., as auditor of the county, against

the State, on relation of Scherer, is an error proceeding brought in this court to reverse the judgment of the court below rendered in an application on behalf of Scherer, as relator, for a writ of mandamus to compel Davies, as county auditor, to approve the appointment of two persons named by Scherer as assistant assessors, and to deliver to Scherer books and papers pertaining to the office of assessor, Mr. Scherer claiming that he is the assessor of one of the wards or precincts of the city by virtue of his election thereto. The other case of Scherer v. Rine was instituted in the court below but brought to this court by appeal, and is a suit for an injunction to restrain Rine from disturbing Scherer in the performance of the duties of the office as assessor.

We are brought first to a consideration of the question whether or not Scherer, at the time of the institution of these suits, was entitled to claim the office of assessor. He had been duly elected thereto on the 5th day of November, 1907, and he attempted to qualify by filing a bond on the 19th day of the same month. The statute, Section 1518, provides that upon the election of an assessor in any ward or precinct of a municipal corparation, the office shall be considered vacant, in the event of the failure of the person elected to give bond and take the oath of office for one week after his election. By Section 1536-3, it is provided:

"When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, excepting that justices of the peace and constables shall continue to exercise their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes, and such justices and constables shall be elected at municipal elections," etc.

By Section 1536-998, it is provided that certain official bonds in municipalities, including, as we construe the statutes, the bond of the assessor, "shall, upon its approval, be delivered to the city clerk," who shall file and preserve the same after

record. By Section 1536-997, it is provided, that such bond shall be approved by the mayor. Section 1517-1 provides that in municipal corporations divided into wards, an assessor shall be elected in each ward at every annual election. He shall take the same oath, give the same bond and perform the same duties as are provided for township assessors. The section immediately preceding 1517 provides as to the character of the bond to be given by the township assessor, so that the two sections must be read together to determine the duties of the municipal assessor. Sections 1517 and 1518, to which I have already referred, are carried into the municipal code, and the code has provided for the amount of the bond to be given.

On April 8, 1908, after Scherer's election, an official oath was taken by him, and on the 13th the city council undertook to pass a resolution approving his bond, and the mayor undertook to approve the act of the council, the bond having been fixed at one thousand dollars. There was never any approval of Scherer's bond by the mayor. He did nothing, so far as the record discloses to us, but approve the resolution of the council.

By Section 1536-999, it is provided that:

"The council may declare vacant the office of any person elected or appointed to an office who shall fail to take the oaths required in Section 1737" (which in this 6th edition is given as 1536-996) "or to give any bond required of him within ten days after he has been notified of his appointment, or election, or obligation to give a new or additional bond, as the case may be."

This seems to have application to bonds generally, but by the section to which reference has already been made, 1518, specific provision is made with reference to assessors, and it is provided, in effect, that as to this office, perhaps because of the need of filling it speedily after election, the office of assessor shall be considered vacant, without waiting for the council to declare it so. The Legislature probably made this enactment in view of the conditions existing, of a legislative character, as to the time of election, when the enactment was made, but they have permitted Section 1518 to remain in force notwithstanding the sub-

sequent changes as to the time of holding municipal elections.

A deputy auditor, Mr. Otto Sanzenbacher, attempted to approve the bond of Scherer, but we are quite clear in our view that the approval of an official bond is an act requiring such judgment of the officer attempting to exercise such approval that it can not be done by a merely ministerial officer, and we do not think that a deputy auditor is clothed with the power attempted here to be exercised. The same thing is true as to the appointment of assistants. It is an authority given to the assessor. The assessor names the assistants, and the appointment is to be exercised or approved by the auditor, and it is a power which he could not delegate to another.

Now coming directly to the question, based upon the legislative enactments to which I have referred, and the view which I have expressed as that of the court, whether or not Mr. Scherer at the time of the institution of these proceedings was the legally appointed and qualified assessor, or in other words, whether he was the *de jure* officer, I desire to cite certain authorities which seem to me decisive of the question. I have before me the case of *The State, ex rel Attorney-General,* v. *James M. Matheny*, 7 Kans., 327, in which it is held that the failure of a county clerk-elect to file his official oath and bond with the county treasurer within twenty days after the commencement of the term for which he was elected, vacates his office. In *State, ex rel Berge*, v. *Lansing*, 64 N. W., 1104, decided by the Supreme Court of Nebraska in 1905, it was held:

"Section 716, providing that 'if any person elected or appointed to any office shall neglect to have his official bond executed and approved as provided by law, and filed for record within the time limited by this act, his office shall thereupon *ipso facto* become vacant' construed, and held to create a condition precedent to the right of a person so elected or appointed to be inducted into office."

This is the decision of the court, although two of its judges dissented. The fourth paragraph of the syllabus is:

"Held, further, that such provision is self-executing, and that unless the official bond, where one is required, is filed within the

time provided by law, the person elected loses all right to the office, and the vacancy can be filled without any previous judicial determination of the fact."

The case is interesting because of the conclusions arrived at by the court, and also the comment in the opinion upon other cases, which are collated on page 1109. Numerous cases are cited, and the judge speaking for the court says:

"It will thus be seen that the overwhelming weight of authority under statutes much less mandatory than our own is to the effect that, where a time is prescribed within which one, in order to be inducted into an affice, must take the oath or file a bond, the taking of the oath or the filing of the bond is a condition precedent to the right to enter upon the office, and that the right is absolutely lost by a failure to perform the condition within the time limited."

We have a general provision in our statutes, which has found analogies in the phraseology of those of some other states. Section 19, Revised Statutes, reads as follows:

"Any person elected or appointed to an office of whom bond or security is by law required previous to the performance of the duties imposed upon him by his office, who refuses or neglects to give such bond or find such security, agreeable to, and within the time for that purpose prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and the same shall be considered vacant, and be filled as provided by law."

This section also should be read in connection with Section 1518 referring specifically to the office of assessor. In Section 19 we have the provision as to the inference which is to be drawn from the refusal or neglect of the assessor to qualify. He "*shall be deemed to have refused*" the office; and in Section 1518 we have the provision specifically provided as to the assessor's office, that if he fail to take the oath of office for one week after his election, "*the office shall be considered vacant.*" Taking the two sections together, there seems to be no escape from the conclusion that the failure to file his bond and take the oath of office within the time and in the manner provided by

law, raises the presumption that he has declined the office, and also that it has become vacant. The statute says "it shall be considered vacant," and the other provision that, under certain circumstances and as to certain municipal officers, the council may declare offices vacant, has no application to the circumstances of the present case. The vacancy is not dependent on such declaration by the council.

The Supreme Court of the state of Arkansas, *Falconer* v. *Shores,* 37 Arkansas, 386, has decided that the sheriff is by law *ex-officio* collector of revenue, but if he fails to give bond as such collector by the time prescribed by the statute, the first Monday in January, he forfeits the office and can not be restored to it by executing the bond afterwards. I cite this case because of the attempt made by Scherer, after the expiration of the time allowed by law for his qualifying, to take the oath of office and file the bond, obtaining the approval of the deputy auditor. After the office has become vacant, and after the conclusive presumption has been raised of his intention to decline the office, it would seem that there is no power in Mr. Scherer to restore himself to the office by any subsequent acts.

The case cited in the 25th Ohio State at page 567, *Kelly* v. *The State,* does not affect the law governing the present case. In that case a question of estoppel was raised as against the sureties upon the bond of a county treasurer who had not qualified within the time required by the law, and it was held that as against such sureties the principle of estoppel would arise. The officer attempted to qualify after the expiration of the time provided by statute, and then proceeded to perform the duties of the office, and the public, treating him as an officer *de facto,* and transacting business with him, acquired rights by virtue of the equitable principle of estoppel. But no such principle or question has been raised in the present case. On page 577 is some language which is probably *dictum,* but still should be given such force as we ordinarily give to expressions of that character by the judges of the Supreme Court, and it may be read:

"The effect of the treasurer's failure to give bond, or take the oath of office, on or before the first day of the term, involves a more serious question."

Then the statute is quoted, which says that upon such failure the office shall be held to be vacant, and makes it the duty of the commissioners to fill it by appointment; and Judge Welch says:

"I suppose the true construction of this statute to be, that upon such failure to give bond and take the oath, the office *ipso facto* becomes vacant, without any resolution of the commissioners to that effect, and without the appointment of any one to the office, and that the treasurer-elect in such case is liable at any time thereafter to be ousted from the office by a proceeding on the part of the public, or of an appointee. It seems to us, however, that the treasurer and his sureties are estopped from setting up this defense."

Here we have by this *dictum* a recognition of the principle which seems decisive in the present case, where no question of estoppel has been raised, where the public has not been injured, and is not seeking to protect its rights as against a defective officer or the sureties upon his bond. A *dictum* to similar effect appears in the opinion in *State* v. *Hopkins*, 10 Ohio St., 511, *quid vide.*

A more decisive case is that of *The State, ex rel Poorman,* v. *County Commissioners*, 61 Ohio State, 506, holding:

"If one elected to the office of sheriff fails, without justification, to give an official bond before the first Monday of January next after his election, there occurs on that day a vacancy in the office which the county commissioners should fill by appointment."

The court in that case, and the decision was *per curiam,* applied the principles of Section 19, which I have read, and also Sections 1203 and 1205 of the Revised Statutes, considering this general section number 19 applicable to the case of the failure of a sheriff to qualify, although there were specific provisions for his qualification, just as in the present case we have specific provisions for the qualification of an assessor, and as to the effect of his failure to qualify within the time provided. Section 1203 of the sheriff act provided that, "the sheriff or coroner shall, within ten days after receiving their commissions,

and before the first Monday of January next after their election, give bond to the state with two or more sureties approved by the county commissioners"; and Section 1205 provided that, "If the sheriff or coroner fails to give bond within the time above specified, or fails to give additional sureties on his bond, or a new bond, within ten days after he has received written notice that the county commissioners require such additional surety or new bond, then the said commissioners shall declare the office of such sheriff or coroner vacant and said office shall thereupon be filled as provided by law." But it will be noted that, although there was the provision quoted as to the declaring of the office vacant by the commissioners, the syllabus of the case holds that the office, on the very day when the bond should have been filed, became vacant.

Without considering for the time being the question whether the appointment of Rine by the auditor made him the *de jure* officer, it can not be held that Scherer became a *de jure* officer merely by virtue of his election and his attempted qualification in the April after such election.

The question remains, and has seemed to us one of vital consequence in the case, whether a merely *de facto* officer can maintain a proceeding in mandamus to compel the recognition of any rights in him as an officer, and an examination of the authorities and a consideration of the principles involved lead our minds to the conclusion at which we have unanimously arrived, that a *de facto* officer does not possess the same rights as to maintenance of proceedings for mandamus that are held by an officer *de jure*.

The case of *Ex Parte Harris,* 52 Alabama, 87, holds:

"Mandamus is not a proper remedy to try the right to public office, of which there is a *de facto* incumbent, nor will it lie in any case to compel performance of duty or exercise of power, unless the relator has a clear legal right to demand it and is without any other adequate and specific remedy."

On the question as to the right of a mere *de facto* officer to maintain mandamus, I invite attention to the definition of the expression "officer *de facto*" as found in Mechem on Public Officers, Section 317. I will not stop to read, but in one of the paragraphs of the section it is said:

"Thus if the title of the assumed officer be directly assailed by the state, in a proper proceeding, it will be necessary for him to show himself something more than an officer in fact. So in a direct proceeding brought by the assumed officer himself to secure rights which belong only to an officer *de jure*, it may be necessary for him to show himself to be such."

Now is not that the present case? Here is a person who claims to be performing some of the functions of an officer, in other words, to be an assessor *de facto*. He says that he was to a certain extent recognized by the auditor at one time as an assessor; that he came into possession of some of the necessary blanks or papers, and that he inspected or viewed at one time certain structures, and that he was elected by vote of the people to the office. In order to fortify his position and sustain claims to being a *de jure* officer, he seeks to get other indicia or evidences of his right to the office. But that is a kind of fortification of title which we think it is not the province of the proceeding in mandamus to bring to him. He must do it in a direct proceeding in the nature of quo warranto, or in some other way. He must bring the title to his office directly into issue.

Section 322 of this same work has this language:

"It is evident that two different persons can not, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law. There can not, therefore, be an officer *de jure* and another officer *de facto* in possession of the same office at the same time. Hence if the officer *de jure* is in, there is no room for an officer *de facto;* and if the officer *de facto* is in, the officer *de jure* can not be in also."

There are two cases from other states bearing directly upon this question. One is that of *People, ex rel Sullivan,* v. *Weber,* 86 Illinois, page 283, holding—I read the third, fourth and fifth paragraphs of the syllabus:

"Where one claims rights as an officer, by virtue of his office, he must show that he is legally entitled to act—that he is an officer *de jure* as well as *de facto.*

"The acts of an officer *de jure* are valid and effectual everywhere when within the limits of his authority; but the acts of

a *de facto* officer are valid only so far as the rights of the public, and of third persons having an interest in such acts, are involved; but such officer can claim nothing for himself.

"The title of a *de facto* officer can not be inquired into in a collateral way between third parties, but it may be inquired into where he is suing in his own right as an officer."

He is so suing here. He is claiming that he is an officer; he is insisting that he is entitled to the paraphernalia or insignia or indicia of his office; that he must have the tools, the furniture; that he must have everything that pertains to the office which he claims to hold. In other words, the title to the office is drawn directly in question in the first instance, and it is not enough for him to say, "I insist upon being clothed with all the rights and powers appertaining to the office, because I am exercising some of the powers appertaining to the office."

The Supreme Court of Indiana has made a like holding in *Glascock* v. *Lyons,* 20 Indiana, 1:

"If a person, rightfully in the possession of an office to which he is entitled, is ousted therefrom by an intruder, an action for money had and received would lie in his favor against the usurper to recover the fees, when fixed or customary fees are incident to the office.

"And in such an action the title to the office may be determined.

"A person who is rightfully entitled to an office, although not in the actual possession of it, has a property in it; and against a mere intruder, who may perform the duties of the office for a time, and receive the fees arising therefrom, he may maintain an action for money had and received to recover such fees, and such intruder can not retain any part thereof as compensation for his labor."

We are too prone to forget, in our construction of cases affecting the incumbencies of office, that an office is not a mere institution like an almshouse or an orphans' asylum, provided for the benefit of an incumbent, but it is a place of service. It is established for the benefit of the public, and the statutes are to be construed and enforced in the light of that fact.

We hold that upon the views already expressed, viz: first, that Mr. Scherer has not shown himself to be a *de jure* assessor,

and, second, that the proceeding in mandamus will not lie in favor of one who is not such, that the writ should be refused. Our judgment is strengthened somewhat by the fact that the auditor himself has recognized, and is recognizing, another person as the *de jure* assessor; has approved the appointments of assistants for such assessor, and has given him the books and papers pertaining to the office, bringing the case very much on a parallel with that suggested in Mechem, Section 322, *supra,* where it is said that there can not be two officers, one *de facto* and one *de jure,* at the same time, when the *de jure* officer is in possession. It would seem that at the beginning of these proceedings, no matter what had happened before, Scherer was no more *de facto* officer than Rine; that is to say, he was no more acting than Rine; he was no more in possession of the apparent evidences of an incumbency than was Rine, and for that reason, in addition to those already suggested, it would seem as if mandamus was not a proper proceeding to determine which of the two men was entitled to office. Again, his proceeding is not against Rine; it is instituted against the county auditor, and no rights of Rine can be determined in the mandamus proceeding against the auditor.

Coming to the injunction suit which was brought by Scherer, claiming to be at least an officer *de facto,* and asking that he be not disturbed in the exercise of the duties of his office, it may be repeated that such application must be made because of the danger to the public, rather than because of any deprivation of benefit to himself. It is because, if he is disturbed in the performance of his duties while he is the one *de facto* officer, the public will be injured. When the case was first presented to us, and upon the showing then made and citation of authorities, and such examination as we were able to give to them, we concluded that, while the testimony was somewhat meager and vague in support of the claim of Scherer that he was a *de facto* officer, still there was enough to justify his claim, and we were disposed to grant the injunction. But much light has been given to us in the re-discussion of the case in connection with the presentation of the mandamus proceeding. It is not that

new evidence has been offered, but we have had time to give to the whole matter more careful consideration, and it has been brought more clearly to our minds that no interest of the public can be subserved by preventing Rine from going on and performing the duties which are devolved upon him by the appointment. It is now made probable as between Scherer and Rine, who are both parties to the injunction suit, that Rine is the officer *de jure* as well as *de facto*. He was appointed, as the statute requires, by the auditor. He was appointed after the office had become vacant by reason of the failure of Scherer to qualify; and Rine was not appointed by a deputy, but by the auditor, as the statute requires. He has filed his bond with the auditor pursuant to a like requirement; he has, so far as appears, qualified regularly, and under those circumstances we are not now disposed to prevent him from performing the duties of the office, and thereby increasing the entanglement between these two gentlemen who are both claiming to be assessors.

We have arrived at the unanimous conclusion, not only that the writ of mandamus should be refused, as already stated, but that we should not grant the injunction asked by Scherer. The contrary view previously announced in the injunction suit has not been embodied in any entry on the docket of the court or the journal, and for this reason it is not necessary to put the present decision in the form of setting aside a judgment. We have simply reconsidered the case, and the judgment of the court will be as an original one. The injunction will be refused and the petition of the plaintiff dismissed. On the cross-petition of Rine, which asks an injunction against Scherer of like character, we have concluded that the facts warrant us in granting it and the judgment will be entered accordingly.

ASCERTAINMENT OF DAMAGES WHERE GOODS WERE NOT UP TO STANDARD.

Circuit Court of Hamilton County.

THE ILLUMINATED CAR SIGN CO. v. JAMES H. WILSON.

Decided, March 24, 1908.

Sales—Construction of Contracts of—Measure of Damages Where Goods Proved Unsatisfactory—Negligence in Manufacture an Element Which Should be Excluded in Determining Actual Cost of Manufacture—Evidence—Charge of Court.

A contract which provided that the plaintiff should receive from the defendant corporation one-half of the profits derived by the defendant from "all signs which it should make and furnish and which should be placed on said Brooklyn Company's cars as aforesaid," must be construed to mean that the signs were subject to the approval of the Brooklyn Company acting in good faith.

Ellis G. Kinkead and *John D. DeWitt,* for plaintiff in error.
Joseph W. O'Hara and *Orville K. Jones,* contra.

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

Although there is direct conflict between the testimony of Mr. Hunter and Mr. Wilson, the plaintiff in the original action (the only persons present when the alleged contract was made), we think the evidence shows the existence of a contract substantially as set forth in the petition.

The measure of damages stated in the petition is as follows:

"That defendant would pay to plaintiff for his said services one-half of the profits made by defendant upon all the signs which it should make and furnish and which should be placed upon said Brooklyn Company's cars as aforesaid, which profits were to be the difference between the price obtained by defendant for said signs and the actual cost of manufacturing the same."

Under this allegation the profits made by defendant were not limited merely to signs made and furnished, but to *those which should be placed upon said Brooklyn Company's cars* as aforesaid, that is to say, in pursuance of the joint efforts of plaintiff and defendant. It amounts to an admission that the signs

were subject to the satisfaction and approval of the Brooklyn Co. acting in good faith, and the plaintiff is bound thereby.

There is testimony tending to prove that the cost of reconstructing the signs and even an admission that part of such cost was due to the negligence of the defendant, which of course would exclude it from consideration in estimating the actual cost of manufacture. The court in its charge to the jury did not give this interpretation to the pleading, but left the question for determination by them from the evidence.

As we understand the testimony it is admitted by Mr. Hunter, president of the defendant company, that the cost of making changes in the bonnet signs, amounting to $2,501.33, was due to the negligence of the superintendent of the defendant company. Deducting this amount from the cost of manufacture, exclusive of commissions and royalty, as shown by the books of defendant, there was a net profit of $4,074.80, one-half of which this plaintiff was entitled to, and if he will remit all in excess of that amount the judgment will be affirmed, otherwise reversed for error in charge of court and because the damages are excessive.

The commissions paid to the New York agent as well as the royalty were not a part of the cost of manufacture, and were therefore properly excluded in ascertaining the profits as defined in the contract. The declaration of the witness, Taylor, to the witness, Perung, "Yes, I know all about that case, there is no question but what Wilson is right in that matter" is not only an opinion of the witness but a declaration that he has knowledge of all the facts necessary to form such opinion—whereas the facts within his knowledge as disclosed in his deposition are wholly at variance with such necessary facts. He was the representative of the purchasing company whose duty it was, and who did conduct the negotiations for the purchase of 1200 signs from the defendant, hence his testimony that plaintiff took no part in such negotiations is irreconcilable with the declaration which, for the purpose of impeachment, is more significant because made after his deposition was taken and after his attention had been directed to the facts. The admissibility of the declaration is supported by the following cases: *Henitz* v. *Caldwell*, 16 C. C., 630 (affirmed 64 O. S., 583); *Dilcher* v. *State*, 39 O. S., 130; *Kent* v. *State*, 42 O. S., 426.

COSTS ON CHANGE OF VENUE.

Circuit Court of Guernsey County.

THE BOARD OF COUNTY COMMISSIONERS OF GUERNSEY COUNTY, OHIO, v. THURLOW.

Decided, November Term, 1907.

Sheriff—Fees of, Where There is a Change of Venue and the Accused is Acquitted—Payable Under Section 1231 and not Under Section 7264.

Where there is a change of venue and the accused is acquited, the sheriff has no claim for fees, under Section 7264 of Revised Statutes as amended, 93 Vol. Ohio Laws, page 7, against the county where the indictment was found; his fees in such cases being provided for by Section 1231 of the Revised Statutes.

Charles S. Sheppard, for plaintiff in error.
Turnbaugh & Eagleson and *A. M. Morris,* contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to common pleas court.

T. M. Thurlow, the sheriff of Noble county, obtained a judgment by consideration of the court of common pleas against the board of county commissioners of this county for serving subpoenaes and other services rendered by him in the case of *The State of Ohio* v. *Barber.* Barber was indicted for a felony in Guernsey county and obtained a change of venue to Noble county, where he was tried and acquitted. Thurlow presented his bill for his services to the board of county commissioners of this county, which was rejected, and an appeal was taken to the common pleas court; and that court rendered judgment in his favor for the amount of his claim.

Thurlow claims that he is entitled to payment of his claim under Section 7264 of the Revised Statutes as amended, 93d Vol. Ohio Laws, page 7.

The section as amended provides that:

"The costs accruing from a change of venue including the compensation of the attorneys appointed to assist the prosecuting attorney, and the reasonable expense of the prosecuting

attorney incurred in consequence of such change of venue, and also including the fees of the clerk of the court and the sheriff and the jury fees of the jury, to be paid by the county in which the indictment was found."

The part of the amendment specially relied upon is: "And also including the fees of the clerk of the court and the sheriff and the jury fees of the jury, to be paid by the county in which the indictment is found." We do not see that this amendment affects the original enactment at all.

The section as it originally read was:

"And the costs accruing from a change of venue, including the compensation of the attorneys appointed to assist the prosecuting attorney and the reasonable expenses of the prosecuting attorney incurred in consequence of such change of venue, shall be allowed and paid by the commissioners of the county in which such indictment was found."

Under the section as it then read the matter was before our Supreme Court, 49th O. S., 373, and it was held that the sheriff of the county where the trial was had was not entitled to be paid his costs by the county where the indictment was found in cases where the state fails to convict; that the only compensation he was entitled to is the allowance provided by Section 1231 of the Revised Statutes which is payable out of the county treasury of the county where the trial is had. As a fact the sheriff had no fees or costs that he could claim, as the accused was acquitted; for in such cases the court of common pleas, under Section 1231, makes an allowance to the sheriff for his services to be paid out of the county treasury of the county where the trial is had. Noble county is making no claim, and very probably could not do so, as there is no specific provision of law under which it could make any claim.

The county commissioners did right in rejecting the claim. Whether the remedy by appeal was the proper one, it is not necessary for us to inquire, as defendant in error has no claim that he can enforce.

The judgment of the common pleas court will be reversed and the proceeding of defendant in error dismissed at his costs.

ACTION ON BOND IN FAVOR OF COUNTY.

Circuit Court of Richland County.

STATE, EX REL HUSTON, v. SAMUEL A. ESSWEIN ET AL.

Decided, January, 1908.

Judgments—For Defendants Should be Affirmed on a Single Valid Defense—Principal and Surety—Pleading—Necessary Averments for Recovery on Bond Running in Favor of County—Section 799.

1. A judgment for the defendants should be affirmed, if among the defenses which were interposed there was any one which was valid, or if there be any other sufficient reason under the law for sustaining the judgment.
2. Failure to aver, in an action against a contractor and his sureties for damages in failing to complete a contract entered into with the county commissioners, that the contract relied upon was one of binding force and effect, and that the contract was endorsed by the prosecuting attorney in compliance with Section 799, Revised Statutes, and that there has been performance of all other prerequisites necessary to a complete and valid contract, precludes any recovery thereon by the county.
3. Such prerequisites are not for the benefit and protection of the sovereign power alone, but they are of the essence of the contract, which without them becomes null and void.

Lewis Brucker, G. M. Skiles and *W. H. Bowers,* for plaintiff in error.

S. M. Douglass, C. H. Workman, J. J. Adams, G. E. Crane and *Sater & Seymour,* contra.

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

This proceeding [*State of Ohio, for the use and benefit of Richland County, Ohio, by C. H. Huston, Prosecuting Attorney of Richland County, Ohio,* v. *S. A. Esswein, W. H. Shinnick and G. J. Carter*] is prosecuted to reverse the judgment of the court of common pleas. The plaintiff in error was plaintiff in the case below and defendants in error were defendants therein. To the amended petition filed by plaintiff the defendants each filed general demurrers.

In the court of common pleas these general demurrers were overruled, and thereupon defendants filed joint and several answers containing fifteen separate defenses. To each of these defenses except the first the plaintiff filed demurrers, and the demurrers were sustained to each excepting the third and fifth.

The case was heard by the common pleas court, a jury being waived, and a judgment rendered in favor of the defendants. A motion for a new trial was filed, overruled and exceptions taken, and this proceeding is now brought in this court to reverse the judgment of the common pleas court.

We may say at the outset that the judgment of the court of common pleas must be affirmed, if there is a single valid defense made in this case, or if, under the law, there is any other sufficient reason for sustaining the judgment.

The Supreme Court, in *Sites* v. *Haverstock*, 23 Ohio St., 626, thus lays down the rule as to the verdict of a jury:

"Where the jury, by their verdict, 'find the issues joined in the cause' in favor of one of the parties, this is to be taken as a verdict finding each and all of the issues therein for such party.

"In such case, if the issues are such that a finding of either of them in favor of the successful party entitles him to the judgment rendered, the judgment will not be reversed for error in the instructions of the court relating exclusively to the other."

In *McAllister* v. *Hartzell*, 60 Ohio St., 69, the Supreme Court lays down the rule:

"Where two issues are presented in the pleadings for the determination of the jury, and there is a verdict finding the issues for the defendant, and such finding on either issue entitles him to a general judgment in his favor, and a judgment is rendered on the verdict, such judgment will not be reversed for error in the instructions of the court to the jury relating exclusively to one of the issues."

The Supreme Court, in the recent case of *State* v. *Dickerson*, 77 Ohio St., 34, held that the reviewing court was entitled to look into the record and, if the judgment which was in review was right for any reason, it was the duty of the reviewing court to affirm the same.

The amended petition that was filed in the court below was based upon a bond which the defendants, Williams and Beaver, as principals, and Esswein, Shinnick and Carter, as sureties, had executed and delivered to the board of county commissioners of Richland county, in the sum of $15,000.

The condition of the bond was that—

"F. H. Williams and H. H. Beaver have this day submitted to the board of county commissioners a proposal for labor and materials for remodeling the court house at Mansfield, Ohio, as set forth in the proposals hereunto attached. Now, should the said F. H. Williams and H. H. Beaver, within ten days after receiving notice to that effect, enter into a contract to complete said work, and after entering into a contract faithfully to carry out all the conditions, implied and stated, in said contract, a full understanding of which is hereby acknowledged, and leave the building and premises free from all liens and claims whatsoever, chargeable to said county commissioners, then this obligation to be void and of no effect; otherwise to remain in full force and virtue in law."

The petition proceeds, after giving a copy of the bond and reciting its conditions, and says that the board of county commissioners heretofore accepted the proposal of Williams and Beaver and entered into a contract in writing with the said Williams and Beaver to remodel the court house of Richland county. The petition further avers that Williams and Beaver failed, neglected and refused to complete the remodeling of the court house, according to the terms of said contract, wholly abandoning said contract and refusing to complete the same. They further allege that the commissioners of Richland county complied with all the terms of their contract on their part to be performed.

It will be noted that, by the averments of this petition, the plaintiff does not allege that Williams and Beaver entered into "a valid or binding contract," that they entered into "a contract agreeable to the statute in such cases made and provided," that they entered into "a contract according to law," or that they "duly entered into a contract." So that there is a total lack of averments in this petition that the "contract," which was so

claimed to have been entered into between Williams and Beaver and the commissioners was of any binding force and effect whatever.

The Supreme Court, in *Wellston* v. *Morgan,* 65 Ohio St., 219, thus states the rule:

"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."

So that, at the outset of this case, so far as there is any averment in this petition, it totally fails to state that the "contract," or alleged contract, that it is claimed was entered into between the commissioners and Williams and Beaver, was of legal and binding effect.

We are also of the opinion that it would be necessary for the plaintiff in this case to set forth the facts showing a compliance with the statute, such as is required by Section 799, Revised Statutes, alleging the endorsement by the prosecuting attorney and all the other pre-requisites to a complete and valid contract.

It is elementary, and as Judge Davis states the rule in *State* v. *Griffith,* 74 Ohio St., 80, 92, "There is no proposition of law more firmly settled in this state than that sureties are not liable beyond the letter of their contract." These sureties, defendants in this case, could not be bound beyond the strict letter of their contract. Their obligation was that, if said Williams and Beaver, after entering into the contract, would faithfully fulfill and carry out all the conditions stated in the contract, then the obligation was to be void and of no effect; otherwise to remain in full force and virtue in law. We are clearly of the opinion that this presupposed an entry into, on the part of the principals, of a valid, legal and binding contract.

But it appears from the petition itself, and also from the record in the case, that Williams and Beaver either wholly abandoned or failed to complete their contract according to the terms of the contract that they had entered into. The contract which it is claimed they had entered into with the commissioners provided that, after a certain certificate was made by the architect

and after written notice given to the contractors, the commissioners were at liberty to enter upon the premises and complete the same. And the petition avers that said certificate was furnished and the county commissioners proceeded, under the terms and provisions of said contract and in accordance with the specifications and supplemental specifications, details and plans, and with due diligence, to complete said uncompleted contract for the remodeling of the said court house. And then the petition closes with the averment that they have completed the uncompleted contract in so far as they had power to do so and have paid for the completion of the work.

Section 799, Revised Statutes, provides, in respect to public buildings and bridges, in contracts of this character—

"If such contractor or contractors fail or refuse to proceed with the work specified in his or their contract or contracts, * * * the commissioners shall have power to declare such contract or contracts annulled, and shall proceed to make another contract or contracts for the completion of such work, in accordance with the provisions of this chapter."

Now, the provisions of this chapter provide that there shall be competitive bidding in all cases where the amount is over $1,000. It is unnecessary to quote at length the statutes governing this provision.

As we have called attention, this petition affirmatively states that they proceeded to complete the uncompleted contract in so far as they had power to do so, but there is not a single averment that they attempted to comply with the law in a single respect, so far as letting the contract by bids, having the subsequent contracts endorsed by the prosecuting attorney, or having the certificate of the auditor that the money was in the treasury therefor. It does appear in the record in this case that they did attempt to let the contract by competitive bidding and that one Whissler made a bid which was, as shown by the record, above the amount the auditor certified was in the fund to the credit of the building fund for that purpose. The record shows that they rejected the bid on the ground that it was illegal to accept the same, and then, in total disregard of the law, as we find in the

record, they entered into separate contracts, without any competitive bidding, without having the contracts endorsed by the prosecuting attorney, or without, it seems to us, complying with any of the provisions which are provided for the safeguarding of the public funds. So that, so far as the sureties are concerned, this petition is fatally defective; and, so far as the record goes, we think it shows affirmatively that, at the time of the default of the principals, Williams and Beaver, the county commissioners wholly failed to observe the law in respect to buildings of this kind.

In respect to the principals, Williams and Beaver, if no valid contract was entered into between them and the commissioners, they could not be held to complete the contract, and there would be no default on their part if, before its completion, they had abandoned, failed or refused to complete the same. If the parties to this contract were bound to complete said contract, it would present the anomalous position that they could be compelled to give their time, labor and effort to supply the county with a remodeled court house, and the commissioners at the end refuse to pay, or a tax-payer enjoin the payments, and these parties be without remedy.

But it is urged on our attention and claimed earnestly in argument that these provisions are for the benefit of the sovereign power, and that the parties to the contract can not take advantage of the failure to comply with the law. For the failure to have a contract endorsed by the prosecuting attorney, the statute says that the contract shall be null and void, and for failure to comply with the other provisions, certifying the money, etc., the statutes provide it shall be null and void, and you can not add to, or take from, the clear and expressive language of the statute.

If anything were needed to interpret the meaning of these words, we call attention to a case in *Buchanan Bridge Co.* v. *Campbell,* 60 Ohio St., 407, 425, where the court, speaking through Judge Burket, uses the following language:

"No notice of the proposed letting was published; no record of the contract was entered in the minutes of the commissioners by the auditor; no plans or specifications were ever made, ap-

proved or deposited with the auditor; no contract was ever submitted by the commissioners to the prosecuting attorney for his approval, and none was ever approved by him.

"These omissions are fatal to the validity of the contract, and, by force of the above cited sections of the statute, the contract is totally void and imposes no obligation on either party to it.

"The statutes are notice to the world as to the extent of the powers of the commissioners, and the bridge company is bound by that notice. It knew, or was bound to know, that the commissioners had no power to thus enter into a contract, and that a contract thus attempted to be entered into would be null and void, and would not bind either party."

As we view it there was no valid contract between the commissioners and Williams and Beaver and none is alleged in this petition and, therefore, there could be no recovery.

Upon the issues made by the answer in this action, we think that the judgment of the court upon the third and fifth defenses was sustained by the proof in this case, and the judgment of the court of common pleas was right and is affirmed. Exceptions will be noted and the cause will be remanded to the court of common pleas for execution.

LIABILITY FOR BROKER'S COMMISSION.

Circuit Court of Hamilton County.

HASKINS v. LEWIS.

Decided, July 18, 1908.

Factors and Brokers—Liability of Owner for Commissions—Order for Goods Refused When Offered by Broker, but Afterwards Accepted From the Customer.

Where a broker brings a contract to his principal, which the principal declined to accept for the reason that there would be no profit on the sale after payment of a commission, but afterward the principal accepted the same contract direct from the customer, he is liable to the broker for his commission.

Roettinger & Gorman, for plaintiff in error.

Alfred B. Benedict, contra.

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

This was an action for a brokerage commission by Lewis against Haskins on a certain glassware contract. There is little dispute as to the facts. The evidence is largely made up of correspondence between the parties. In brief, it shows that during the year 1904 Lewis was a glass broker, doing business in Cincinnati, and Haskins was a glass manufacturer, doing business at Martins Ferry, Ohio. In the early part of this year the parties commenced transacting business with each other, Lewis as broker and Haskins as manufacturer, and this relation continued during this year to the entire satisfaction of both parties, although it was claimed by Haskins that he had not made any money on certain of the contracts, but it was not charged that this was by reason of any fault of Lewis as broker.

It appears that Haskins during this year had accepted through Lewis a contract to furnish certain goods to the Standard Oil Company. Haskins was not able to supply all the goods desired by the Standard Oil Company owing to the fact that his factory had not been fully equipped, but it appears from the correspondence that Haskins was desirous that Lewis should get for him the entire contract of the Standard Oil Company for the year 1905. This contract was very large, consisting of 10,000 barrels. This contract was to be let in the early part of January, 1905. On January 3, 1905, Lewis went to Wheeling, West Virginia, with this contract and met Haskins and urged him to accept it. There is a conflict in the evidence as to what was said between the parties about this contract at this meeting, but we don't regard a decision as to this conflict as determining the rights of the parties in this action. Haskins said at this conference that he told Lewis that he had lost money on the Standard Oil contract for the year 1904, and that he would never sign the contract for the 10,000 barrels at the price named, to-wit, $2.10 per barrel and pay Lewis a commission of five per cent., which was the amount of the commission that the parties had agreed Lewis should receive in this business and which amount had been paid him the year previous. Lewis denied that Haskins made such a statement. But disregarding this conflict

it is clear that at this meeting Haskins objected to entering into this contract at the price offered, and that Lewis urged its acceptance.

Afterwards, on or before January 23d, Haskins entered into the contract with the Standard Oil Company for the 10,000 barrels at the price named, to-wit, $2.10 per barrel, for the year 1905. Lewis demanded his commission of five per cent. on this contract, which being refused he brought this action and recovered in the court of common pleas.

The answer of Haskins was a general denial and a further defense that he had notified Lewis that he would not accept this particular contract through him, presumably for the reason which he says in his evidence, that he told Lewis on January 3d that he could not accept the contract and pay him five per cent. commission and come out whole. There is no evidence which tends to show that at the conference on January 3, 1905, the relation of broker and manufacturer had been broken off or terminated. Lewis still continued to urge Haskins to accept this contract and after Haskins had made the contract with the Standard Oil Company he, Haskins, still wanted to do other business with Lewis. The reason given by Haskins for making the contract with the Standard Oil Company was that the low prices did "not carry a profit justifying a commission" to Lewis. There being no controversy as to the facts, it becomes a question of law for the court.

Lewis during a course of business which existed between him and Haskins, as a broker, brings to Haskins a contract which Haskins accepts. Is Haskins liable to Lewis for the commission? On all other contracts which Lewis had brought to Haskins he had paid Lewis commissions in accordance with their agreement. Why should he not pay this commission? Haskins' reason why he is not liable is, that he told Lewis on January 3d that he would never enter into the contract and pay him a commission, and further that he wrote Lewis on January 23d, after the contract was made, that he made the contract with the Standard Oil Company direct, for the reason that the profits would not justify a commission. There is no claim that

Lewis agreed to release Haskins from the payment of the commission.

The decisions on brokerage commissions are mostly on real estate sales, but the principle seems equally applicable to all brokerage commissions. The principle applicable to such contracts is thus stated in 140 Mass., 339:

"If the owner of land employs a broker to sell it for a stipulated compensation, the broker is entitled to receive that sum, if in pursuance of his employment he substantially effects a sale by introducing to the owner a person to whom the owner sells the land."

In this case, the facts are undisputed that Lewis furnished to Haskins a customer, to-wit, the Standard Oil Company, with whom Haskins contracted on the terms of the proposition as submitted by Lewis; and on all such contracts it was agreed between Lewis and Haskins that Lewis should recieve five per cent. as a commission. It seems to us clear that Lewis should recover. The fact that Haskins said he told Lewis that he would not enter into the contract and pay him a commission, even if true, would not relieve him from his obligation to pay Lewis his commission, unless Lewis had agreed to it, and there is no claim made that Lewis ever assented to this.

The case in 8 C. C., 513, relied on by plaintiff in error, does not seem to us to be controlling in this case. The facts in that case differ materially from those in this case. When the contract was made in that case the Eureka Company was no longer the agent of the other company, while in this case the contract was entered into while the relation of broker still existed.

The facts being admitted, the case became one for the court, and if the judgment is correct, and we think it is, errors in the charge of the court to the jury, if any, are immaterial.

Judgment affirmed.

APPROPRIATIONS FALLING UNDER THE BURNS LAW.

Circuit Court of Noble County.

SARAH M. HURST v. INCORPORATED VILLAGE OF BELLE VALLEY.

Decided, November Term, 1907.

Municipal Corporations—Ordinance Appropriating Money for a Dike—Within Provisions of the Burns Law—Appropriation—Injunction—Section 1536-205.

An ordinance of a municipal corporation appropriating private property for the building of a dike is an ordinance for the expenditure of money and is void if no certificate has been previously filed and recorded by the proper officer as required by Section 1536-205 of the Revised Statutes, known as the Burns law; and an injunction will be granted restraining the municipality from proceeding in the probate court to assess compensation to the land owner for the land appropriated.

Okey & Frazier, for plaintiff in error.
Dye & Smith, contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to Noble Common Pleas Court.

The council of the Incorporated Village of Belle Valley in this county duly passed a resolution and an ordinance to build a dike within said corporation and also to appropriate the private property of the plaintiff, Sarah Hurst, for that purpose; the costs of the same to be paid out of the general fund. After the passage of such resolution and ordinance a proceeding was commenced by the solicitor on behalf of the village in the probate court of the county to assess the compensation to be paid to plaintiff as damages for such appropriation.

Immediately upon the commencement of such proceeding plaintiff instituted a suit in the common pleas court to enjoin the village from prosecuting such action. A temporary injunction was granted by the common pleas court which, upon final hearing, was dissolved and the case is now before us on error.

At the time of the passage of the resolution and ordinance no certificate such as is provided, in Section 1536-205, had been

filed with council that the money necessary to pay the amount of the compensation to the plaintiff in error or the costs of the proceeding was in the treasury, and that was the ground upon which the injunction was sought in the court below and the only reason assigned before us why the injunction should have been allowed.

The question is therefore directly made: Whether or not in such case such certificate must be filed and recorded before the passage of the resolution and ordinance and, if not, is such resolution and ordinance void? No serious contention is made but that if the case is one that is controlled by Section 1506-35 that the proceedings in council were void and hence the injunction should have been allowed.

There has been no direct decision by our Supreme Court upon this question and the decisions by our circuit courts are directly opposed to each other.

In the case of *Tyler* v. *City of Columbus*, 6 C. C. R., 224, it was decided in the second circuit that when a city council deems it necessary to condemn private property for street purposes, that the statute does not apply and no certificate is necessary, while in the case of *Rhodes et al* v. *City of Toledo et al*, in the same volume, page 9, the court in the sixth circuit held directly the reverse.

These are the only two cases we find reported that have been decided by the circuit court of the state where the question of the appropriation of private property is directly involved.

From the opinion in the case of *Tyler* v. *City of Columbus* it appears that the reason for the decision in that case was that in appropriation cases damages are indeterminate, that therefore the amount in the treasury necessary for the improvement could not be ascertained, and that therefore the Legislature did not intend that a certificate should be filed in such cases. It might be said in answer to that, as it was said in *Rhoades et al* v. *Toledo et al*, all that was required is for the auditor to exercise his best judgment.

Without entering into a discussion of the controversy, we have only to say that that difficulty has been considered in several adjudicated cases since the determination of the case of

Tyler v. *City of Columbus*, in which cases that objection is held to be more fanciful than real.

In the case of *L. H. Bond* v. *Village of Madisonville*, 2 C. C. R., 449, first circuit, it was held that a contract made between a village and an attorney at law for professional services, he to receive for his services the reasonable value thereof, was held to be within the statute and absolutely void, and that no recovery could be had for the value of the services rendered by the attorney. The opinion of Chief Justice Smith makes a strong case and is difficult to answer.

The case of *Braman* v. *Elyria*, 5 C. C.—N. S., 387, affirmed without report, 73 O. S., 346, is not applicable to this case, as in that case a certificate was filed and recorded and the only question was as to whether or not it was done in time.

We have said that there is no direct decision of our Supreme Court upon this question, but at the same time there have been decisions that indirectly tend to show that an ordinance for the appropriation of land for a public improvement is controlled by the statute.

In the case of *Ryan et al* v. *Hoffman et al*, 26 O. S., 109, the section of the statute was under consideration. The principal question involved was whether or not it applied to cases where the ordinance was passed prior to the date of the act or to ordinances passed subsequent to the date of the act appropriating money to pay expenditures made under such prior ordinances, and it was held it did not, but in the opinion it is said:

"The ordinance condemning the land in question is an ordinance for the expenditure of money but it was passed and took effect in September, 1872, long before the law in question was passed and therefore is not affected by it; and the passage of the ordinance of March, 1875, appropriating money for the payment of the land condemned under the former ordinance was not in contravention of the third section of the law."

In the case of *City of Cincinnati* v. *Holmes, Adm'r, et al*, 56 O. S., 104. Judge Minshall says in the opinion on page 113:

"It may be said that the indebtedness is not created until a contract for the improvement is made. It is true that it does not exist in favor of any particular creditor, nevertheless, on

making the order the successive steps—the advertisement for bids, action on them, the letting of the work and making of the required contract—all follow as a necessary sequence under the statute. If the council should refuse to take any of these steps without cause, it could be compelled by mandamus to do so. Hence, if the Burns law can have any application to this statute, according to its spirit it must apply to the order of council that the improvements be made. It is this order that fixes and entails the indebtedness upon the corporation. It is in fact an order for the expenditure of money."

We are therefore of opinion that an ordinance for the appropriation of private property such as is involved in this case is an ordinance for the expenditure of money and that such ordinance is void for the reason that no certificate was filed and recorded as required by the act.

The judgment of the court of common pleas must therefore be reversed, and the court proceeding to render such judgment as that court should have rendered, a perpetual injunction is granted as prayed for in the petition.

ALIMONY FOR MAINTENANCE AND AS A SHARE OF THE PROPERTY.

Circuit Court of Hamilton County.

ANNA LOUISE MADDEN v. JOHN E. MADDEN.

Decided, July 18, 1908.

Husband and Wife—Marriage a Business Partnership—Dissolution of—Alimony—Revision of Decree on Account of Changed Circumstances—Termination of Allowance as of the Date of Re-marriage—Interpretation of the Words "Issues Joined" as Used in Decree—Determination as to Character of Alimony Which was Allowed—Section 5702.

1. While the dissolution of a marriage works the dissolution of a business partnership, a court will not on a petition for alimony alone anticipate a decree for divorce and the consequent division of the property, unless the facts require it, and the judgment expressly shows that the allowance is made as a division of the property, and not for support of the wife.

2. Where the petition was for alimony alone, under Section 5702, and the allowance which was granted contained a provision for payment in monthly installments, with a reservation in the decree of the right of either party, in the event of changed circumstances, to apply to the court for a modification or termination thereof, an application by the husband for a termination of the allowance will be granted, where it appears that subsequent to the making of the allowance she obtained a divorce and married another man who is abundantly able to support her in her former state.
3. In such a case evidence offered at the hearing for alimony, which tended to prove assistance by the wife in acquiring the property, will be regarded as presented for the purpose only of increasing the allowance, and it will be presumed that whatever increase the evidence warranted was merged in the judgment.

Charles W. Baker, for plaintiff.

William Lindsay, Workum & Bowdle and *Charles B. Wilby*, contra.

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

The petitioner seeks to revise the decree for alimony entered February 7, 1906, and the chief question presented is whether the allowance was intended for the maintenance or support of the wife, or a division of the husband's property. If the latter it is final, but if the former it may be revised or terminated according to the changed circumstances of the parties. The amended petition upon which the decree was granted was for alimony alone under Section 5702, Revised Statutes, but contained an averment that she materially assisted her husband in accumulating his property, which averment was denied in the answer.

The court found "on the issues joined in favor of the plaintiff and that the plaintiff is entitled to reasonable alimony out of the defendant's real and personal property as prayed for." It is claimed that this finding includes the issue that the plaintiff assisted her husband in acquiring his property, and that the alimony was allowed, not for the support of the wife, but as a permanent division of the husband's property. The only issues joined which entitled the plaintiff to reasonable alimony were such only as were based upon the statutory grounds for alimony. The efforts of the wife in acquiring the property were relevant only to the amount or reasonableness of the alimony

and would have been considered by the court as well without as with the averment to that effect.

Suppose the court had found no statutory ground for granting alimony, would it nevertheless have proceeded to render a judgment in favor of the wife for her share of the property? We think not, as the very nature of the case requires such finding to support any judgment whatever.

In the case of *Weidman* v. *Weidman,* 57 O. S., 101, at 104, it is said:

"The property of the husband is usually the result of the joint efforts of both husband and wife, and upon dissolution of the marriage she is entitled to her equitable share of the property as alimony."

The dissolution of the marriage works a dissolution of a business partnership such as is averred in the amended petition; but a court will not, upon a petition for alimony alone, anticipate a decree for divorce and the consequent division of the property, unless the facts require it, and if they do then the judgment should expressly show that the allowance is made not for support of the wife, but as a division of the property.

Convincing evidence of the character of the alimony is found in the fact that no petition for divorce had been filed; in the provision for payment in monthly installments, and in the reservation by the decree itself of the right of the plaintiff or defendant, in the event of a change of circumstances, to apply to the court for a modification or termination thereof—all tending to show the allowance was intended as maintenance.

Whatever effect may have been given to the evidence tending to prove assistance of the wife in acquiring the property, was merged in the judgment for alimony and only increased the amount.

The changed circumstances relied on to terminate the allowance are the divorce subsequently granted to plaintiff and her marriage to another man, who is abundantly able to support her as in her former state. It is also admitted that plaintiff claims nothing by way of support.

Our conclusion therefore is that the alimony be terminated as of the date of remarriage.

LIABILITY FOR GOODS LOST AT DESTINATION.

Circuit Court of Hamilton County.

SIG. & SOL. FREIBERG v. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY ET AL.

Decided, June 20, 1908.

Carriers—Failure of Consignee to Take Goods—And of Railway to Notify Consignor of Such Failure—Railway May Place Goods in Warehouse—And Change Its Relation from Carrier to Bailee—But Consignor is Entitled to a Tracer and Re-possession—Failure to Respond to Demand for Tracer—Goods Destroyed by Fire—Carrier Liable.

It is the right of a shipper to demand that goods which have failed to reach the consignee be traced and reported back to him by the carrier; and where a carrier upon receiving demand from a shipper that goods be traced apparently acquiesces therein, but as a matter of fact takes no action for a long period during which the goods might have been traced, and they are finally destroyed in a burning warehouse, the carrier is liable to the shipper as a matter of law for the loss thus sustained.

Cobb, Howard & Bailey and *Charles E. Tenney,* for plaintiff.
Harmon, Colston, Goldsmith & Hoadly, contra.

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

This was an action in the Superior Court of Cincinnati, brought by the plaintiffs in error against the defendant companies for the value of five barrels of whiskey which had been shipped by the plaintiffs over the railways of the defendants to one Hanley at the city of Buffalo, N. Y. A jury was waived, and the cause was submitted to the court and judgment was rendered for the defendants. It is here on error to this judgment. The question is one of law as the facts are not disputed. The facts are in the main as follows:

On July 24, 1902, the plaintiffs delivered to the C., C., C. & St. L. Railway Co., commonly called the "Big Four Railway Company," five barrels of whiskey consigned to James K. Han-

ley, Buffalo, N. Y., and received from the railway company the usual bill of lading. The "Big Four" company transported the whiskey to the city of Cleveland, and there delivered the whiskey to the "Nickle Plate" Railway Company, a connecting line, defendant herein, which said company transported said whiskey to the city of Buffalo, where it arrived about the 1st of August, 1902. Hanley was promptly notified of the arrival of the whiskey by the "Nickle Plate," but paid no attention to the notice and did not receive the whiskey, whereupon within a few days the railway company placed the same in a warehouse, where it remained until destroyed by fire on June 7, 1903. The plaintiffs were not notified by the railway company that Hanley refused to receive the whiskey. The plaintiffs claim to have sold the whiskey to Hanley on four months time. At the end of that time they drew on Hanley for the value of the whiskey. The bank through which the draft was drawn notified Hanley, and in reply he said: "never ordered nothing from them people and received nothing." This reply was sent to the plaintiffs on the 26th day of December, 1902. On the same day the plaintiffs wrote the Big Four Railway Company a letter as follows:

"CINCINNATI, Dec. 26, 1902.

"FREIGHT AGENT, C., C., C. & St. L. Ry. Co.

"*Dear Sir*: Enclosed please find copy of bill of lading for our shipment of July 24, consigned to James K. Hanley, Buffalo, N. Y. We are today informed by consignee that he had never received these goods, and we will thank you therefore to kindly send tracer after this shipment at once and report delivery to us here. Trusting you will give this your immediate attention, we remain,

"Very truly yours,

"SIG. & SOL. FREIBERG."

To this letter no reply was made by the railway company and apparently no attention was paid to it. Afterward the plaintiffs wrote to Big Four as follows:

"CINCINNATI, Jan. 21, 1903.

"Mr. F. P. BOISSEAU, Agent, C., C., C. & St. L. Ry. Co.

"*Dear Sir:* On December 26th, we sent you copy of bill of

lading for our shipment of July 24th, consigned to James K. Hanley, Buffalo, N. Y., requesting you to have this shipment traced and report delivery to us here. We have written you several times since that date in reference to this matter, but have no reply from you. Kindly trace this shipment immediately and report delivery to us here. Awaiting your reply, we remain,

"Very truly yours,

"SIG. & SOL. FREIBERG."

To this letter the following reply was sent:

"CINCINNATI, Jan. 23, 1903.

"MESSRS. SIG. & SOL. FREIBERG.

"*Gentlemen*: Replying to your favor dated January 21st, wherein you refer to your letter of December 26th, enclosing us copy of your bill of lading covering shipment of July 24th, consigned to James K. Hanley, Buffalo, N. Y., requesting that we have this shipment traced and report delivery to you.

"Your letter with a copy of bill of lading was endorsed to Mr. George Metzger, our division freight agent, as this office does not do any tracing whatever for shipments delayed in transportation. If hereafter when you desire a shipment traced you will address Mr. Metzger or Mr. N. R. Johnson, our general freight agent, at Fourth and Vine, it will receive prompt attention. I have referred your letter of the 21st to Mr. Metzger.

"Yours truly,

"F. P. BOISSEAU, F. C. A."

No further attention was paid by the railway company to this matter and the plaintiffs wrote the railway company as follows:

"CINCINNATI, Feb. 19, 1903.

"Mr. F. P. BOISSEAU, C., C., C. & St. L. Ry. Co., City.

"*Dear Sir:* Enclosed please find original bill of lading for our shipment July 24th, consigned to James K. Hanley, Buffalo, N. Y. Mr. Hanley informed us that he has never received this shipment, and we therefore instructed you several times to trace this shipment and report delivery to us here. As you failed to comply with our request, we beg to make claim to this shipment and enclose herein copy of original invoice and our bill for the shipment. Kindly send us claim number at your earliest convenience.

"Trusting this claim will be speedily adjusted, we remain,

"Very truly yours,

"SIG. & SOL. FREIBERG."

On February 24, 1903, the C., C., C. & St. L. Railway, through Mr. F. P. Boisseau, acknowledged the receipt of this letter and gave the number of the claim and asked them to refer to the number given in subsequent communications. Afterwards the railway company sent the following letter to plaintiffs:

"CINCINNATI, Aug. 5, 1903.

"MESSRS. SIG. & SOL. FREIBERG.

"*Gentlemen:* We respectfully return you herewith your claim presented against us for $335.76, account of loss on whiskey to James K. Hanley, Buffalo, N. Y. We have carefully investigated the handling of this shipment and find the same was delivered to the N. Y., C. & St. L. at Cleveland under date of July 29. Mr. James Webster, of the N. Y., C. & St. L. has returned claim papers advising that repeated notices were mailed to consignee of the arrival of the shipment, but no responses were received by them. The shipment was finally placed in storage with the Buffalo Storage & Crating Company, where it was destroyed by fire on June 7th, and it is found that the storage company carried no insurance whatever on any of the property stored by them. Under the circumstances the N. Y., C. & St. L. R. R. refuse to entertain your claim, and as we are in no way responsible would thank you to cancel your bill against this company and allow us to close our records.

"Yours truly,

"F. P. BOISSEAU, F. C. A."

The defendants filed answers setting up five defenses. The N. Y., C. & St. L. Railway Co. said it was not asked to trace the goods by plaintiff, and that it had notified the consignee of the arrival of the goods and after four days it had placed the goods in the warehouse, and that it had done all that in law it was required to do.

The plaintiffs were not notified that the goods were delivered to the N. Y., C. & St. L. Ry. Co. by the "Big Four" until so informed by the letter of August 5, 1903.

We do not deem it expedient to consider here the question whether it is incumbent on a railway company to notify the con-

signor when the consignee refuses to take the goods, for the reason that it does not determine any question in this case. Nor do we think there is here any question as to the duty resting on a railway company after the consignee refuses to take the goods. We consider it settled law that the railway company had the right to place the goods in a warehouse, and change its relation of carrier to that of bailee, and its responsibility as to the goods after that are such as the law places on a bailee. The rights of plaintiffs, if they have any, do not rest on the question whether the railway company wrongfully placed the goods in a warehouse.

We regard it as settled law that upon the failure of the consignee to receive goods shipped to him the title to the goods is in the consignor, and that he has the right to repossess him of the goods and that it is the duty of the railway company to reship the goods to the consignor upon his demand, subject to reasonable regulations by the railway company as to the payment of charges, etc. According to the evidence in this case the goods were always the property of plaintiffs. Hanley says he never bought the whiskey. Upon receipt of knowledge by the plaintiffs that the goods had not been delivered to Hanley, the defendant was notified to trace the goods and return them to plaintiff, but it was more than seven months before the defendants informed plaintiffs as to what had become of these goods. The goods had in fact been destroyed by fire more than five months after the company had been asked to trace and return the goods.

Ordinarily questions as to what railway companies should do under circumstances of this kind are questions of fact to be left to the jury, but where they admit of but one conclusion they become questions of law for the court.

When plaintiffs informed the defendant that they wanted the goods traced and reported to them, the demand was a right they had. It was a duty resting on the railway company to comply with this demand. It made no claim at the time that it was not a duty resting upon it. It received the request and apparently acquiesced in it, and apparently did nothing, although repeatedly urged by plaintiffs. It is not claimed by defendants

that it was not within their power to trace the goods or to return them before they were destroyed.

We think the defendants had ample time in which to trace the goods and return them. The goods were destroyed long after they should have been returned to plaintiffs, and we think they should be held liable for their loss.

Judgment reversed and judgment for plaintiffs.

NECESSARY PARTIES TO FORECLOSURE IN OHIO.

Circuit Court of Lucas County.

UNITED STATES MORTGAGE & TRUST COMPANY v. ANDERSON ET AL.*

Decided, March 10, 1908.

Parties—Mandatory and Permissive Joinder of—Foreclosure—Outstanding Claimant a Necessary Party to, in Ohio—Pleading—Prior Encumbrancers—Contrary Policies of the Law—Protecting Purchasers at Judicial Sale—Constitutional Law—Right to Trial by Jury.

1. A petition in an action by a mortgagee, asserting that a defendant claims to be owner in fee simple of the mortgaged premises and praying that defendants be required to answer and set forth their respective claims to the mortgaged property or be forever barred sufficiently complies with the provisions of Revised Statutes, 5006, as to joinder of such claimant of title.
2. In Ohio an outstanding claimant of title to mortgaged real estate is a proper party defendant in a proceeding to foreclose the mortgage.

B. A. Hayes, for plaintiff.

C. H. Trimble, R. P. Cary and *C. A. Thatcher,* contra.

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

Opinion on demurrer.

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* For other opinions in the same litigation, see *Anderson* v. *Messinger,* 4 O. L. R., 361; *Anderson* v. *United Realty Co. et al,* 9 C. C.—N. S., 473, and *United States Mortgage & Trust Co.* v. *Anderson et al,* 11 C. C.—N. S., 177.

The demurrer as presented to us is to the petition of the United States Mortgage & Trust Company, the plaintiff, filed by the defendant, Peter Anderson, in the court below and re-urged here.

The allegation of the petition as to the reasons for making him a party defendant is as follows: "Plaintiff further says that the defendant, Peter Anderson, claims to be the owner in fee simple of said premises." And just before the prayer it is said, "the plaintiff therefore asks that they" (certain defendants) "be required to answer and set forth their respective claims or be forever barred." It may be a question whether this prayer refers to the defendants immediately before named, or whether it includes with the other defendants Peter Anderson. All are named in one paragraph, and as the statement in regard to the other defendants is similar to that with regard to Anderson, my own judgment is that this clause is intended to refer to all defendants who are so brought in.

In Bates' work on Pleading and Practice and in the Kansas cases which he cites, it is indicated that an averment of this kind is hardly sufficient in some jurisdictions, or at least in those to which reference is made by Bates, without some further averment disputing the validity of the claims asserted by the parties so brought in. But in the case of *Winemiller* v. *Laughlin et al,* 51 O. S., 421, our Supreme Court makes a little more liberal interpretation of Section 5006 of the Revised Statutes. It will be remembered that that section provides that any person may be made a party who has or claims an interest in the controversy, and no special requirement is made in the statute as to the averments that are to be made as to the asserted rights of such claimants. In the case cited, *Winemiller* v. *Laughlin et al,* it was held in the syllabus, second paragraph, that:

"The plaintiff in an action to foreclose a mortgage is not required to set forth either the nature of or the facts constituting the claim of another lienholder, in order to bar the latter by a decree against his claim if he should fail to answer. If for that purpose anything more is required than to make him a party and serve him with legal process, it will be sufficient for the petition to state that such defendant claims some interest in the mortgaged

premises, and advises him that his claim or lien will be barred if he fails to appear and disclose it."

It will be noticed that there is an implication here that possibly it will not be necessary to say anything about his claim; that it may be necessary only to make him a party by summons, thereby giving him an opportunity to assert his claim by pleading it; in other words, that it may suffice to serve notice upon him that there is a suit in which the property in which he claims to have an interest is to be made the subject of a controversy and possible sale. But whether that is or is not permissible, the Supreme Court has definitely determined by this decision that it is not necessary to do more than say in the petition that he has or claims an interest in the controversy, advising him that it will be barred if he fails to appear and disclose it, and then serve him with summons, giving him an opportunity to assert his rights and have them litigated.

We are unanimous in the opinion, derived from an examination of the numerous authorities cited, that the strong current of adjudications outside of our own state is in support of the contention that prior encumbrancers or claimants, other than such as derive their titles or interests from the mortgagor of the mortgage which is sought to be foreclosed, are neither necessary nor proper parties in a suit of this kind, and the important query with us, and the one to which we have devoted the most of our attention, is as to whether that rule prevails in Ohio, whether it is the practice which has been adopted here, and whether it is the rule best supported by the adjudications and the statutes of our own state.

In Whittaker's Annotated Code, in his annotation of Section 5006, and on page 106 (bottom paging), are references to some of the same authorities which have been cited in argument, and also to Mr. Bliss' work on Code Pleading, to which in our somewhat hurried examination of the question we have not had access. He cites Bliss on Code Pleading, Sections 100 and 101, in support of the proposition that in Ohio such prior encumbrancers or outstanding claimants are proper parties, whether or not they are necessary ones.

In Bates' Pleading and Practice, Volume 1, page 583, is a discussion of the question very pertinent to the consideration of this demurrer. I read from the edition of 1881 which considered the authorities, or at least a number of them, bearing date prior to that time. There is no essential addition to the discussion of the question in the very recent edition of the same work. On the page to which I have referred, Mr. Bates calls attention to the distinction between necessary and merely proper parties, and says that that distinction is very clearly shown in foreclosure cases. We have often had occasion to examine the distinction between mandatory and permissive joinder of parties. There are cases where persons must be brought in because they are essential to a determination of the controversy, and others where they may be brought in, in order to permit adjudication of all controversies respecting claims relating to the same property in the same action.

At the outset it may be said that the law might proceed upon either of two contradictory policies. It might attempt to protect paramount lienholders against any disturbance of their claims by contests between subsequent mortgagees and persons owning the equities of redemption. It might by like reasoning and upon the same principle decline to embarrass or disturb outstanding claimants by bringing them into the litigation of controversies with which they have no concern. On the other hand, it may be the policy of the law to protect purchasers of property at judicial sales and to make more convenient the ascertainment of the value of properties sought to be sold. One state may adopt one policy, and another, another, and in determining which policies have been chosen in the different jurisdictions something may depend upon the nature of the foreclosure proceedings in the various states. In Ohio it necessarily involves a judicial sale, for the proceeds of the property are subjected to the payment of the mortgage claim. Not so in some of the states. In several of them the mortgagee takes the property without any judicial sale at all.

Now manifestly, in a state where no appraisal and sale is required, a very different rule might apply. Mr. Bates, in

further consideration of this question, bases a large part of his reasoning upon the provisions of our statutes as to appraisal of the property and its sale to a purchaser. Omitting his language on this page until we arrive at paragraph 18, we find under caption, "Prior Encumbrancers, Whether Proper":

"The very great authority of Mr. Pomeroy," he says, "Sections 334 and 342, note 4, is that the incumbrancers whose liens are prior to that of the plaintiff, are in no way affected by the decree of foreclosure or the sale thereunder. Their rights are paramount, and they are neither necessary nor proper parties, and says it is generally so considered except in Iowa, citing a number of authorities, to which may be added *Broward* v. *Hoag*, 15 Fla., 370; *Coy* v. *Downie*, 14 Fla., 544, 563, and also the Kansas and Wisconsin cases cited below, as to the necessity of claiming the lien to be subsequent in order that a default may cut it off, the advice of which I have followed in drawing the forms of petition.

"Nevertheless, his authority of *Wright* v. *Bundy*, 11 Ind., 398, seems to be rather the other way, and the later authority in New York of *Brown* v. *Volkening*, 64 N. Y., 76, holding prior mortgagees to be proper parties, would overrule contrary decisions in that state. The latest New York authority is that so far as mere legal rights are concerned, only the mortgagor and subsequent lienholders are proper parties, and they only are affected by the judgment, but that prior incumbrancers may be made parties for the purpose of having their interests ascertained and paid out of the proceeds, which purpose must be indicated in the petition. *Emigrant Industrial Sav. Bk.* v. *Goldman*, 75 N. Y., 127, 132."

"It is also held," he says, "that a prior incumbrancer is a proper party in *Standish* v. *Dow*, 21 Iowa, 363; *Heimstreet* v. *Winne*, 10 Iowa, 430; *Holland* v. *Jones*, 9 Ind., 495; *Warren* v. *Burton*, 9 So. Car., 197; *Adger* v. *Pringle*, 11 So. Car., 527-545; *Besser* v. *Hawthorn*, 3 Ore., 129.

"In *White* v. *Holman*, 32 Ark., 753, he is said to be not a necessary party, perhaps implying that he is a proper one."

I have read these citations simply because I find them in Mr. Bates' discussion of the matter, and without withdrawing the statement which I made a little while ago, that our court has concluded that the decided weight of authority outside of Ohio supports the contention of counsel contending for this demurrer

and the doctrine of Mr. Pomeroy. Mr. Bates then addresses himself to the consideration of the question of the conflicting interests, or the conflicting policies, as I have called them, and says:

"Though the logic of the position of prior incumbrancer, as a holder of a paramount right, who can not be dethroned or disturbed by those subject to him, may be in favor of Mr. Pomeroy's opinion, yet there is in Ohio a practical objection to the doctrine, which is insuperable.

"In Ohio a sale is always ordered in foreclosure cases (R. S., 5316). There must be an appraisement of the real value of the property in money (R. S., Section 5389)—for this section applies to mortgages, R. S., Sec. 5373—and there can be no deduction in the appraisement for incumbrances, but the appraisement must be of the entire estate (*Baird* v. *Kirtland,* 8 Ohio, 21; *Commercial Bank* v. *Western Reserve Bk.,* 11 Ohio, 444, 450; *Fosdick's Lessee* v. *Risk,* 15 Ohio, 84, 106). And the sale can not be for less than two-thirds the appraisement. Section 5391.

"The consequence is obvious," continues Mr. Bates, "if prior incumbrances are not cut off, no bidders will give a minimum of two-thirds the value of the entire estate, with several mortgages to pay off in addition, and the junior incumbrancer is helpless, unless he is able to pay up the earlier liens.

"Nor would it be possible for the appraisers to examine the title and allow for prior incumbrances, for their value could be determined often only after examining witnesses as to the amount of interest or principal already paid, and deciding questions of law as to the validity of possible defenses, and if such prior incumbrance happens to be an indemnity mortgage, its amount would be contingent on considerations inextricable except by a court."

With much force, this last argument of Mr. Bates might be applied to the case of an outstanding but disputed claim of title; one which for the determination of its validity might require the examination of many witnesses and the taking of much evidence, a matter, of course, of almost insuperable difficulty to appraisers attempting to determine the value of the equity of redemption merely or the value of the interest of a party in possession, where his right to the possession is controverted by some person not in court.

Directly pertinent to this inquiry is the case of *Jonathan Thatcher et al* v. *Joshua M. Dickinson et al,* decided by the Putnam Circuit Court of this state at the April Term, 1888, 2 Cir. Dec., page 82. The third, fourth and fifth paragraphs of the syllabus read as follows:

"3. In a suit to foreclose a mortgage and to marshal liens, an order to sell can not be made subject to a certain undetermined indebtedness set forth in the answer and cross-petition of a defendant lienholder.

"4. Under the statute the appraisers are sworn to appraise the property at its cash value. A court is not authorized in such a suit to order an appraisement of the property 'subject to a certain undetermined indebtedness,' and an appraisement in accordance with such an order is irregular.

"5. In such an action the court should see to it that all lienholders and parties interested should be made parties, and it is error in the court to dismiss, without prejudice, a defendant lienholder, and order a sale of the property subject to his undetermined lien."

The opinion in the case is by Judge Seney. I will not stop to read it, but will say that the discussion of the matter is very much along the same line as the reasoning embodied in Mr. Bates' work on Pleading and Practice.

The case of *Doan* v. *Biteley*, 49 O. S., 588, has been largely relied upon by counsel for the plaintiff to sustain their contention that Anderson is a proper party here, because of his assertion or claim of being the owner of these premises which are sought to be sold in the foreclosure proceeding; and we think that there is much force in the claimed application of this decision. It is true that it was not the case of the foreclosure of a mortgage against a living mortgagor. But can it be said that when an administrator attempts to sell a decedent's real estate for the purpose of paying debts, his right to sell has a larger scope than that which is possessed by the sheriff upon a judicial sale of mortgaged property. In the case of the mortgage, the mortgagor owns an equity of redemption; where a man dies, he leaves to those who succeed to his interests only that which he owned. It does not seem to us that the rights conveyed at an

administrator's sale can rise higher than those which were owned by the decedent at the time of his death, if the rights conveyed by the sheriff or master at a judicial sale in a mortgage foreclosure can rise no higher than those which were owned by the mortgagor at the time of foreclosure. In either case by the adjudication in Ohio in the case of *Doan* v. *Biteley* it would seem that it was the policy of the law to have an end of litigation; to avoid a multiplicity of suits; to bring in all persons who might be interested in the sale or in having clouds removed from titles and, having determined the controversies, to protect the interests of possible purchasers by giving to them unclouded titles, titles free and clear of the claims of all persons who may be brought within the jurisdiction of the court to assert them. I have not been able to see any distinction of substance between the case which was heard in *Doan* v. *Biteley* and that which we have in the case at bar. True, the administration law makes more specific provision as to the making of parties defendant in proceedings to sell land; but the ultimate intent of the foreclosure proceeding to sell the land instead of a mere equity of redemption is made equally apparent by the legislative requirements already referred to.

The case of *Stewart* v. *Johnson*, 30 O. S., 24, decided by the Supreme Court Commission, has some bearing, we think, upon the question before us. The second paragraph of the syllabus is:

"It is the right of a mortgagee, as against his mortgagor, to foreclose the mortgage; but under the statute, he can foreclose only by a sale of the mortgaged premises; a junior mortgagee may therefore maintain an action for the foreclosure of his mortgage against those having an interest in the premises, to subject the same to the payments of the liens thereon, without having first paid off the prior mortgage."

There had been in that case a foreclosure by the senior mortgagee and a purchase at judicial sale, and it was held that the rights of the junior mortgagee remained unaffected, he not having been made a party, and when he subsequently sought to foreclose his mortgage, it was held that it might be done.

In 53 Ohio State, 151, is the case of *Stewart, Administrator*, v. *Railway Company et al,* which went up from my own county of Huron in the year 1895. I will not stop to read very much of the case, but simply invite attention to the language of Judge Williams as found on page 167:

"It is the duty of a mortgagee to make all persons who appear of record to have a lien upon or interest in the mortgaged premises, parties to his action of foreclosure, and if he does not, their lien or interest remains unaffected thereby; and any such encumbrancer, whether prior or subsequent to the mortgage, who has not been made a party, may maintain an action to enforce his lien, and have a re-sale of the property for that purpose."

Citation is made of several earlier cases in Ohio, and also *Vanderkemp* v. *Shelton,* 11 Paige, 28.

Our conclusion of the whole matter is that a demurrer to the petition ought not to be sustained, but in announcing that result of this discussion, we do not wish to be understood as going any farther than the necessities of the question demand; in other words, we are not passing upon what would be the rule in the case of an effort to bring into court a prior encumbrancer whose indebtedness has not yet matured. We are not disposing of a case as against a mortgagee having a mortgage which he may desire to preserve in force upon property for a term of years perhaps, and wherein, if the land were forced to sale as against him, it might interfere with his just rights. We leave that question as an open one, to be determined when the question properly arises. The demurrer to the petition will be overruled.

CIVIL ACTION TERMINATED BY UNLAWFUL DISCHARGE OF JURY.

Circuit Court of Hamilton County.

FRANCISKA RAU, EXECUTRIX, v. L. RISIDEN.

Decided, May 16, 1908.

Trial—Discharge of Jury—Unauthorized, When—Cause Terminated Thereby—Discretion of Court—Res Judicata—Sections 5195 and 5196.

The power to discharge the jury in a civil cause during trial or after the cause is submitted and before verdict is not discretionary in a court, but must be based on a finding that some necessity exists for such action, or upon consent of both parties; and where the record discloses no necessity for such action beyond a bare request by the plaintiff, and no consideration by the court of the necessity for so doing, the discharge is unauthorized and deprives the court of further jurisdiction, and a motion to dismiss the action should be granted.

Cormany & Cormany and *John J. Gasser*, for plaintiff in error.
Stanley Matthews and *Burch, Peters & Matthews*, contra.

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

It is apparent from Sections 5195 and 5196, Revised Statutes, that the power to discharge a jury during the trial or after the cause is submitted and before verdict is not discretionary in the court, but must be based upon a finding of some necessity for such action, or upon the consent of both parties. In the case of *Dobbins* v. *State*, 14 O. S., 493, the third proposition of the syllabus is as follows:

"To justify holding the accused to a further trial, after such discharge, the record must show that an obstacle which the law will recognize as a necessity, did in fact exist, that it engaged the attention of the court, and that the order was based thereon, and was the result of consideration and decision; but it need not show all the facts and circumstances which influenced the decision, unless made part thereof by bill of exceptions."

Although that was a criminal case the same rule would seem to apply here in a civil action. In the case of *State* v. *Behimer*, 20 O. S., 572, in discussing the constitutional provision that no person shall "be twice put in jeopardy for the same offense" it is said at page 576:

"The constitutional provision extends the common law maxim, which was limited to felonies to all grades of offenses; and it is but the application to the administration of criminal justice, of a more general maxim of jurisprudence, that no one shall be twice vexed for one and the same cause. On this maxim rests the whole doctrine of *res judicata*. The object of incorporating it into the fundamental law, was to render it, as respects criminal causes, inviolable by any department of the government."

The record in this case discloses no reason for the action of the court, nor that anything engaged the attention of the court other than a bare request by the plaintiff that the jury be discharged and the case continued. If the unauthorized discharge of the jury in a criminal case legally ends the prosecution, there seems good reason to hold that such discharge in a civil action works, under the maxim above referred to, a like termination. We are of opinion, therefore, that the court had no jurisdiction to further try the case and the motion to dismiss the action should have been sustained.

Judgment reversed and cause remanded to be dismissed for want of jurisdiction.

POWER OF THE GENERAL ASSEMBLY TO INVESTIGATE LOCAL GOVERNMENTS.

Circuit Court of Hamilton County.

THE STATE OF OHIO, ON THE RELATION OF HIRAM M. RULISON, PROSECUTING ATTORNEY OF HAMILTON COUNTY, OHIO, v. BENJAMIN F. GAYMAN ET AL.

Decided, July 27, 1908.

Constitutional Law—Investigation of Corruption in Local Governments—Power of the General Assembly to Order—Justification for —Procuring Information for a Future General Assembly not Sufficient—Real Purpose of the Resolution, not Its Declared Purpose, Will be Sought—Revolutionary Procedure not Permissible.

1. The Senate joint resolution passed by the General Assembly February 14, 1908, providing for the appointment of a committee to investigate charges of corruption in the government of the city of Cincinnati and county of Hamilton, is an exercise of judicial power not expressly conferred by the Constitution, and a gross violation of Section 32 of Article II thereof, unless it can be justified on the ground of seeking information in aid of intended legislation.
2. But the intemperate language in the resolution and the license and revolutionary procedure proposed, together with the declaration that all laws are being violated by an organized band which no one dares to oppose, make it clear that hope is not based on additional legislation which obviously could not be rendered effective under such circumstances; but these considerations cause it to be evident that the resolution was not adopted in good faith for the purpose of providing remedial laws, and places it beyond the pale of the Constitution.
3. And were this not true, the fact that the General Assembly has adjourned *sine die* renders it impossible that information which might be obtained by such an investigation shall be used by the body seeking it for the purpose proposed, or that it will be so used by a body over which the recent General Assembly will have any control, and therefore deprive the investigation of the purpose announced, and leaves the matter in the same situation as though no purpose had been declared by the resolution.

Hiram M. Rulison and *Frank F. Dinsmore*, for plaintiff.
Theodore Horstman, contra.

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

The pleadings in this case raise the question of the validity of a joint resolution of the General Assembly and of the power of the committee appointed thereunder to investigate charges of corruption existing in the government of the city of Cincinnati and the county of Hamilton.

The preamble recites the appointment of a former committee for the same purpose, which disclosed many abuses subversive of government by the people, one of which was corrected by a subsequent act of the Legislature; charges in general terms of usurpation of power belonging to the people, bribery, corruption in office, wholesale election frauds and other forms of misgovernment. The resolution provides for the appointment of a committee of six, three from each house, with full power to investigate all said matters and charges and all matters and things in any way pertaining thereto; empowers the committee to compel the production before it of any books and records, letters or documentary evidence of any character, which, in the judgment of the committee or a majority thereof, pertains to any matter or thing under investigation and wherever found, and also to compel the attendance of any witnesses; and directs the committee to make report to the General Assembly if in session, and if not to the Governor for transmission to the succeeding General Assembly, of its proceedings with full transcript of testimony taken by it together with its findings in writing with such recommendations for further legislation and amendment to existing legislation as the disclosures of said committee may warrant.

The distrust of our institutions, laws and men expressed by the Legislature in this resolution is unbounded and deplorable, extending even to its own ability to provide a remedy, as it imposes the burden upon its successors. The very nature of the power granted as well as the persistence in asserting it after the decision of the case of *State* v. *Guilbert*, 75 O. S., 1, calls for a determination of the question whether the right to exercise it exists at any time independent of the adjournment of the Legislature.

The claim is made first that the power conferred is judicial

and not legislative, the exercise of which would contravene Section 32, Article II of the Constitution, providing, "The General Assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred."

The power to subpoena witnesses, to send for books and papers, to hear and determine charges of crime, is certainly judicial in its nature; but whether so in the sense of this constitutional inhibition is not as clear. If the right to punish were added the power would be complete and embrace every act that could be done by the courts; but the very absence of this power shows how barren of good results such proceedings would be, and on the other hand no one can measure the harm that would follow.

The General Assembly had, prior to the adoption of the present Constitution, not only assumed power not delegated to them, but had usurped a power expressly conferred upon the judiciary, by granting divorces. *Bingham* v. *Miller,* 17 Ohio, 447.

This abuse of power, existing for a period of more than forty years, was the occasion of emphasizing the inhibition against granting divorces, and in no sense lessens the force of or in any way qualifies the general provision against the exercise of judicial power not expressly conferred.

The special as well as the general inhibition existed by implication from the distribution of the powers of the state, by the Constitution, to the three departments of government *(The City of Zanesville* v. *Telegraph & Telephone Co.,* 64 O. S., 67), but owing to the growing temptations to exercise power not conferred it was deemed wise to deny the right in positive terms. The resolution empowers the committee in effect to frame indictments, hear ex parte evidence, and determine the guilt or innocence of the accused, who would thereby be exposed to all the censur and disgrace attending a legal trial without the privilege of making a defense, and without exempting them from subsequent trial for the same offense. It was intended to avoid such confusion of power and protect the personal and property rights of the citizen by adopting this provision of the Constitution, and unless this investigation can be justified upon the

ground of seeking information in aid of intended legislation it is a gross violation of such provision. *Kilbourn* v. *Thompson*, 103 U. S., 168.

This brings us to an inquiry of the purpose the Legislature had in granting such extraordinary power to a special committee—not the expressed but the real purpose. The resolution declares the purpose to be "for further legislation and amendment to existing legislation as the disclosures of said committee may warrant"; but the constitutional rights of citizens of this state can not be invaded by either branch of the government upon a mere declaration of good faith. A present intention to do an act in the future, when brought in question can only be determined by existing conditions. In this case the conditions relied on are expressed in the preamble to the resolution and are little short of anarchy itself. There is no suggestion of any defect in the criminal statutes thus violated, either in definition or penalty; but the chief complaint is that an organized band of law breakers are defying all laws and no one dare restrain them.

What legislation is proposed to meet a situation like this if found to exist? None whatever, and none could under such conditions be suggested that would be more effective than the present statutes. The efficiency of all law and especially criminal law lies in the certainty of its enforcement, and it would be a fruitless task to pass numerous criminal statutes when existing statutes upon the same subjects with ample penalties are violated with impunity. We might with propriety suggest the mode of procedure under the Constitution and the statutes, were it not that the resolution as a whole forecloses every avenue of escape from the dire calamity by declaring all the instruments for the enforcement of law to be tainted with corruption. Such charges might not be unexpected from irresponsible agitators in the heat and excitement of a political campaign, but so far as we are advised have no precedent in any adjudged case or even in any legislative body.

The language of the preamble is intemperate, illtimed and revolutionary. If sanctioned by the courts the dominant political

party will be licensed to prefer, at each recurring election, charges of crime against the citizens of any community of which its adversary has control and to hear and determine the same.

We are persuaded that however gross may be the abuse of power, and however flagrant may be the violation of law, the people are not ready nor willing to abandon orderly and legal procedure in the exposure, conviction and punishment of crime; and that even the authors of this injustice will, when released from political strife and turmoil, condemn their own production. We are of opinion therefore that the resolution itself shows that it was not, in good faith, passed for the purpose of remedial legislation, and that an attempt was made to exercise judicial power contrary to the Constitution.

If we are wrong in this conclusion the question still arises whether the committee can act after the final adjournment of the General Assembly. The right to investigate and gather information in the manner here proposed exists, if at all, as an incident of and by implication from the power to legislate conferred by the Constitution. An act duly passed by the General Assembly is a complete exercise of the power to legislate; but a resolution to investigate for the purpose of further legislation, passed by the same body, is the exercise of a right incident to that power, and if the power itself be surrendered the incidental right goes with it.

When the General Assembly adjourned *sine die* its purpose to use the information in aid of legislation could no longer be carried out; and while it could order the information to be transmitted to its successor, it could not form or express a purpose for nor impose its own upon its successor. The latter would use the information as it saw fit, without regard to the intention of the former.

It is the same as if no purpose were expressed, and the result is that an investigation is proposed, without any legislative purpose or any other acknowledged purpose, with authority in the committee to roam over the entire field of governmental functions and report its discoveries to the next General Assembly fresh from the people who alone have power to instruct.

Such power to investigate is not conferred by the Constitution in express terms nor by implication. *Cushing's L. & P. of Leg. Assemblies,* Section 496; *In re Pac. Ry. Co.,* 32 Fed., 241.

Demurrer to answers sustained.

EVIDENCE ESTABLISHING A GIFT CAUSA MORTIS.

Circuit Court of Hamilton County.

GALBRAITH v. SUTTON ET AL. *

Decided, June 15, 1908.

Gift of Bonds in Expectation of Death—Necessary Conditions to Render Legal—Evidence Establishing Validity of Gift.

Bonds given by an invalid to her sister in expectation of death, but with the condition that they be returned to her in case she should need them, are a valid gift *causa mortis.*

David Davis and *John Q. Martin,* for plaintiff in error.

G. S. Hawke, contra.

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

A gift *causa mortis* is a gift of personal property made in the immediate apprehension of death subject to the conditions, express or implied, that if the donor should not die as expected, or if the donee should die first, or if the donor should revoke the gift before death, the gift shall be void. Am. & Eng. Enc., Vol. 14, page 1052.

We think the evidence in this case shows that the gift to defendant in error as claimed by her was a gift *causa mortis* from Elizabeth L. Galbraith, and particularly when the donor used this language: "Oh, Mary, I am sick; I am very sick. I do not think I am going to live very long; I am going to make you a present; I am going to give you some of my bonds," and afterwards when the donor said: "Mary, I am going to give you some of my bonds. I talked to you about it last fall. I did not do it. I will

* Affirming *Sutton, Executrix,* v. *Galbraith,* 7 N. P.—N. S., 293.

put it off no longer. The doctor tells me in all probability I will not live a year. I want you to have them. You have a right to them. You know where the money came from."

The evidence shows that all the elements of a gift *causa mortis* were present in this case. It was made in expectation of death; the bonds were delivered, and the donee retained possession. There was no revocation of the gift and the donor subsequently died without recovering from the sickness mentioned by her.

The gift therefore being legally consummated, the bonds to recover which this suit is brought belonged to the defendant in error, Mary L. Sutton, and not to the estate of Elizabeth L. Galbraith.

Judgment affirmed.

VALIDITY OF EXTENSION OF A STREET RAILWAY FRANCHISE.

Circuit Court of Montgomery County.

STATE OF OHIO, EX REL HERMAN, CITY SOLICITOR OF DAYTON, OHIO, V. THE OAKWOOD STREET RAILWAY COMPANY.

Decided, June 22, 1908.

Municipalities—Extension of Street Railway Grant—Passage of Ordinance Delayed Beyond Expiration of Original Grant—Extension Ordinance a Temporary Act, When—Failure to Publish—Presumption—Consents—Mistake as to Name of Company—Change in Judicial Construction—Effect of, on Contracts not Retroactive—Overthrow of Doctrine of Classification—Irregularities in Passage of Ordinance—Waiver—Proceedings for Ouster—Section 2502.

1. A grant extending a street railway franchise is not rendered invalid, because while awaiting certain enabling legislation, under an amicable arrangement between the municipality and the company, the passage of the ordinance extending the grant was deferred for some months beyond the termination of the life of the original grant.
2. An ordinance extending a street railway grant, which relates to but one road and involves no expenditure of money belonging to

the city, but is simply a contract between the railway company and the city, is not of a general or permanent nature, and is not rendered invalid by reason of failure to read it on three different days or to suspend the rules requiring this to be done.

3. The duty of publishing an ordinance rests upon the city, and in an action brought by the city solicitor to oust a street railway company from its franchise, it is encumbent upon the city to establish such an omission, and in the absence of proof to that effect a presumption arises that publication was regularly made.
4. Whether consents from abutting property owners were secured for such an extension is a matter which concerns the property owners only, and in the absence of complaint from them can not be used by the city as ground for an ouster proceeding; and, moreover, such an objection will be deemed to have been waived where many years have intervened.
5. The fact that the extension was granted to the Oakwood Street Railroad Company, instead of the Oakwood Street Railway Company, does not afford ground for an ouster, where it is admitted that it is one and the same company, and the city accepted the bonds of the company and all the bridge and street improvements made by it under the ordinance.
6. Inasmuch as judicial construction with respect to a statute is given the same effect in its operation on contracts and existing contract rights that would be given by legislative amendment, subsequent adjudications which seem to render Section 2502 unconstitutional will not be construed as having a retroactive effect upon a franchise founded on a good consideration and granted at a time when this statute would have stood the constitutional test; and particularly will such retroactive effect be denied in view of the curative provisions of Section 31 of the municipal code.

SULLIVAN, J.; WILSON, J., and DUSTIN, J., concur.

Quo warranto.

This action was brought originally in this court and submitted at its last term; it is an action to oust the railway company from its franchise. The issues are plain and well put, and there is little or no conflict in the testimony upon the main facts, and the questions of law arising upon the issues made and the facts presented have been so fully settled in our opinion that it does not seem necessary to do more than state the conclusions we have reached.

From the facts stated in the petition, taken in connection with the testimony submitted, we find that the action is properly brought.

The gravamen of the relator's complaint is that the railway company is exercising and enjoying the privileges and rights claimed by it in contravention of law. There is no complaint against the company that it is not exercising its franchises in in the interests of the public, or furnishing all the facilities for its patronage that are required by law and the terms of its contract with the city. The plain, simple question presented is whether it is exercising these privileges in contravention of law.

The railway company, in its response to the petition, sets forth in substance the ordinance granting to it the right and privilege of occupying the streets named for its tracks, and the operation of its cars thereon, and the agreement between the parties relative to the company continuing in possession and operation of its route until the negotiations looking to a renewal of its former grant were terminated; and in addition it sets forth the considerations that moved the city through its officials to apply to the Legislature to amend Section 2502, authorizing cities of its grade and class to grant originally, or extend grants, to street railway companies' franchises for a period of fifty years. That, relying upon the validity of the act as amended and of the ordinance enacted by the city in pursuance thereof, and upon the good faith of the city, it fully complied with and discharged the obligations to the city placed upon it by the city ordinance, and in addition expended large sums of money in the improvement and equipment of its road, etc., to keep pace with the demands of the public using its road.

The answer further sets forth that its route at the time of the passage of the ordinance was and is composed of two separate routes, which by proper proceedings under the statute were consolidated, and the consolidated route was known interchangeably as the Oakwood Railroad Company and the Oakwood Railway Company; that before consolidation the separate routes were known as Nos. 2 and 3. It sets forth the various expenditures of large sums of money. All were made on faith of the grant

of fifty years. That for the improvement of the streets required of the company, the grant for that period was the chief consideration offered by the city. It has been continuously subject to the valid ordinances of said city under its police power; that it has since on demand by the state paid one per cent. of its gross receipts.

The reply of the plaintiff, after denying many of the allegations of the answer of the company, sets forth in detail wherein the company is exercising rights and privileges in contravention of law; that the right and franchise claimed by the company began in 1891; that it does not and has not claimed any such rights except under the ordinance of that date; that the grant for route No. 2 expired March 17, 1891; that no ordinance or resolution was legally passed renewing said grant; that the ordinance of July 10, 1891, under which the company claims, was never legally passed; that the franchise for route No. 2, which expired March 17, 1891, could not be renewed unless renewed during the life of the original grant or, as expressed by the statute, at its expiration; that the ordinance of July 10, 1891, was not read upon three different days before its passage, and the rules requiring this were not suspended, and hence the ordinance is not valid; and that Section 2502 as amended, and under which the grant was attempted to be given, was unconstitutional.

The testimony produced shows that prior to the expiration of the original franchise for route No. 2, to-wit, March 16, 1891, the city council passed an ordinance extending the franchise for a period of twenty-five years from and after that date. Because of the burdens imposed upon the company by this ordinance the railroad company declined to undertake the burdens with a franchise for only twenty-five years. It seems to have been satisfactorily apparent to both the city and the railway company that to assume and undertake the burden imposed would result in financial embarrassment to the company. By an amicable arrangement between it and the city it continued in the operation of its road, and also in negotiations with a view of a renewal of said franchise, and having Section 2502 amended authorizing the

city to extend the grant for a period of fifty years and this amicable arrangement continued until the amendment was secured, and the passage of the ordinance of July 10, 1891, in pursuance thereof, extending the grant to the company for the period of fifty years from and after the date of the expiration of the respective grants. But relator claims because the statute provides that grants may be renewed at their expiration and that such statutes must be strictly construed, therefore, the grant for route No. 2 having expired March 16, 1891, it could not be renewed July 10, 1891, as stated above.

The testimony if not directly, still by inference, clearly shows that a renewal was sought at the expiration of the former grant, although its completion was not fully accomplished until July 10, 1891. During this period the parties were endeavoring to get together upon terms, and at no time were the negotiations looking to its completion abandoned. Each party was desirous to arrive upon terms, and the delay was not because either had abandoned the purpose to renew.

We think, in view of these facts, and that now for the first time this claim is being made by the city, and the ordinance finally passed itself treating and designating it as a renewal, that the ordinance of July 10, 1891, should now be recognized and treated as a compliance with the statute.

The ordinance of July 10, 1891, was not read on three different days, nor were the rules suspended requiring this to be done; and hence relator insists that the railroad company has no grant or authority to maintain and operate its road upon the several streets composing its route; that it is an ordinance of a general or permanent nature, and unless it was read on three different days, or the rules dispensed with, it was a nullity. In our opinion it was neither of a general or permanent nature. It related to but one road, involved no expenditure of the city's money, nor did it relate to the government of the city, and the limitation of the grant extended by it was absolutely fixed. At the time there was and now is a general ordinance of the city, passed long prior to the date of this one, relating to all street railways within the limits of the corporation. Furthermore, the

ordinance was simply a contract between the city and the railway company. We think, under the authority of *Railway* v. *Horstman*, 72 O. S., ——, it was a special act and temporary.

It is claimed by the relator that the ordinance was not published as required by the statute, and for that reason it is void. It was not incumbent upon the railway company to discharge this duty; it was upon the city. It seeks now to avail itself, to the prejudice of the company, of its own omission. Being incumbent upon the city, the burden of establishing this omission is upon it. We are of the opinion it has not discharged it; and in the absence of testimony on the point the presumption is that the ordinance was published.

The relator claims there is no proof of consents. Whether any were given as to the extension should not avail the city here, as that is a matter of the abutting land owners alone, and no one of that class is here complaining. The lapse of so many years after the extension was granted, without protest, we are inclined to the view that in law it constitutes a waiver.

The charter title of the defendant is the Oakwood Street Railway Company and the grant in the ordinance is to the Oakwood Street Railroad Company. It is therefore claimed by the relator that the respondent has no grant. The relator does not deny the allegation of the railway company that it is the same company. It negotiated the renewal with the Oakwood Street Railway Company. It acted upon the acceptance of the ordinance by that company, accepted its bonds and all the bridge and street improvements made by that company under the ordinances, concedes there is no Oakwood Street Railroad Company; that the respondent has since 1871 operated the route and that it is called interchangeably Oakwood Street Railroad Company and Oakwood Street Railway Company. Certainly under these facts the relator does not seriously contend that the railway company should be ousted for this reason.

In our opinion the ordinance contains but one subject.

It is claimed by the relator that Section 2502, as amended April 24, 1891, contravenes the Constitution and therefore the

grant of the city, July 10, 1891, to the railway company is invalid. At the time of the amendment Dayton was the only city in the state of the second grade of the second class. The classification by which it was placed in a class by itself was based upon a substantial difference in population, viz., below 30502 and above 20,000. This court upheld the classification of Dayton in what is known as the crematory case. Its judgment was affirmed by the Supreme Court.

Our attention has not been called, neither have we been able to find, any other case in which classification as applied to this city has been assailed; and whether it would be upheld when invoked under conditions disclosed in this case it is unnecessary we think for this court to venture an opinion. Upon the point, however, it may not be out of place here to call attention to the expression of the Supreme Court, made since the cases in 66 Ohio State, understood to overthrow the entire doctrine of classification, found in the second syllabus in *Gench* v. *State*, 71 Ohio State, 151:

"Within the legitimate purposes of general legislation not relating to the organization of cities and villages a *bona fide* classification on the basis of real and substantial difference in population, and out of conditions growing therefrom, may be valid."

Whether the section under consideration is repugnant to the Constitution under the 66th Ohio State cases is not the question that must determine the controversy here. A change in judicial opinions respecting the constitutional validity of legislative enactments can not have retroactive operation upon contracts entered into pursuant to statutory provisions and in reliance upon former adjudications respecting their validity. To give them such operation would violate another provision of the Constitution equal in importance to the one urged here.

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to legislative amendment; that is to say, making it prospective but not re-

troactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as on amendments of the law by means of a legislative enactment. *Lewis* v. *Auditor Sims*, 61 O. S., 471; *Douglass* v. *County of Pike*, 101 U. S., 677."

So that if, in view of adjudications since the amendment to Section 2502, April, 1891, the section is probably unconstitutional, yet as similar laws, including the same or similar constitutional defects, had been judicially determined valid theretofore and at the time of the grant to the railway company, the subsequent adjudications could not have a retroactive effect upon the grant, because it is a contract founded upon a good consideration. *Shoemaker* v. *City of Cincinnati*, 68 O. S., 603.

In the case of the *State, ex rel Seymour, Prosecuting Attorney*, v. *Gilfillen*, this court held the tax inquisitor law unconstitutional, 19 Circuit Decisions, 709.

But we held that rights acquired by the inquisitor by virtue of contracts entered into according to the provisions of said act when that or similar acts were held by the highest court of the state to be constitutional were valid and subsisting rights and could be enforced. This judgment was affirmed by the Supreme Court.

The ordinance is a contract between the railway company and the city, and hence the controversy here involves the above rule.

The overthrow of the doctrine of classification in the 66th Ohio State cases necessarily involved in doubt numerous rights acquired by citizens whilst the doctrine was upheld. Whether feared or expected, yet so great was the surprise when it came that a special session of the Legislature was deemed imperative and it was called. Rights similar in character to those involved in this case the Legislature evidently apprehended would be seriously affected, involved in doubt and become at once a source of serious litigation; and hence it fixed rights arising out of contracts by legislative enactment. To avoid any question as to

the rights of parties acquired by contract theretofore it passed a curative act—Section 31 of municipal code of 1902.

Whilst we have seen that the relator, under the common law, is not entitled to the decree it prays for here, yet the Legislature has wisely removed all doubts that might arise.

Judgment for defendant.

PROSECUTIONS FOR EMBEZZLEMENT.

Circuit Court of Hamilton County.

AUSTIN W. TIDD v. STATE OF OHIO.

Decided, June 6, 1908.

Criminal Law—Indictment for Embezzlement—Time Laid Immaterial, When—Ownership of Property—Evidence.

The time laid for the receiving of the money in an indictment for embezzlement is immaterial, when it appears that at the time the embezzlement occurred the ownership of the property was as alleged in the indictment.

Thomas L. Michie, for plaintiff in error.

Froome Morris, contra.

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

The plaintiff in error was convicted of embezzlement in the common pleas court of this county and sentenced to the penitentiary, to reverse which judgment this suit in error is brought.

The only ground of error complained of is, that while the indictment charges Tidd with embezzling money, the property of the Smith Envelope Company, a corporation, on the 14th day of March, 1907, which money came into his posession and care as treasurer and manager of such corporation at the time of the embezzlement, yet he can not be held under the indictment, for the reason that at the time of the embezzlement is alleged to have occurred no such corporation existed, and therefore he should be discharged.

We do not think the time laid in the indictment as to the embezzling of the money is material.

The record shows that at the time of the delivery of the money from Ellerhorst to Tidd, there was talked over the formation of the corporation to be known as the Smith Envelope Company; that soon afterward such a company was duly incorporated; that certificates of stock were issued by the company, signed by Ellerhorst, as president, and Tidd, as treasurer; that Tidd expended a part of the money entrusted to him in fitting up the office of the company, and for sundry necessary expenses, and when the jury found him guilty of embezzlement, it was for the embezzlement of money after the incorporation of the company, and necessarily found that the money belonged to the Smith Envelope Company.

The record further discloses that the defense made to the jury at the trial of the case was that the money alleged to have been embezzled was not the money of the Smith Envelope Company, but belonged to the Standard Pay Envelope Company. The jury were called to pass upon this question of fact, and found in their verdict that the money entrusted to him, for which he was convicted, was the money of the Smith Envelope Company. As has been said in cases cited by counsel for State, if a man has received a thing of another under a claim of agency, he should not be allowed to turn around, after having embezzled it or any part of it, and claim that he was not the agent in taking it.

From all the evidence in the case we are of the opinion that the verdict of the jury is sustained, and believe that the plaintiff in error had a fair trial

We find no errors in the record, and the judgment will be affirmed.

THE LICENSING OF CHATTEL MORTGAGE AND SALARY LOAN BROKERS.

Circuit Court of Hamilton County.

WILLIAM F. CHAMBERS, A TAX-PAYER, v. CITY OF CINCINNATI ET AL.

Decided, November 30, 1907.

Municipal Corporations—Licenses Regulating Chattel Mortgage and Salary Loan Brokers—Provision Requiring Signature of Wife Invalid—Penalties for Violation of Ordinance—License Fees—Records a Loan Broker May be Required to Keep.

An ordinance requiring brokers engaged in making chattel mortgage or salary loans to secure a license as a condition precedent to doing business within the municipality is not invalid because the license fee is fixed at as high a figure as $250, or because said brokers are required to keep records of the name of each pledgor, the amount of the loan, the rate of interest charged, the date when the loan is payable, and a description of the articles pledged, which record shall be filed in the office of the city auditor and be open to inspection by the mayor and chief of police; but a provision requiring that if the pledgor is a married man his wife must sign the application for the loan is of no effect.

W. F. Chambers and *Fyffe Chambers*, for plaintiff.
John R. Schindel, Assistant City Solicitor, contra.

This case involved the validity of the following ordinance of the City of Cincinnati:

"An ordinance, No. 1671, to regulate and license chattel mortgage and salary loan brokers.

"Be it ordained by the Council of the City of Cincinnati, State of Ohio:

"Section 1. No person, firm or corporation shall, within the city of Cincinnati, engage in the business of a chattel mortgage loan or salary loan broker, or engage in the business of loaning money secured by mortgage, bills of sale or other contracts involved as security the forfeiture of rights in personal property, or upon assignments, bills of sale or other conveyance of salary

or wages, without first having obtained a license from the Auditor of said city so to do.

"Section 2. The auditor of said city shall issue to any person, firm or corporation a license as provided for in Section 1, for the period of one year, upon the payment to the city of Cincinnati of the sum of two hundred and fifty dollars ($250), upon condition that the books and accounts of such licensee shall be open at any time to inspection by said auditor; provided, however, that said license shall expire on the 31st day of December of the year in which issued; but said auditor may issue a license to any such person, firm or corporation who engages in business after the first of January, for a period less than a year, upon payment of a proportionate amount of said sum.

"It shall be the duty of the auditor to examine the books and accounts of such licensee at least once every year.

"Section 3. Every such person, firm or corporation so licensed, shall give to each pledgor, mortgagor or assignor, a card upon which shall be written in ink, typewriter or printed, the name of the person, firm or corporation making the loan, the name of the pledgor, mortgagor or assignor, the article or articles pledged, mortgaged or assigned, unless there be more than fifteen of said articles, in which case a general description thereof be sufficient; the amount of the loan, the amount of interest charged, the amount of expense charged, exclusive of interest, and the time for which each of said charges are made; the date when the loan is made and the date when payable; and shall also give the pledgor, mortgagor or assignor a receipt for each payment of principal, interest or any other charge made on said loan, by or in behalf of said pledgor, mortgagor or assignor, and if any payment shall consist of principal and interest, or any other charge, said receipt shall specify the amount of each.

"Section 4. No such person, firm or corporation so licensed shall receive as security for any indebtedness any chattel mortgage, bill of sale or assignment, or any other conveyance of any personal property, salary or wages, signed in blank, but all blank spaces shall be filled in with ink or typewritten, with the proper words and figures, and if said conveyance shall be for salary or wages, the name of the person, firm or corporation by whom the person making the conveyance is employed, and shall also appear on said paper.

"Section 5. Every such person, firm or corporation shall, on or before 10 o'clock A. M. on each and every Wednesday, file with the auditor of said city of Cincinnati, a true record of each

and every loan made during the calendar week immediately preceding. Said record shall be made upon cards or blanks furnished by said auditor and shall consist of the name of the person, firm or corporation making the loan, the name of the pledgor, mortgagor or assignor, a specific description of the article or articles pledged, mortgaged or assigned, the amount loaned, rate of interest, the amount charged for interest and the time for which said interest charged is made, the amount of expense charged, exclusive of interest, and the time for which said expense charged is made, and the date when said loan is payable; such record so filed with the auditor of said city shall remain in the office of said auditor as a permanent record, open to the inspection of the mayor or chief of police of said city.

"Section 6. No such person, firm or corporation shall make a loan to a married man upon the security set forth in Section 1 unless the application for said loan and the conveyance of the chattels or salary shall be signed by the wife of said applicant.

"Section 7. Any person or persons either as principal, agent, officer or employer who violates any of the provisions of this ordinance, or any person or persons, firm or corporation who shall carry on the business of a chattel mortgage or salary loan broker, or loan money as set forth in Section 1, without obtaining a license as provided herein, shall for the first offense be fined not less than twenty-five ($25) dollars, nor more than two hundred ($200) dollars and the cost of the prosecution, and for the second and any subsequent offense shall be fined not less than one hundred ($100) dollars, nor more than five hundred ($500) dollars, and it shall be the duty of the auditor, upon the second conviction of any such person, firm or corporation holding a license issued under this ordinance to forthwith revoke said license.

"Section 8. That Sections 22 and 23 of Ordinance No. 468, entitled, 'An ordinance to provide for licenses on certain trades, businesses, professions, etc., passed July 13th, 1904,' be and the same are hereby repealed.

"Section 9. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

"Passed December 3d, A. D. 1906. Frank L. Pfaff, President of Council. Attest, Edwin Henderson, Clerk."

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

In this case, heard on appeal, we are of opinion that ordinance No. 1671 of the city of Cincinnati, to regulate and license chattel

mortgage and salary loan brokers in said city, is valid. We do not think the sum required to be paid is unreasonable, or that the condition relating to the inspection of the books and accounts of the parties affects the validity of the ordinance.

It is evident that the ordinance is intended solely to regulate, as its title sets forth, chattel mortgage and salary loan brokers, and does not extend to others engaged in the loaning of money, as banks, brokers, etc.

While we are of opinion that Section 6 relating to the wife of a man signing the application for a loan, or the conveyance of the chattels or salary is of no effect, yet this would not invalidate the other provisions of the ordinance.

The petition, therefore, for an injunction will be dismissed.

CONSTRUCTION OF WILL.

Circuit Court of Stark County.

NICHOLAS YOUNGBLOOD ET AL v. HARRY YOUNGBLOOD ET AL. *

Decided, February Term, 1908.

Wills—Devise of Residuary Estate to "Legal Heirs"—Distribution to Grandchildren of Deceased Brother—Heirs of Deceased Devisee Take by Virtue of Section 5971—Intention of Testator—Descent and Distribution.

Where a testator bequeathes his residuary estate to the "legal heirs" of a deceased brother without other or further designation as to who are intended as his beneficiaries, and by his will directs that such residuum "shall fall to and be divided in equal shares among the legal heirs of my deceased brother, and I hereby bequeath and devise the same to them"; and at the time of making said will one of the sons of the testator's deceased brother was dead, leaving heirs—*Held:*

1. That all persons who at the time of the death of the "deceased brother" of those who answer the description of "legal heirs" of said deceased brother at the time of such brother's death are entitled to share in such a residuary estate in equal proportion,

* Affirmed by the Supreme Court, without report.

and if at the time of making of the will any of such "legal heirs" had died leaving issue surviving the testator, that such issue shall take the share which would have otherwise gone to such "legal heir," had he survived the testator. Revised Statutes, 5971, controls such distribution.

2. The expression "legal heirs" as used by a testator has a well known, definite meaning in the law, to-wit: Those upon whom the law would cast the estate if the testator had died intestate; the expression "to be divided in equal shares" merely points out how such persons are to take their interests.

Willison & Day, for plaintiffs in error.

D. F. Reinoehl and *A. N. Kaley*, for defendants in error, cited:

Mooney v. Purpus, 70 Ohio St., 57; Woolley v. Paxson, 46 Ohio St., 307; 30 Am. & Eng. Enc. Law (2d Ed.), 705, 718, 725, 729; Thurston v. Bissell, 13 C. C., 293; Huston v. Crook, 38 Ohio St., 328; Bunnell v. Evans, 26 Ohio St., 409; Wiley v. Bricker, 21 C. C., 109; McKelvey v. McKelvey, 43 Ohio St., 213; 15 Am. & Eng. Enc. Law (2d Ed.), 322; Underhill, Wills, 814; Richey v. Johnson, 30 Ohio St., 288; Weston v. Weston, 38 Ohio St., 473; Campbell v. Clark, 5 New Eng. Rep., 66 (N. H.); Hall v. Smith, 61 N. H., 144; Farmer v. Kimball, 46 N. H., 435; Sears v. Russell, 74 Mass., 86; Denny v. Kettell, 135 Mass., 138; McCartney v. Osburn, 6 West. Rep., 793 (Ill.); Howard v. Fenkell, 10 West. Rep., 671 (Ohio); 2 Jarman, Wills, (5d Ed.), 156; Morrell, In re, 4 Paige, 44; Wickers v. Clarke, 8 Paige, 161; Birney v. Hann, 10 Ky., 322; Chapman v. Chapman, 2 Conn., 347; Thompson v. Garwood, 3 Whart. (Pa.), 287; Loockerman v. McBlair, 6 Gill (Md.), 177; Ward v. Stow, 2 Dev. Eq. (N. C.), 509; Kean v. Hoffecker, 2 Har. (Del.), 103; King v. Beck, 15 Ohio, 559; Collier v. Collier, 3 Ohio St., 369; Jarman, Wills, 204; Paige, Wills, 545, 547; Sinton v. Boyd, 19 Ohio St., 30; Stewart v. Powers, 9 C. C., 143; Delaney v. McCormack, 88 N. Y., 174.

DONAHUE, J.; TAGGART, J., concurs; MCCARTY, J., not sitting.

This proceeding in error is brought to reverse the judgment of the common pleas court in an action brought by Harry Youngblood against Nicholas Youngblood and others, to construe the

will of Peter Youngblood, deceased, by the terms of which will Peter Youngblood devised certain real estate and personal property to his widow for her life with the right to consume thereof all that might be necessary for her support, and at her death such real estate if unsold, and all personal property or proceeds thereof that should remain unconsumed, he directed "shall fall to and be divided in equal shares among the legal heirs of my deceased brother, John Youngblood, and I hereby bequeath and devise the same to them." This latter provision of the will is the one sought to be construed, and the question arising thereon is as to who are the heirs of his brother, John Youngblood, deceased. The common pleas court made a finding of fact covering the questions in this case at length and about these facts there is no dispute. The question is as to the conclusion of law from these facts. It is not necessary to give in detail all of the finding of facts; it is sufficient for the purpose of this review to note the controlling ones.

Peter Youngblood executed this will on the twenty-sixth day of September, 1893; he died September 30, 1894; that his wife died July 1, 1906; that his brother, John Youngblood, died in 1855, leaving four children surviving him as his only heirs at law. These children were John, Joseph, Frank and Nicholas; that the son Joseph died in September, 1888, leaving six children —Mary, Clara, Harry J., Cora, Joseph and Blanch. Some of the other sons have died since the death of the testator but there is no contention between the parties here that their death makes any difference in the construction of this item of the will; the controversy is as to the interest these children of Joseph Youngblood take under the will of Peter Youngblood. It is insisted that these six grandchildren were and are heirs of John Youngblood, the deceased brother of the testator, and that therefore they come within the class of heirs of John Youngblood named in Peter Youngblood's will; that the directions of the will are that these heirs shall share equally and that therefore each of said grandchildren shall take an equal share with the living sons of John Youngblood, deceased. That is to say, that this residue of Peter Youngblood's estate must be divided into nine parts,

one of each of said parts given to the living sons of John Youngblood and one of these parts given to each of the children of Joseph Youngblood. In view of the doctrine announced by the Supreme Court of Ohio in the case of *Mooney* v. *Purpus,* 70 Ohio St., 57, if these grandchildren are heirs of John Youngblood, deceased, then they each share equally with their uncles in this devise. That is to say, each will take an equal part as heir of John Youngblood and not simply the share of their father had he survived the testator.

While it is true that in the construction of a will the main object to be arrived at is the intention of the testator, yet, a court is not authorized to say, that the testator intended other than the clear and manifest meaning of the words used to express his intention. He is supposed to have known the legal effect and import of the words used, and to have intended that which they express, notwithstanding it might seem that he had inadvertently used these words.

It is only where there is an ambiguity, an uncertainty in the words used, or a contradiction in the terms that a court is justified in attempting to determine the intention of a testator in order to determine the purpose and construe the language of the will. So in this case we must conclude that he used the word "heirs" advisedly, and if the effect of that be to give to these six children six shares instead of one, although we might personally think that the testator did not so intend, yet we must nevertheless give full effect to the language used, for a court has no power to make wills for people, but only to construe them. In the case before us the words used are plain, certain and unambiguous, and have a well-known, definite legal meaning, and full effect must be given to them without regard to consequence.

The only thing left for the court to determine is who are the heirs of John Youngblood, deceased, and this question must be determined by reference to the statute of descent and distribution, for it is only by force of this statute that any heirs of deceased persons exist. In construing these statutes we must keep in mind the fact that no living person has heirs. The legal definition of the word "heirs" is, "those who take the estate of an

intestate under the statutes of descent and distribution," and all persons who do take any portion thereof under this statute, no matter how small it may be, is an heir in the legal contemplation of the word, so that an hour before John Youngblood's death he had no heirs—they were simply heirs apparent, nothing more; but at his death, then they became his heirs, and that class became fixed and certain and can never be changed by any subsequent event no matter of what nature or extent it may be. That is to say, when a man dies the law determines who his heirs are, and except for the one exception of posthumous issue, there is not and can not be any change in those heirs. To illustrate this let us consider the descent of property owned by John Youngblood at his death. His four sons living would be his only heirs, and if one of them died the day after, his children would inherit not from John Youngblood but from their father, and the estate would first be vested in the legal representatives of Joseph Youngblood and would be applied to the payment of his debts and legacies, and the residue would pass to them if he died intestate, but they would not inherit from the grandfather if their father survived their grandfather by so much as one moment of time; but if the father died an hour before the grandfather then they would inherit directly from the grandfather. True, they would only take their father's share but they would take as heirs of the grandfather and not as heirs of the father; so that in order for a grandchild to become the heir of the grandfather, the father must die before the grandfather; otherwise any interest they take in the grandfather's estate is taken as the heir of the father and not as the heir of the grandfather. Joseph Youngblood lived thirty-three years or more after his father's death. All that time he was the heir of the father, and if John Youngblood had had an inheritable interest in any property the enjoyment of which was delayed for a half century, Joseph Youngblood would inherit his share of that property, and any part of it that his children would take, they would take through him, as his heirs, and they could never take as heirs of their grandfather. This being true, notwithstanding the death of Joseph Youngblood before the death of the testa-

tor, Peter Youngblood, and even before the execution of his will, it in no wise changed the heirs of John Youngblood. They were fixed and certain at the time of his death, and except for posthumous issue would forever remain fixed and certain. These grandchildren no more become his heirs than the most absolute stranger to him; they never were his heirs and never can be his heirs. Their father, Joseph Youngblood, having survived the grandfather forever precluded the possibility of these grandchildren becoming the heirs of the grandfather, and any intestate property of which the grandfather died seized would pass to, and vest in, their father's estate, and if they derive any benefit therefrom of any kind or character it would be because they inherit the same from their father immediately, and not because they inherit anything from the grandfather.

We are therefore clearly of the opinion that these grandchildren never were the heirs of John Youngblood; could not become so because of the death of their father after the death of the grandfather, but could only become the heirs of John Youngblood by the death of their father before the death of their grandfather; and that being true they do not come within the class designated in the will as the heirs of John Youngblood, deceased, and could take no interest whatever under this will, were it not for the provisions of Section 5971, Revised Statutes, which provides that when a devise of real or personal estate is made to any children or other relative of the testator, if such children or other relative shall have been dead at the time of the making of the will, or shall die thereafter leaving issue surviving the testator, in either case such issue shall take the estate devised in the same manner as the devisee would have done, etc. So that we think the word "heirs" in the will of Peter Youngblood does designate a class and that that class was fixed and certain immediately upon the death of John Youngblood, and that they were his four sons; that these four sons were relatives of the testator; that Joseph died before the making of the will, and that under the provisions of Section 5971, Revised Statutes, his children take his share, no more and no less. So that this residuary estate under this

will passes to said four sons of John Youngblood, deceased, who were his only heirs at law, in equal proportions, share and share alike, that is, each shall take one-fourth thereof, and that the children of any of these deceased sons shall take their father's interest therein.

The conclusion of law of the common pleas court upon the facts found and the judgment entered therein was erroneous and should have been as hereinbefore stated, and for such error, which we find prejudicial to the rights of plaintiffs in error, the judgment of the common pleas court is reversed, and the judgment may be here entered that should have been entered in the common pleas court upon these findings of fact. Exceptions of defendants in error noted. Costs of this proceeding in error adjudged against the defendants in error and cause remanded for execution.

REQUIREMENTS IN AFFIDAVIT IN ATTACHMENT.

Circuit Court of Hamilton County.

GEORGE F. GILBERT v. STEPHEN J. BURKE.

Decided, March, 1908.

Attachment—Requisites of Affidavit for—Statement on Belief Only as to Non-Residence of Defendant not Sufficient—Section 5522.

1. An affidavit in attachment under Section 5522, Revised Statutes, where the defendant is a non-resident, in order to give jurisdiction must contain statements showing: nature of plaintiff's claim; that it is just; the amount which the affiant believes the plaintiff ought to recover; and that the defendant is a non-resident of this state.
2. An affidavit for attachment which avers that "Stephen J. Burke, plaintiff, being first duly sworn, says that the claim sued upon is for money paid by him for the use and benefit of the defendant and upon contract, and that said claim is just;" and "affiant believes that he ought to recover the sum of $105, together with interest, from the 17th day of August, 1895, and that the defendant is a non-resident of this state," is in compliance with the first

three provisions of Section 5522, but as to the question of non-residence is upon affiant's belief merely, and is therefore not a sufficient statement under the statute of the fact of non-residence; and it follows that the proceedings in attachment founded on such affidavit are void.

Samuel B. Hammel, for plaintiff.

C. M. Thompson and *F. M. Gorman*, for defendant.

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

This action is here on appeal. It is an action to quiet title. Gilbert was the owner of certain real estate in this county, and at no time was a resident of the city of Chicago, state of Illinois, when the defendant in this action brought an action against him in this county, got a judgment against Gilbert and sold the land belonging to Gilbert. Burke was the purchaser at the sheriff's sale, and he now claims to be the owner of the land in controversy, by virtue of the sheriff's deed.

In order to get jurisdiction, Burke was compelled to sue out a writ of attachment. He filed the following affidavit:

"Stephen J. Burke, plaintiff, being first duly sworn, says that the claim sued upon is for money paid by him for the use and benefit of the defendant, and upon contract, and that said claim is just.

"Affiant believes that he ought to recover the sum of $105, together with interest from the 17th day of August, 1895; and that the defendant is a non-resident of this state."

Does his affidavit contain the necessary statements required by the statute? If not the proceedings under it are void. The first proposition of the syllabus in *Endel* v. *Leibrock*, 33 O. S., 254, is as follows:

"A writ of attachment under the code without the requisite affidavit is void."

In *Dunleavy* v. *Schwartz*, 17 O. S., 640, the Supreme Court say:

"An affidavit stating the plaintiff's belief that the defendant has absconded, with intent to defraud his creditors, without setting forth any acts justifying such belief, does not lay a sufficient ground for issuing a writ of attachment."

This decision was followed by the Supreme Court in 23 O. S., 192.

Proceedings in attachment are purely statutory, and the provisions of the statutes must be strictly complied with, in order to give jurisdiction.

In this case, in order to give jurisdiction, it was necessary that the affidavit should contain, under Section 5522, Revised Statutes, statements showing:

(1). Nature of plaintiff's claim.

(2). That it is just.

(3). The amount which affiant believes that plaintiff ought to recover, and

(4). That the defendant is a non-resident of this state.

There is no question but what the first three provisions have been complied with. But, is there an allegation that the defendant is a non-resident of the state? And is, "and that the defendant is a non-resident of this state," a statement that he is a non-resident of this state by the affiant? What does the affiant say? Grammatically, the verb next preceding this clause must govern, which is "affiant believes." It can not be connected with the verb "says" in the first part of the affidavit. The sentence in which the verb is used is complete in itself, and there is nothing to show in the composition of the sentence. or the punctuation, that it was intended to cause any subsequent allegation of a fact. If it has any verb, therefore, it must be "believes." Therefore, if it has no verb, it is no statement of a fact, and if it is the verb "believes," it is not a sufficient statement of a fact as required by statute. If we are correct in this view, it follows that the proceedings in attachment were void, and Burke got nothing by it.

Decree accordingly.

ELEMENTS ENTERING INTO THE QUESTION OF NEGLIGENCE.

Circuit Court of Hamilton County.

THE CINCINNATI TRACTION COMPANY v. DORENKEMPER, ADMINISTRATRIX.*

Decided, November, 1907.

Negligence—Questions as to—Where a Butcher Drove upon a Car Track and was Run Down—Charge of Court—Earning Power—Damages—Pleading.

1. Special charges to the jury in an action for damages on account of wrongful death from the running down of a wagon by a street car are erroneous if conditions are omitted therefrom which are necessary to a determination of the question of negligence.
2. The belief of the decedent that he had time to clear the tracks and its reasonableness must be determined, not from the direct testimony alone, but from all the circumstances surrounding him at the time.

Kittredge & Wilby, for plaintiff in error.

Horstman & Horstman, contra.

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

The negligence charged in the petition is—

1st. The car was at the time operated at an excessive and dangerous rate of pseed.

2d. Without any warning or signal having been given of its approach towards said point of intersection.

3d. That prior to the approach of said car to said point of intersection defendant caused the lights and head light of said car to be extinguished so that plaintiff's intestate was unable to see its approach.

The second special instruction requested by the defendant and refused by the court is as follows:

* Reversing *Dorenkemper, Admrx.*, v. *Cincinnati Traction Co.*, 5 O. L. R., 173, which see for the facts of the case.

"If the preponderance of the evidence shows that the motorman gave the signal by ringing this gong, and as soon as the deceased started to cross the track applied his brake and used every effort to stop the car, your verdict should be for the defendant."

This charge ignores the question of speed, lights of the car and the time and place of ringing the gong, hence properly refused.

The eighth special instruction requested by the defendant and refused by the court is as follows:

"If the jury find that the deceased started to go onto the track when the car was so near that it was impossible for the motorman, by the exercise of ordinary care, to stop the car without a collision, the verdict should be for the defendant, provided that the jury find that there was nothing to indicate to the motorman that the deceased intended to attempt to cross until he started to go onto the track."

Under this charge the defendant could be guilty of every act of negligence charged in the petition, and yet be released from liability, provided it was impossible for the motorman to avoid a collision, after he became aware of Dorenkemper's peril. It was properly refused.

The general charge of the court contained the following:

"The court charges you that if you find from all the evidence that the motorman who had charge of the car which struck the plaintiff's intestate could, by the exercise of ordinary care, have seen the plaintiff's intestate after he started upon the tracks, and in time to stop the car before it struck him, and that by reason of the failure to stop the car said plaintiff's intestate was injured, it would be such negligence on the part of the defendant as would enable the plaintiff to recover, provided that the plaintiff's intestate was free from negligence on his part."

This was clearly erroneous and prejudicial because no such negligence is averred in the petition. *Drown* v. *Traction Co.*, 76 O. S., 234.

The general charge contained also the following:

"You have a right in making your estimation of the damages, if you so do, to look to the pecuniary benefit that the wife and children would probably have derived from Henry Dorenkemper, if he had not lost his life, and in assessing such damages you may look to the manner of man that Henry Dorenkemper was, his occupation and ability to earn money and to acquire property."

His occupation was that of a butcher, and the evidence tended to prove that he was a strong healthy man capable of doing the work of a butcher and earning money at such work if well directed; but the decedent had for many years conducted his own butcher shop, and the record is silent as to his thrift of success in such business except as may be inferred from the length of time he continued it. Nor does the evidence show to what extent he provided for his family except by inference only. We think, however, that the evidence was sufficient to justify the charge given, but not the verdict for such a large sum as $6,000.

The general charge contained also the following instruction:

"If you find from the evidence that plaintiff's intestate could have seen the car and would have seen it in the exercise of ordinary care, then you should find for the defendant, unless you find further that he had reason to believe that he had sufficient time to clear the tracks before the car reached the place where he was attempting to cross."

His belief that he had sufficient time to clear the tracks and its reasonableness must be determined, not only from the direct testimony, but from the situation of the parties and the circumstances surrounding. We think, therefore, that the evidence warranted the charge, although the pleading did not, as no issue of contributory negligence was tendered, hence not prejudicial to plaintiff in error *(Traction Co.* v. *Parrish,* 73 O. S., 1). The absence of such issue prevents us also from weighing the evidence in support of it.

Judgment reversed and cause remanded for new trial.

PROVOCATION AS AN ELEMENT OF DAMAGES.

Circuit Court of Hamilton County.

GUS W. MENNINGER v. JAMES TAYLOR.

Decided, December 28, 1907.

Assault and Battery—Civil Action Against the Assailant for Damages—Charge of Court as to Provocation—Error.

In an action for damages for malicious assault, an erroneous charge by the court with reference to provocation constitutes reversible error, notwithstanding the evidence warranted the jury in fixing the damages at the amount named in the verdict.

Cogan & Williams, for plaintiff in error.
Phares, Gusweiler & Rosenberg, contra.

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

In an action for damages for assault and battery, the following instruction is erroneous:

"If you find from the evidence that the conduct of the defendant was not the result of fear of injury to himself, nor such excitement as the circumstances of the case might arouse in the mind of a man of ordinary good temper, but was the result of provocation or sudden anger brought into action by the occasion, the jury may go beyond compensation for loss and suffering, and may add any sum you may think reasonable by way of punishment of the defendant and an example to the public."

Provocation may be considered in mitigation of punitive damages, but not as a ground for awarding such damages. *Mahoning Valley Ry. Co.* v. *De Pascale*, 70 O. S., 179.

The condition of sudden anger may have been the result of some unlawful act of the plaintiff, and yet under this charge would warrant exemplary damages.

The evidence, which is all before us, discloses an unprovoked and malicious assault, and the jury under proper instructions could hardly award less damages; but the error seems to be, under the ruling of our Supreme Court, reversible. *Globe Insurance Co.* v. *Sherlock*, 25 O. S., 50.

Judgment reversed and cause remanded for a new trial.

ERRORS IN TRIAL FOR PERSONAL INJURIES.

Circuit Court of Hamilton County.

THE CINCINNATI GAS & ELECTRIC CO. v. MARY COFFELDER.

Decided, July, 1908.

Misconduct of Counsel—Ground for a New Trial, When—Charge of Court—Negligence—Preponderance of the Evidence—Reading Pleadings to Jury—Motion for New Trial After Term.

1. It is not error for the trial judge to read the pleadings to the jury before explaining them, or to permit the jury to take the pleadings to the jury room.
2. It is error in the charge of the court to so define the weight of the evidence as to exclude documentary evidence, or to define the preponderance of the evidence as other than that evidence which determines the conclusions which must be reached.
3. A reviewing court will not undertake to proportion the blame for improper argument provoked by counsel for the other side, but where objection is made to such argument it is a duty which is not merely discretionary on the part of the trial court to interpose and admonish the offender and instruct the jury to disregard what has been said, and failure so to do is ground for a new trial.
4. It is not error to overrule a motion for a new trial filed after term, based on newly-discovered evidence which could not with reasonable diligence have been discovered before, where no witness is called to prove due diligence in ascertaining the facts.

John W. Warrington and *Murray Seasongood*, for plaintiff in error.

A. W. Goldsmith and *Charles M. Cist*, contra.

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

The petition filed by the plaintiff, Mary Coffelder, in the United States Court was substantially the same as the one upon which the case was tried in the common pleas court, and as it contained no admission not found in the latter, there was an error in excluding it as evidence.

The charge of the court that the defendant "did dig the trench and is responsible for whatever result naturally grew

out of that" is not equivalent to saying that the defendant is an insurer against accident. If the defendant took all necessary precautions to warn and protect the public, especially at night, and an accident nevertheless occurred through the negligence of the person injured, it was the natural result, not of digging the trench, but of such negligence as an abstract proposition of law, and without further explanation its tendency would be to mislead the jury; but in subsequent portions of the charge the court specified the particular results for which, under the pleadings, the defendant would be responsible, and it was not therefore prejudicial.

It was not error to read the pleadings before explaining them to the jury, and we are aware of no rule in this state preventing the jury from taking them to the jury room.

The court erred in charging the jury that "by preponderance of the evidence is meant * * * the evidence that you believe and that influences your mind in arriving at the conclusion you made."

They may have been influenced by evidence that did not outweigh or overbalance the evidence that required a different conclusion. It is not a question of what may but what amount of evidence must influence their mind.

In the next paragraph of the charge "the weight of the evidence" is so defined as to exclude from consideration all the documentary evidence received, which was also error.

The first and third specifications of improper argument to the jury by counsel for plaintiff show that it was provoked by and made in answer to the argument of counsel for defendant, and the court will not undertake to apportion the blame in order to inflict a penalty upon the client. The second specification is as follows:

"Talking about railroads again, I have seen that demonstrated more than once, that one man wants to relieve himself of responsibility of want of discharge of duty. If there is a verdict in this case you will find Mr. Kenan wanting to know who is responsible for this dereliction of duty. He will send for Mr. Miller and Mr. Franklin and Mr. Kruse and Mr. Reising, and they will try to put the blame on this dead man.

"MR. SEASONGOOD: I want to object to this; just because Mr. Goldsmith's railroads do that is no reason why he should accuse us of it.

"MR. GOLDSMITH: I object to that.

"MR. SEASONGOOD: Will Your Honor instruct the jury to disregard that?

"MR. GOLDSMITH: Very good. It may go out. * * *

"MR. GOLDSMITH: I have a right to charge that is natural that these men who are in interest—

"MR. SEASONGOOD: That is entirely incompetent to argue that.

"MR. GOLDSMITH: I say Mr. Franklin and Mr. Kruse and Mr. Reising are interested in this controversy as employes and subordinates in this gas company, just as much as this plaintiff and her sister and father."

There is no pretense that these remarks were supported by any evidence in the case, but were confessedly based upon the experience of counsel in like cases against railroad corporations. To thus assail the credibility and integrity of witnesses, whose only offense is their employment with a corporation, is not only highly reprehensible, but a gross abuse of the privilege of counsel, and if permitted to stand unrebuked will tend to inflame existing prejudice against corporations and their employes and to defeat the general administration of justice as well as work an injury to the defendant in this case.

If counsel had been content to rest when, upon objection by counsel for defendant, he said "It may go out," we might assume that the withdrawal was made in the proper spirit and that no prejudice resulted; but when he immediately added, "I have a right to charge that is natural that these men who are in interest," it was in effect not only a reiteration of his remarks, but an assertion of the right to make them and an aggravation of the offense. The objection of counsel for defendant and the failure of the court to rule on the same affirmatively appear in the record, thereby bringing the case within the rule stated in the case of *Hayes* v. *Smith*, 62 O. S., 161, and *State* v. *Young*, 77 O. S., 529. There was no prejudicial error in defining negligence or proximate cause, nor in charging the jury to

fully compensate plaintiff for injuries caused by negligence of defendant.

The petition for a new trial filed after term is based on newly-discovered evidence which the defendant could not with reasonable diligence have discovered before, misconduct and fraud of plaintiff, and false testimony. The misconduct and fraud consist in alleged false testimony of plaintiff, her family and physician, which is of no avail until the guilty party has been convicted. Section 5354, Revised Statutes, sub. 10.

It does not appear that the defendant could not with reasonable diligence have discovered the evidence bearing upon the question of plaintiff's earning capacity before and after the accident, and as to the cause of a permanent lowering of her shoulder; while it is true that no amount of diligence or foresight would suggest that a brother would voluntarily furnish a clue to facts tending to prove the falsity of his sister's testimony, yet there were many natural and easy sources of information leading up to proof of her earning capacity and the extent of her injury to which the defendant did not resort.

No employer, officer or attorney of the defendant was called as a witness to prove due diligence in ascertaining the facts. Hence there was no error in refusing a new trial upon petition filed after term; but the judgment will be reversed for error in the charge and failure of the court to rule upon objection to improper remarks of counsel to the jury, and the cause remanded for a new trial.

FACTS PREFERABLE TO EXPERT TESTIMONY.

Circuit Court of Guernsey County.

THE WILLS CREEK COAL COMPANY v. MARY JONES, ADMINISTRATRIX.

Decided, November Term, 1907.

Negligence—Evidence as to Facts Existing at Time of the Accident—Should be Given to the Jury in Preference to Expert Testimony, When.

Where it is practicable to place plainly before the jury the facts and circumstances surrounding a claimed defect in the roof of a coal mine, it is error to permit an expert to testify, "that if the fire boss had gone through the entry before the men went to work and used ordinary care in the inspection of the roof, he would have discovered the fact that the roof was dangerous and liable to fall."

Robert S. Scott, for plaintiff in error.

James Joyce, for defendant in error.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to Guernsey Common Pleas Court.

John R. Jones, the husband of the testatrix, defendant in error, was killed in the mine of plaintiff in error by the falling of slate from the roof in an entry. Two grounds of error are urged:

First. The verdict is against the weight of the evidence as to the question whether or not the company was guilty of negligence and as to whether or not plaintiff's intestate was guilty of contributory negligence.

Second. Improper evidence was admitted by the court.

As to the first ground it is sufficient to say that we have examined the evidence carefully and we do not think the claim of plaintiff in error is correct, and we would not reverse the judgment upon the ground of the insufficiency of the evidence.

The second proposition is attended with more difficulty. One of the important questions in the case was whether or not Latchney, the fire boss, whose duty it was to examine the

roof of the entry, to see if it was in a reasonably safe condition, had properly performed that duty. Latchney had testified he had examined the roof on the morning of the day Jones was killed.

A witness by the name of Kackley was called, who testified that he had been a miner for many years and showed that he was qualified to give an opinion as to the duties of a mine boss, and thereupon this question was asked him:

"Q. Now, I believe you told before what the duties of a mine boss were. A. Yes, sir.

"Q. In that mine, Mr. Kackley, by your experience as a coal miner, if the fire boss had gone through Entry 53 that morning and had used ordinary care in the examination and investigation of that roof at the place where Jones was killed, tell the jury whether or not it would have disclosed the fact that the roof at that time and at that point was dangerous and liable to fall?"

To this question there was an objection and exception and the witness was permitted to answer that it would.

And to another witness of the same character the question was asked:

"Now, John, by your experience as a coal miner, if the fire boss of that mine had gone through the Entry 53 that morning, and had used ordinary care in the examination and investigation in the roof in that entry at the place where Jones was killed, would it have disclosed the fact that the roof was dangerous and liable to fall?"

To this there was also an objection and exception and the witness was permitted to answer, "Yes, sir."

There was no difficulty in showing the condition of the roof. Indeed it was shown that there was a crack in it; that siftings of slate, rock and other materials were on the floor of the entry, immediately below where the crack was and other matters indicating that the roof was faulty and imperfect. That being so, whether or not it was dangerous and liable to fall and whether or not the fire boss by proper inspection would or should have discovered that fact, seems to us was entirely a question for the

jury to determine and not the witness. In fact it was the important question in the case. The act of the fire boss (Latchney) not discovering the dangerous condition of the roof and its liability to fall, if he made the inspection as he claimed he did, was the real ground of negligence on the part of the company, relied upon.

As we have already said, there was nothing particularly hidden or deceptive about the roof, and the means of proper examination upon the part of the fire boss had been fully explained to the jury.

In the case of *Railroad Company* v. *Schultz,* 43 O. S., 282, 283, in the opinion by Welch, C. J., in which the question of expert testimony is exhaustively considered, it is said:

"In such cases the witnesses are required, so far as may be, to state the primary facts which support their opinions.

"Where it is practicable to place palpably before the jury the facts supporting their opinions, the witnesses should be restricted in their testimony to such facts, and the jurors left to form their opinions from these facts, unaided by the mere opinions of the witnesses.

"As the warrant for the admission of the opinions of witnesses as evidence is found in some exception to the general and very salutary rule which requires that only facts be stated to the jury, it is the duty of a reviewing court to see that the admission of mere opinions as evidence was within some one of the established exceptions to such general rule; and where it does not appear upon the whole record but that the jury was equally capable with the witnesses of forming an opinion from the facts stated, it is error to admit in evidence the opinions of witnesses."

In Rogers on Expert Testimony, pages 15 and 16, it is laid down:

"Whether this or that act amounts to negligence is ordinarily a matter of judgment and common experience rather than of science or skill, and the opinions of experts are inadmissible in evidence concerning the same. An expert may be asked whether certain things were properly or skillfully done, but not whether a person was guilty of want of ordinary care or of negligence in doing of such things. The witness can not be asked whether a

person exercised due care; nor whether a person was a careful driver; nor 'is that the ordinary, careful, prudent, and safe manner (of performing the service)'; nor 'what would be the chances for a stage coach to tip over, being driven by an ordinarily careful, prudent driver'; nor whether the practice of a certain railroad in blowing its whistle was 'reasonable or unreasonable,' 'prudent' or 'extraordinary,' or 'an unreasonable manner of proceeding on the part of the engineer'; nor whether leaving a horse unhitched in a mill yard 'was the act of a careful and prudent man'; nor whether placing wet staves on the outside of an arch with fire in it 'was a safe and prudent way to dry them'; nor whether the plaintiff could have been injured in oiling a certain part of the machinery of a steam engine if he had not been careless; nor whether the means of egress from a building were all that due care required the defendant to provide; nor whether certain goods 'were as well handled and cared for as goods usually are when attached.'

"And so it has been held that while a physician might state what, in his opinion, was the cause of a certain hemorrhage, yet it was not competent for him to say whether it was to be attributed to the party's negligence. It has been held, too, that the opinion of a witness was inadmissible that it was not prudent to use a certain hoisting apparatus with less than three men, on a stone of two tons' heft. In the case last cited the court says: 'When this machine was fully described as to its structure, strength, methods of use, number of men required, danger in its use by less number, its safety and adequacy when properly used, the inference as to the prudence of undertaking to operate it on a stone of the size in question with only two men, was one which required no particular knowledge and skill, but rested in the sound judgment of the jurors, and one which they could as well decide for themselves.'

"In a case where it was claimed that a railroad company had been guilty of negligence in not removing certain brasses from the boxes of car wheels, it was held improper to ask an expert 'when ought they to be removed?' The court says: 'We think, however, that the proposed fact is not competent to be established by the opinion of a witness offered as an expert. The effects of allowing the brasses to become worn and thin and broken should be shown. Then the jury would be competent to determine whether it was negligence to fail to remove them before such condition existed. To allow a witness to testify as an expert to such fact would be to substitute the witness for the jury.'"

It is said that if this evidence was improperly admitted, yet it was not prejudicial. We do not think so. It had a strong bearing upon the case in many respects, especially one. One witness testified he informed the fire boss, Latchney, several days before it fell that the roof was in bad condition. Latchney testified he never told him so. He further testified he had no knowledge of the condition of the roof before it fell, although he examined it that morning of the accident. The evidence therefore tended to contradict the fire boss that he examined the roof, as was his duty to do each morning before the men went to work. In addition, it would have a telling effect upon the jury as to the knowledge of the fire boss.

Evidence of the same character was also admitted for the purpose of showing that Jones was not guilty of contributory negligence. So-called experts were asked "if a miner exercising ordinary care in going through the entry attending to his own work would have seen the defect in the roof."

What we have said upon the other branch of the evidence admitted applies with equal force to this evidence.

The judgment of the common pleas court is reversed for the admission of incompetent evidence and the case remanded for a new trial.

ENFORCEMENT OF UNION MUTUAL FIRE INSURANCE COMPANY'S ASSESSMENTS.

Circuit Court of Hamilton County.

JAMES B. SWING, AS TRUSTEE, v. CLINTON CRANE AND J. O. COLE.

Decided, July 18, 1908.

Fire Insurance—Assessments against Policy-Holders in the Union Mutual—Two Assessments for Same Liability—Application of the Statute of Limitations.

1. The decree of the Supreme Court, in the action for ouster of the Union Mutual Fire Insurance Co., does not bar any stockholder or member from questioning his liability for an assessment or from setting up any other defense.

2. Moreover the six years' statute of limitations runs against an assessment levied on a policy-holder of this company, and the running of the statute is not barred by the approval by the Supreme Court of a second assessment against the same party, when it covers the same liability as the first assessment with probable costs of collection added.

P. A. Reece, for plaintiff in error.
Stephens, Lincoln & Stephens, contra.

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

From an examination of the evidence in the above case, together with the facts admitted by the pleadings, we are of the opinion that the judgment of the court below should be affirmed. The decree entered by the Supreme Court in the suit for ouster of the Union Mutual Fire Insurance Company of Cincinnati would not exclude any stockholder or member from questioning his liability for an assessment or as to any other defense he might have. *Swing* v. *Humberg*, 101 N. W., 938.

It clearly appears that the defendants have no assessment notes; that their policies were of the standard form; that no special regulations were written or printed upon or attached in any way to said policies, and that when the policies were issued to them they never agreed to accept any assessment insurance. Besides, the company never reorganized under the statutes of Ohio relating to mutual fire insurance companies, as amended by act approved April 14, 1888, to take effect July 1, 1888. We think, therefore, that the plaintiff is not entitled to recover as against the defendants.

Second. In addition, we are further of the opinion, that if the plaintiff in error has a claim against defendants in error that this claim is now barred by the statute of limitations. The defendants held a short term policy and cash was paid therefor. The trustee's first report was made in 1891, and the assessment ordered the same year. In 1896 he filed a supplemental report setting out the liability of C. Crane & Company, and was ordered to levy an assessment thereon. In 1897 he again filed a report showing that he had assessed Crane & Company on their two policies for $558.87, and this assessment was approved. Noth-

ing, however, was done under this assessment as far as C. Crane & Company were concerned. On June 11, 1901, another assessment was approved by the Supreme Court against the policy holders, including C. Crane & Company, and from which it is evident that it is an assessment including probable costs of collection for the same liability assessed and approved in 1897. This being so, it would seem that the action on this last assessment is barred by reason of the lapse of six years from and after the making and approval of the prior assessment in 1897. The last assessment was not on account of a further liability arising out of the fact that the prior assessment was not sufficient in amount to cover the liabilities to which the defendants in error were bound to contribute, but rather it seems that the prior assessment was a claim against Crane & Company of their entire amount of liability. It was the duty, therefore, of the trustee to have at once asserted it, as the subsequent assessment could not revive the former one and stop the running of the statute. *Swing, Trustee,* v. *Ohio Cultivator Co.*, 9 C. C.—N. S., 45.

Judgment affirmed.

STREET IMPROVEMENT ASSESSMENTS.

Circuit Court of Lucas County.

WILLIAM H. PRENTICE ET AL v. CITY OF TOLEDO.

Decided, March 21, 1908.

Streets—Assessments for Improvement of—Character of the Property may be Considered—Burden of Proof—Discretion in the Matter of Levying—Courts will not Interfere Unless Grossly Excessive—Section 1536-213.

1. Street paving assessments will not be enjoined as excessive and inequitable unless so established by a preponderance of proof.
2. The potential as well as the present use of property is to be taken into account in making assessments for public improvements.
3. An assessment for a street improvement of $943.59 upon property estimated after the improvement by complaining owner's witness at $2,800, although slightly above 33 1-3 per cent. thereof, will not

be interfered with as being in contravention of Section 53 of the municipal code of 1902 (R. S., 1536-213), where there is other evidence that the assessment is less than 33 1-3 per cent. of the value of the property as enhanced by the improvement.

F. H. Geer, for plaintiffs, cited: Walsh v. Sims, 65 Ohio St., 211; Norwood v. Baker, 172 U. S., 269; State v. Newark, 37 N. J. Law, 415; Hammett v. Philadelphia, 65 Pa. St., 146; Tide-Water Co. v. Coster, 18 N. J. Eq., 518; Dillon, Mun. Corp., Section 761; Griswold v. Pelton, 34 Ohio St., 482; Chamberlain v. Cleveland, 34 Ohio St., 551; Schrader v. Overman, 61 Ohio St., 1; Walsh v. Barron, 61 Ohio St., 15; C., L. & N. Ry v. Cincinnati, 62 Ohio St., 465; Davidson v. New Orleans, 96 U. S., 97; C., N. O. & T. P. Ry. v. Kentucky, 115 U. S., 321; Dayton v. Bauman, 66 Ohio St., 379; Ayers v. Toledo, 6 C. C.—N. S., 57; Breuer v. Cincinnati, 52 Bull., 281; Cincinnati v. James, 55 Ohio St., 180; Pike v. Cummings, 36 Ohio St., 213; Groesbeck v. Cincinnati, 51 Ohio St., 365; Blair v. Cary, 2 C. C.—N. S., 25; Birdseye v. Clyde, 61 Ohio St., 27; Lewis v. Symmes, 61 Ohio St., 471; Price v. Toledo, 4 C. C.—N. S., 57; Cincinnati v. Shoemaker, 10 C. C.—N. S., 38; Stafford v. Hamston, 2 Brod. & Bing., 691.

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

Appeal from Lucas Common Pleas Court.

This is a suit brought here by appeal to enjoin paying assessments on Central avenue, between Collingwood avenue and Cherry street. A number of plaintiffs, property owners, have united in bringing the suit, claiming that the assessments upon their several properties are excessive and inequitable, the assessments having been made according to benefits.

Of course the burden rests upon the parties attacking the assessments made in behalf of the municipality; that burden must be sustained by a preponderance of the evidence; and, as previously held by this court and probably throughly established by other adjudications, it is not sufficient in order to justify the stopping of the collections that this court should conclude that if we were the assessing tribunal we would have adopted some-

what different measures, or would have made lighter burdens upon the properties involved. We are not disposed to depart from the conclusions arrived at in the case of *Price* v. *Toledo*, 4 C. C.—N. S., 57, in which, on page 63, if my memory serves me, Judge Hull used some quite strong language in defining the province of the court as to interference with the discretion of the assessing committee, holding, in substance, that in order to justify an interference by the courts, the assessments must be so grossly excessive as to indicate fraud. It may not be necessary to go to that length in the present case, and probably is not. It is sufficient to say that the plaintiffs have not maintained their claim by a preponderance of the evidence, which is required to justify the granting of an injunction, that the assessing body have so assessed the properties as to abuse its discretion; and without some abuse of that discretion which is given by the law, we are not justified in interfering.

If we look at mere numbers of witnesses, which may be taken into account in connection with the character of their testimony, and the other circumstances of the case, we find that a decided majority of persons qualified to speak, testified in behalf of the defendants, and in their estimates of the benefits to the properties involved, nearly, if not quite all of the defendant's witnesses testified that the benefits are greater than as found by the assessing board. The witnesses called for the plaintiffs and also for the defendants are persons who have had more or less experience in buying and selling real estate; it has been their business for years. It is apparent that the notions of men who are frequently called upon to determine the market values of real estate greatly vary among themselves. There is, to illustrate, in the present case, one property in which the estimates of benefit, by reason of this pavement, are varied all the way from $100 to $1,500; and this by the testimony of men more or less qualified to speak, by reason of their experience as to the market values of properties. It is not surprising, when we see so wide a range of opinions in a matter which can not be fixed with absolute certainty by any mathematical process, that the board of public officers should arrive at estimates of value which might not

entirely concur with those which the judges upon the bench might be disposed to adopt if the question came to them in the first instance.

Some criticism was made in cross-examination, or by way of suggestion to the court by counsel for the plaintiffs, of the evidence of several of the witnesses for the defense, upon the ground that they had not inspected the interiors of houses upon property assessed and so become thoroughly familiar with the values of properties immediately before and immediately after the paving improvement. We think, however, that too much emphasis has been placed by counsel for the plaintiff upon this feature of the case. It is not of so much consequence what use has been made of property by improvements that have been placed upon it, as the potential value of the lot as affected by the improvement for which the assessment is made. In the case of *McMaken* v. *Hayes*, 10 C. C.—N. S., 38, in the opinion it is said, page 44:

"We think that it may justly be said that it is not altogether the present use that is made of the property but its potential use that fixes the market value of property and that such use is to be taken into account by the persons assessing the benefits."

But even if the use that has been already made of the property and improvements that have been placed upon it are to receive consideration by the persons assessing the benefits in determining the extent to which the property is enhanced in value by the improvement, we do not think that the fact that some of the witnesses have not visited the interiors of the houses, should play any very large part in determining the extent to which the property has been enhanced in market value by the pavement.

We have had more trouble with the assessment upon a piece of property owned by the plaintiff, Prentice, having a frontage of 150 feet along the pavement, than with any of the other properties assessed and involved in this litigation. There is an assessment upon this property of $943.59, and I think I may say for the other members of the court, as I do for myself, that if we were making this assessment, it is altogether likely we should not have placed so heavy a burden upon this particular property. Among the numerous witnesses who have testified,

however, there are three who have made the benefits to this property larger than the amount which has been imposed. Mr. Dale testified that it is benefited to the extent of $1,000; Mr. Jones concurs in this estimate, and the witness Emrich places the benefit as high as $1,500. It is claimed, however, with regard to this particular piece of property, and it the only one in the case as to which this question has arisen, that the assessment upon it is more than 33 1-3 per cent. of the value of the property as improved by the pavement and that such an assessment is in contravention of the statute (Sec. 53 of the municipal code of 1902; Rev. Stat., 2373; 1536-213). But here again is a conflict in the evidence. Dale, Wilson, Emrich and Jones all estimate the value of the property as improved at more than three times the amount of the assessment; while one of the defendant's witnesses, Mr. Fuller, estimates the value of the property as improved at $2,800, one-third of which would be very slightly below the amount of the assessment which has been placed upon the property.

We are not disposed to say that there has been such an abuse of discretion in assessing this property as would justify the interference of the court. We have concluded to render the same judgment in regard to it as to the rest. We refuse the injunction as to all of the assessments. The petition of the plaintiffs will be dismissed at their costs.

RETAKING GOODS SOLD ON INSTALLMENTS.

Circuit Court of Hamilton County.

JACOB TENNENBAUM v. STATE OF OHIO.

Decided, November, 1907.

Criminal Law—Defective Affidavit in Prosecution for Retaking Goods Sold on Installments—Conditional Sales—Sections 4155-2, 4155-3 *and* 4155-4.

In the absence of an allegation that the transaction was a conditional sale as defined by Section 1 of Revised Statutes 4155-2, a demurrer will lie to an affidavit charging the seller with retaking goods which had been sold on installments and on which the amount paid exceeded twenty-five per cent. of the contract price for said goods.

Thomas H. Darby and *Lem S. Miller,* for plaintiff in error.
Benton S. Oppenheimer, for the state.

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

Jacob Tennenbaum was tried, convicted and sentenced in the police court of the city of Cincinnati, on a warrant and affidavit containing the following charge:

"That one Jacob Tennenbaum, on or about the 2d day of April, 1907, at the city and county aforesaid, did unlawfully and knowingly take possession by writ of replevin of certain furniture and household goods, theretofore, to-wit, on the 26th day of August, 1905, sold by said Jacob Tennenbaum to said affiant to be paid for in installments, and then and there in the possession of said affiant, without then and there tendering or refunding to said affiant any part of the money paid by said affiant to said Jacob Tennenbaum, the amount so paid having exceeded twenty-five per centum of the contract price of said property."

We are of the opinion that no offense is charged in this affidavit under our statute. There is no allegation in it that it was a conditional sale, as defined by Section 4155-2, Section 1, Revised Statutes. A conditional sale as therein defined is one where the title remains in the vendor until the purchase price is paid.

Section 4155-3, Revised Statutes, provides that property so sold, that is conditionally, shall not be retaken except upon the repayment of a certain amount of the purchase price; and Section 4155-4, Revised Statutes, provides that any one violating this provision shall upon conviction be deemed guilty of a misdemeanor.

There being no offense charged, the demurrer of the defendant to the affidavit should have been sustained. The offense defined by the statute must, in substance at least, be charged in the affidavit, and there is no charge here.

Judgment reversed.

COMPENSATION FOR PUBLIC OFFICERS IN ADDITION TO THEIR SALARIES.

Circuit Court of Carroll County.

THE STATE OF OHIO, FOR THE USE OF CARROLL COUNTY, BY D. O. RUTAN ET AL, V. GEORGE S. TINLIN ET AL.

Decided, November Term, 1907.

Officer and Officer—Compensation to County Auditor—For Services in Furnishing Blanks to Assessors—Commissioners Without Authority to Allow—Sections 1029, 2749, 1069 *et seq*, 1077, 1078, 1528 *and* 2729.

1. Public officers are not entitled to compensation in addition to their salary for services required of them by statute, unless the statute provides therefor in express terms; and as Section 1029, Revised Statutes, does not expressly so provide, county auditors are not entitled to additional compensation for services in furnishing blanks to assessors.
2. If the provisions of this section could be construed to mean that auditors are entitled to extra compensation for their services in furnishing such blanks, as no rate therefore is named therein, or in the sections that specify the rates by which all services of such auditors shall be estimated, Sections 1077 and 1078 forbid the allowance by the commissioners of such compensation and render the same unlawful.

Brief of Fimple & Eckley, on behalf of defendants:

There are just three questions for determination in this case—one of fact, and two of law, viz.:

1. Did Mr. Tinlin in securing the allowance of the claim involved make any misrepresentation or practice any deception or fraud on the commissioners?

2. Do the provisions of Section 1029 of the Revised Statutes furnish the basis for any legal claim for compensation to the auditor?

3. What effect or application, if any, has the statute of limitations in this case?

First. As to the question of fact, it is only necessary to say that the record is not entirely barren of any evidence whatever

tending to show any misconduct on the part of Mr. Tinlin, but on the contrary the evidence does show and the lower court so found, that this claim was allowed in the open, on its merits, after full consideration and discussion by the commissioners in the presence of their legal adviser, the prosecuting attorney.

Second. In determining the question as to whether there is any statutory provision upon which to base a legal claim for compensation for services rendered by the auditor in furnishing blanks to the assessors, we desire to call attention to Sections 1029, 1528 and 2749 of the Revised Statutes of Ohio.

Our contention is, that it was the purpose and province of Section 1029 to provide for the allowance of reasonable compensation to the auditor for his services rendered in furnishing the several assessors with necessary blanks, and that it was the purpose and province of Section 1528 to provide for the payment of the cost of the blanks themselves.

This, we submit, is the plain ordinary meaning of the language employed in the respective sections. Eliminating from Section 1029 the clause which is descriptive of the blanks, the section reads:

"The auditor shall furnish the several assessors all blanks, and all reasonable charges therefor shall be allowed by the county commissioners and paid out of the county treasury."

The word "therefor," as used in this section is an adverb, and means "*for this, that or it,*" therefore inserting the meaning of the word in lieu of the word itself, and you have the substance of the provision as follows: "All reasonable charges," for this, that or it, viz., for the auditor furnishing the several assessors all blanks, "shall be allowed by the county commissioners, and paid for out of the county treasury." In other words, it is equivalent to saying the auditor shall furnish the several assessors all necessary blanks, and for *this* (furnishing) he shall be allowed all reasonable charges.

It is plain that the charges authorized to be allowed by this section are not for *material*, but for *doing* something, and that something is the services rendered by the auditor in furnishing to the several assessors the necessary blanks.

Similar analysis of the language used in Section 1528 makes it equally plain that this section provides for the payment of the blanks themselves. Eliminating from this section the clause descriptive of the blanks, it provides as follows: "The county auditor shall furnish to all assessors all blanks, which shall be paid for out of the county treasury." Grammatically, there can be no doubt that the word "*blanks*" is the antecedent of the word "which," and it necessarily follows that it is the *blanks* for which payment is provided by this section.

We therefore submit that a plain reading of the language used in these two sections, makes it clear that the one was intended to authorize a reasonable compensation to the auditor for his services rendered in furnishing blanks to the several assessors, and that the other was intended to authorize and provide for the payment of the blanks so furnished; but if there is any doubt as to this being the correct construction of the respective sections, we think a careful consideration of the origin of the provisions as now contained in Sections 1029, 1528 and 2749, will wholly remove such doubt.

Section 1029 in exactly its present form is derived from Section 18 of the act of *April 18, 1870* (67 O. L., page 103). *Now bearing in mind the date of the enactment of this provision,* let us see what the status of the law, in so far as it is now embraced in Sections 1528 and 2749, was at the time the provision now contained in Section 1029 was enacted. Section 1528 is derived from three acts as follows: Act of February 5, 1859 (S. & C., 87), requiring the auditor to furnish the assessors blanks for securing statistics relative to sheep killed or injured by dogs, etc.; act of March 26, 1861 (O. L., 58, p. 40), requiring the auditor to furnish assessors blanks for securing statistics relative to the deaf, dumb, blind, insane, or idiotic persons, etc.; and the act of March 31, 1866 (S. & S., 21), amendatory of the last mentioned act, and it is important to note that none of these acts contained any express provision authorizing payment of the cost of the blanks out of the county treasury, although it certainly was clearly implied, as it could not have been the legislative intent, that the auditor should himself pay out of his

own pocket the cost of the blanks; hence the codifying commission at the time of the preparation and adoption of the Revised Statutes, in 1879, inserted the express provision to that effect which now constitutes the last clause of Section 1528, as follows, "which shall be paid for out of the county treasury." Further, Section 2749 is derived from Section 56 of the act of April 5, 1859 (O. L., 56, page 200), which required county auditors before the 15th of April, annually, *to make out* the blank forms and instructions for township assessors and forward them to the township clerks; and the amendatory act of April 13, 1865 (O. L., 62, page 144), which substantially conforms to the provision now contained in the last paragraph of Section 2749, but there was no provision that the state auditor should furnish the county auditor a sample blank form for the listing of property as now provided in said section, until the amendment by the act of March 13, 1891 (88 O. L., page 96).

It will thus be seen that from 1859 to 1866 there were various laws enacted requiring county auditors to furnish township assessors with various forms of blanks necessary, not only to the listing of property for taxation, but for the gathering of various kinds of statistics. And the duty was enjoined upon the auditors of instructing the several assessors as to the manner of using the blanks so furnished. And while in none of the acts was there any express provision that the cost of the blanks themselves should be paid out of the county treasury, as before stated, it certainly was fairly implied, so that when the Legislature in 1870 enacted the provision which now constitutes Section 1029, it certainly was not the legislative intendment to thereby provide for the payment of the blanks, but was intended to provide reasonable compensation to the auditor for his services in furnishing the various blanks required of him. And this must have been the view and construction adopted by the codifying commission in 1879, for after the commission had embodied in the Revised Statutes Section 1029 and came to a consideration of the provisions of law, which now constitute Section 1528, they expressly inserted that which was plainly therefore implied, viz., a provision that the blanks should be paid for out of the county

treasury. *This we submit ought to be absolutely conclusive of the correctness of our contention as to the construction to be placed upon these two respective sections.*

It was the business of the codifying commission to bring together all statutes relating to the same matter, to reconcile contradictions, and to omit all redundant and superfluous provisions. And it is wholly unreasonable to believe that these two sections would have been adopted in their present form, unless the construction herein contended for was the true construction placed upon the respective sections by the codifying commission.

Aside from the foregoing considerations we respectively submit that the Circuit Court of Delaware County, in the case of *The State* v. *Lewis* (unreported), decided July 2, 1903, a transcript of which case is before this court, expressly held that the provisions contained in Section 1029 are sufficient to form a basis for a legal claim by the auditor for compensation for services rendered in furnishing the several assessors blanks. That was an action instituted by the prosecuting attorney against Lewis, as auditor, to recover back certain moneys which had been paid to him as auditor. The petition in that case (see 40 and 41 causes of action) expressly states that the sums therein claimed was paid to Lewis, as auditor, out of the county treasury, "as *compensation* for alleged *services* for preparing and supplying the assessors with blanks under Section 1029 of the Revised Statutes." And the answer of Lewis (see third defense) expressly states, "that each and every of said several amounts so received by said Lyman P. Lewis, upon the accounts presented to and allowed by the commissioners and so by the commissioners paid said Lyman P. Lewis, were for *lawful services* by the said Lyman P. Lewis theretofore performed as such auditor and for which he was entitled to charge and receive the several amounts paid him."

The agreed statement of facts (see last paragraph) is as follows:

"It is further agreed that as to the causes of action 40 to 41, both included, that said Lewis, as auditor of Delaware county, received the amount shown in said causes of action at the time

therein stated; that said amounts were paid to said Lewis for preparing and supplying the assessors of Delaware county with necessary blanks under Section 1029, Revised Statutes; that he presented bills therefor to the county commissioners of Delaware county, who, after due consideration, allowed the same as proper and just compensation to said auditor for the *services* so rendered."

The finding of the circuit court (see journal entry) shows that the court held that the common pleas court erred in overruling the general and special demurrers filed by defendant to each and every cause of action, from the 10th to and including the 41st causes of action and erred in rendering a judgment against the defendant below, "upon causes of action 40 to 41 both inclusive, for the further reason that said judgment is not supported by the law and is contrary to the evidence, as shown by the agreed statement of facts."

It will be noted that both the pleadings and the agreed statement of facts in this case, expressly stated that Lewis' claim was a claim as *compensation*, and was a claim for *services* rendered as provided in Section 1029.

In view of these express statements, how can it possibly be contended that the circuit court did not expressly hold that the provisions of Section 1029 furnished the basis for a legal claim of compensation for services rendered in furnishing assessors blanks as therein provided. The State Bureau of Inspection has so construed it and applied it in every county of this state, from the time the decision was rendered until the present. See defendant's Ex. H, being letter addressed to Auditor Marshall of this county, from the State Bureau, under date of January 21, 1905, wherein it is stated in answer to the auditor's inquiry that:

"Our holding is that the auditor is entitled to a reasonable compensation for furnishing the blanks, etc., to the assessors. Our finding is based upon the decision of the Circuit Court of Delaware County, that being the only decision on the subject that we know of."

See also letter of Attorney-General Ellis to Hon. John A.

Eylar, Prosecuting Attorney Pike County, Ohio, under date of June 9, 1904, wherein he states:

"In reply to your communication of the 6th inst., concerning compensation to county auditors for furnishing blanks, advice and instructing assessors, I beg leave to say it has been held by one of our circuit courts that the auditor is entitled to compensation for preparing and supplying the assessors necessary blanks, as provided in Section 1029, R. S. I am of the opinion that the auditor is not entitled to any compensation under Section 1528, as that section provides particularly for the payment for necessary blanks," etc. (Annual Report of Attorney-General Ellis for 1905, page 181.)

Third. The provisions of Section 1029, therefore, having furnished a legal basis for the claim involved herein, and the same having been regularly presented to, considered and allowed by the county commissioners, we submit that their action is absolutely final, unless the same is impeached for fraud or gross abuse of power, neither of which elements can be found in this case; that the action of the commissioners is final herein, see the following: *Board of County Commissioners of Wood County, et al* v. *Robert Pargillis,* 10 C. C. Rep., 376-386-388; *Ephriam Ridenour et al* v. *The State of Ohio,* 14 C. C. Rep., 393-396-399-400; *Walter Plessner* v. *John L. Pray et al,* 6 N. P., 444-446; *Board of Commissioners of Hamilton County* v. *Noyes,* 35 O. S., 201, paragraph 3, syllabus.

The same doctrine is recognized in the case of *Jones, Auditor,* v. *Commissioners,* 57 O. S., 189-211-213-216. And in the case of *The Printing Company* v. *State,* 68 O. S., 362-367-369-370.

That the statute of limitations has no effect upon or application to this case whatever, we think is made clear by the following: *Fisher's Executor* v. *Moseman et al,* 11 O. S., 42-46; *Taylor et al* v. *Thorne, Administrator,* 29 O. S., 569-573; *Commissioners* v. *Ziegelhofer,* 38 O. S., 523; *Stewart* v. *Logan County,* 2 C. C. Rep., 134-135; *Taylor* v. *Fitch,* 12 O. S., 169; *Chinn* v. *Trustees,* 32 O. S., 236.

We do not believe that the Legislature intended that the auditor could receive no compensation for services, unless they

were of the character that a claim therefor could be made out in detail according to the rates named in sections preceding 1077. And yet Judge Harter in his opinion places a great deal of emphasis upon that and appears to regard the fact that the claim could not be thus made out as precluding any allowance for the services.

In *Jones, Auditor,* v. *Commissioners,* 57 Ohio State, it is said in the opinion:

"That the right to present depends upon whether the claim be one, the rate of which is fixed by statute, and also whether the claim for some amount may be legally paid from the treasury. Both these conditions must concur. But if the rate is not fixed, or if the claim is not legally so payable, no right to present it is given and there is force in the proposition, that if no right to present be given, then no power to allow could be implied, and if no power to allow, then the attempted allowance would be a nullity."

Surely the Supreme Court had in mind claims for services which could be made out in detail, and for which the statutes had provided rates, and this must be the true meaning of the statute and not because no rate is provided, or that it is impossible to make out a claim in detail according to any specified rate, that therefore the claim is illegal and void. If that be true, then there could be no compensation to the auditor for services rendered under Section 4064 for services in transmitting to the commissioners of common schools reports and returns of common schools statistics. The section reads:

"The commissioners of each county shall allow the county auditor, annually, a reasonable compensation for his services under this title, not to exceed $5.00 for each city, village, special, and township school district in his county, to be paid out of the county treasury."

It is just as important to make out a claim under this section in detail according to the rates named in the sections referred to in Section 1077, as it would be under Section 1029, and yet nobody doubts but what an auditor can be lawfully compensated for services under this section.

The sections included in chapter 4, title 8, are not the only sections that provide for compensation to county auditors.

For instance, he is entitled to compensation under Section 1536-91 for keeping the record of the plat commission, under Section 2625, and for services under 3501*a*, the fees being provided in 3502. Again in 4451*a*, fees in ditch cases; making record, etc., in 4506; in county ditch cases, 4507, which provides that:

"All fees under this chapter shall be paid out of the county treasury, as soon as the bill of items thereof is examined and allowed by the commissioners, and the auditor shall issue orders therefor on such allowance; and for all amounts so paid, except to the commissioners, auditor and probate judge, the commissioners shall order the general county funds to be re-imbursed for the money raised for the respective improvements."

There is no rate provided in any of these sections such as is mentioned in 1077; the rates therein referred to are the rates provided for in those sections of that chapter that is provided a rate; and so the Legislature when it enacted 1077 and 1078 and Judge Spear when he used the language quoted herein from *Jones* v. *Commissioners* can not be held to have meant anything else than that Sections 1077 and 1078 were applicable only to those sections in chapter 4 of title 8, which provided a rate of compensation. And it did not mean and could not mean in view of the subsequent sections referred to herein to say that an auditor could not be paid for any services except that for which he could make out a claim in detail according to the rates named in Sections 1069, 1071, 1073, 1074 and 1075, the only sections that precede 1077 which provide a rate. These sections commencing with 1536-91, and including 2625, 3502, 4064, 4451*a*, 4506, 4507 and 4849, all provide for lawful compensation to the auditor, and yet not one of them provides for the rates referred to in Section 1077.

W. L. Handley and *J. C. Oglevee*, for plaintiffs.

Fimple & Eckley, for defendants.

LAUBIE, J.; BURROWS, J., concurs; COOK, J., dissents in a separate opinion.

The case of the State of Ohio, for the use of Carroll County, by D. O. Ruthan et al v. George S. Tinlin et al, is brought here upon appeal and submitted to the court upon the evidence and the arguments of counsel.

The action is brought for the purpose of enjoining payment of a certain sum of money to Mr. Tinlin, auditor of this county. This claim was presented by him to the present commissioners, they allowed it and ordered it paid, and this suit is brought to restrain that payment. The claim was for services in furnishing blanks to the seventeen assessors in the county, while he was such auditor, in the years 1900 to 1905 inclusive. The amount claimed by the auditor was four dollars ($4) each year for each assessor, making a total of four hundred and eight ($408) dollars, which the commissioners allowed, under Section 1029 of the Revised Statutes, which reads as follows:

"The auditor shall furnish the several assessors all blanks, necessary for their use in the discharge of the duties enjoined on them by law, and all reasonable charges therefor shall be allowed by the county commissioners, and paid out of the county treasury."

It is therefore up to us to determine as a matter of law whether or not the auditor was entitled to pay for such services, and whether the commissioners had authority to order its payment. It has long been the duty of county auditors to furnish blanks to assessors for specific or for general purposes, but the forms therefor were and are furnished such auditors by the Auditor of State (Section 2749, Revised Statutes); so that the services performed by the auditor in this instance were simply procuring the printing of the blanks, according to the forms thus furnished, and distributing them to the assessors, as substantially provided in said Section 2749, as well as in said Section 1029.

Said Section 1029 may possibly be construed in more ways than one, and its construction depends upon the meaning to be ascribed to the phrase "all reasonable charges therefor." To what does it refer? What is to be paid for? The principal

definitions of the word "charge," as thus used, are price, cost —the price or cost of an article or thing named, in this instance the blanks. Such auditor is required to furnish all assessors in his county each year while in office all necessary blanks, and the charges—the prices or costs he has paid or agreed to pay for the blanks—are what are to be paid out of the county treasury. Thus defined, the charges—prices or costs—have reference solely to the articles named—the blanks—and could not have reference to his services. While it might possibly be construed to mean payment for either or for both, the clearest interpretation to be put upon it is that it refers solely to the blanks.

However, if this clause of this section can be considered as subject to a double interpretation, there can be no legal basis for the compensation claimed, because public officers of this character are not entitled to extra fees or compensation for services, unless specifically provided for and expressly defined in the statutes. Mere ambiguous phrases, that may be construed in different ways, are not sufficient upon which to base a claim, and to authorize the commissioners to order its payment, especially where a definite salary is given such officer for his general services.

It has been uniformly held by the Supreme Court that, in order to entitle an officer to extra compensation, the statute must be definite in its terms, so as to admit of no double interpretation. That such compensation can not be allowed upon an implication, and while we think the only clear and definite meaning to be ascribed to the words of such clause in said section is the cost of the blanks, the same result must follow if the words will admit of a double interpretation. From the use of such phrase the Legislature may well be considered as having intended the services of the auditor to be covered by his salary. If the Legislature intended that the auditor should be paid for his services in addition to the cost of the blanks, it would undoubtedly have so provided in express terms, as it did in Section 1075 in regard to filing away the tax returns of the assessors, for which they receive 25 cents for each township; and as it did in every other instance where it intended to confer special compensation in addition to such officers' annual salary.

When Mr. Tinlin became auditor, said Section 1029 and Sections 1069 to 1078 inclusive, of Title 8, Chapter 4, Revised Statutes of 1880, under subdivision "County Auditors," were in force and defined the duties, services, compensation and fees of such auditors, and prescribed the rates by which such compensation should be computed for all claims payable out of the county treasury, none of which specify or relate to services in furnishing blanks to assessors. Section 1069, 1070 and 1072, fixed and named a ratable per annum salary for the general services of such auditors, according to population, and Section 1071, 1074 and 1075, an additional compensation for services in special matters therein named. Section 1073 specifies the amount of fees that the auditor may charge and receive in performing for individuals the duties therein specified; and Section 1076 an allowance for clerk-hire.

In none of these sections providing for compensation to auditors for services to be paid out of the county treasury, or otherwise, are the services involved herein referred to in any manner; and even if said Section 1029 could be construed to include payment for services of the auditor, Section 1077 is inconsistent therewith, and absolutely prevents the allowance by the commissioners of any compensation therefor, as follows:

"Section 1077. All claims for services of the county auditors, which are payable from the county treasury, shall be made out in detail according to the rates named in the foregoing sections, and shall be presented to the county commissioners, who, if satisfied that the services have been performed shall allow said bill or claim."

The word "rates," as here used, means of course the compensation to be paid to the auditor for his services, as specified in those sections, including the rates specified in the statutes referred to in said Sections 1071, 1074 and 1075, and the commissioners could not allow the auditor compensation for any other services than those named as to which a rate—amount of compensation—was provided. Neither auditor nor commissioners had any right to create a rate of compensation. It could only be such as was named in the statutes, and if none was named for

services therein required to be performed, none could be allowed. And that is the case here. In none of those sections or statutes are the services in furnishing blanks to assessors named or referred to, or any rate specified therefor, and consequently none can be allowed.

As the provisions of said Section 1077 apply to *all* claims for services, the auditor, therefore, or the commissioners could not fix the money value of his services according to his own estimate of their value, as was done in this case. It must be determined according to the "rates" named in the sections which define his compensation, and none other could be allowed by the commissioners; and none of such rates include, or apply to, the services involved in this case. In addition thereto Section 1078 expressly precludes it and makes it unlawful for an auditor to charge or receive any other or further fees or compensation than such as are named in Sections 1069 to 1076 inclusive.

"Section 1078. The fees and compensation provided for by the foregoing sections shall be in full for all services lawfully required to be done by the auditors of such counties; and it shall be unlawful for any county auditor to charge or receive any other or further fees or compensation, either as clerk of any board, or for any other services rendered by him."

Applying this section to the case in hand, where the compensation is to be paid out of the county treasury, if paid at all, the sections referred to therein as "the foregoing sections," are the same sections referred to in the same words in the preceding Section 1077, to-wit, the sections which define the *rates* by which *all* claims for services of county auditors are to be computed, and none of which rates refer or apply to the claim for services in furnishing blanks to assessors. If there could be any doubt as to this, then no specific compensation could be allowed for such services, as compensation for a specific act can not be allowed unless clearly and definitely specified in the statute. So that if the Legislature intended by the provisions of said Section 1029 to allow compensation to the auditors for their services in furnishing such blanks, it rendered such intent nugatory by the provi-

sions of said subsequent Sections 1077 and 1078—whether intentional or not is immaterial, as the language is plain and explicit.

By the enactment of said Sections 1077 and 1078, no compensation for any other service than those specified in said subdivision of Title 8, Chapter 4, as to which a rate of compensation was provided for, could legally be claimed or allowed unless expressly provided for in some subsequent section or statute. So that if said Section 1029 could be construed to mean that the services of the auditor was what was to be paid for, it would be repugnant to the explicit provisions of such subsequent Sections 1077 and 1078, as no rate is named in said Section 1029.

In *State* v. *Hamilton,* 47 O. S., 69-70, it is declared, in regard to such repugnancies, that "it is one of the settled rules of construction that when, in a statute, there are several clauses which present * * * an irreconcilable conflict, the one last in order of date, or local position, must prevail, whether the conflicting clauses be sections of the same act, or merely provisions of the same section."

The question presented and discussed as to sections subsequent to 1078, providing for payment for services, has nothing to do with this case. If it had, the rule as laid down in *Cincinnati* v. *Connor,* 55 O. S., 82, would probably determine it against the defendants in error.

A number of such subsequent sections are the ones named in Sections 1071, 1074 and 1075, heretofore referred to, and in every one of them a rate is specified for the services therein required, none of which relate to the services involved in this case.

In May, 1902, the Legislature amended said Section 1069 by fixing the rates of the auditor's salary by a percentage on all moneys collected by the county treasurers, and repealed said Sections 1069, 1070 and 1072, but Sections 1071, 1073, 1074, 1075, 1076, 1077 and 1078 were not, and remained in force as before. Such amendment and repeal therefore in no manner affects the question we have here.

Section 1528 of the Revised Statutes has no effect upon the construction to be given to the provisions of said Section 1029; and we can not see how it can help the contention of the defend-

ants. Section 1528 is Title II, in Chapter 2 under the heading "Officers of Civil Townships," subdivision "Assessors"; and provides that "county auditors shall furnish to all assessors all blanks needed by them for the listing of property, gathering and returning statistics, and other official duties, which shall be paid for out of the county treasury"; and in effect is merely a duplicate of Section 1029, as such claim could not be paid until allowed by the county commissioners, and legally they could allow only a reasonable sum.

Further, Section 1029, Sections 1069 to 1078 inclusive, differently numbered, were in force before their re-enactment in 1880; and while other statutes required the auditors to furnish blanks to assessors for certain purposes, said Section 1029 was the only statute on the subject of general scope and that provided for payment until said Section 1528 was enacted in the revision of 1880, and it evidently was not intended to, and it did not expressly, or by implication, modify in any manner the meaning of Section 1029, or the effect of the provisions of said Sections 1077 and 1078 which, for the reasons heretofore assigned, precluded the award of any compensation for furnishing the blanks, even if said Section 1029 could be construed to mean that such auditors should be compensated for their services in furnishing such blanks.

The Legislature at times duplicate statutes, and did in this instance deem it prudent in the revision of 1880, to duplicate in effect the provisions of said Section 1029. It not only duplicated the provisions of Section 1029, but triplicated it as to the auditor's duty in Section 2794, Revised Statutes, as re-enacted in March, 1891.

It is true that this question was settled otherwise by the Circuit Court of Delaware County, in case of *The State, for use, etc.*, v. *Lewis, Auditor, et al*, wherein it was sought to recover back money paid him for services in furnishing blanks to assessors, as in the case at bar; and the courts in that county held in his favor. In other words, that the auditor was entitled to such payment. Thereupon the case was carried to the Supreme Court on error, but was never heard in that court, as the parties disposed of it themselves.

However, the Supreme Court, in a former case between the same parties, *Lewis et al* v. *The State, for use, etc.*, 57 O. S., 189, disposed of in connection with the case of *Jones, Auditor*, v. *Commissioners of Lucas County*, settles the question made here upon principle, and shows clearly that a county auditor is not entitled to any compensation for services in furnishing blanks to assessors under said Section 1029. The court, in that case, denied the right of Auditor Lewis to compensation for any of nine different specific acts performed by him as required by the statutes; in regard to which, as declared in the opinion, p. 211, "No extra compensation is provided by statute, at least, not clearly so." In disposing of the case, Judge Spear says, page 211 *et seq:*

"Sections 1069 and 1071, Rev. Stat. of 1880, provide a salary to county auditors, from eight hundred to forty-four hundred, depending upon population. Sections 1071, 1073, 1074, 1075 and 1076 provide further compensation for services in special matters therein enumerated, but none of them relates to the subject of inquiry here."

That in order to entitle the auditor to any extra compensation the statute must be clear and explicit, and that such compensation "can not be allowed upon an implication" and that the right of the commissioners to pass upon and allow such claims is a very narrow one. That Section 1077 "is to the effect that *all claims for services of the auditor,* which are payable from the county treasury, shall be made out in detail *according to the rates fixed by the statute,* and presented to the commissioners, who, if satisfied that the labor has been performed, shall allow the bill, etc., and then the auditor is authorized to draw his warrant. That is, the right to present depends upon whether the claim be *one the rate of which is fixed by statute,* and upon whether the claim for some amount may be legally paid from the county treasury. *Both* conditions must concur, but if the *rate is not so fixed,* or if the claim is not legally so payable, no right to present it is given, and there is force in the proposition, that if no right to present be given, then no power to allow could be implied; and if no

power to allow, then the attempted allowance would be a nullity." (The italicizing is mine.)

The opinion thus announced, and the provisions of Sections 1077 and 1078, justify the right to the injunction asked for in this case. There is no "rate" specified in either of the sections referred to by which compensation for services in furnishing such blanks could be determined and fixed; and that of itself prevented any allowance of extra compensation therefor, even if the terms of said Section 1029 were plain and unambiguous.

For the reasons stated, decree will be entered in favor of the plaintiff as prayed for.

COOK, J., dissenting.

I can not concur with my associates in the conclusion to which they have arrived.

There is no question but that the defendant is not entitled to the money except the statute provides that he shall be paid for his services; otherwise the presumption is that he performed the services gratuitiously, or that he is compensated by his general salary. Such is the uniform holding of our Supreme Court. The question then is: Does Section 1029 provide for such payment? My associates think not, while to me it seems that it does.

The learned judge who writes the opinion, says that the words "All reasonable charges therefor" refer to the blanks. We do not so construe the words.

The subject of the section is the duty of the auditor and not payment for the blanks. If it meant the charges or compensation for the blanks why say "reasonable charges"; certainly the auditor would be entitled to the cost of the blanks if he paid for them in good faith, whether reasonable or unreasonable. Furthermore why should the auditor be allowed for the charges of the blanks? The blanks are procured by the county and not the auditor. He is under no obligation to pay for them and the county under no obligation to pay him for them. No, the words "All reasonable charges therefor" refer to the services of the auditor.

It seems to me that Section 1528 has an important bearing upon the question and materially helps to sustain the contention of

defendants. That section provides: "The county auditor shall furnish to all assessors all blanks needed by them for the listing of property, gathering and returning statistics, and other official duties, which shall be paid for out of the county treasury."

Concededly this refers to the payment for the blanks. The county auditor must secure the blanks for the county and pay for them out of the county treasury.

My associate who writes the opinion in this case says this is but a duplication of Section 1029. True, if his contention is correct that the blanks are referred to in both sections, but in 1029 "All reasonable charges therefor" are to be paid (Sec. 1528 was passed many years prior to Sec. 1029) and why duplicate the sections. It would certainly be very absurd for the Legislature to do so, and therefore both sections should stand and be held as applying to different subjects if such construction can be fairly placed upon the sections.

But it is said by my associate that conceding Section 1029 applies to the payment of the services of the auditor, yet the auditor is not entitled to any pay for the reason that Sections 1077 and 1078 provide that the auditor shall only receive compensation in special cases, when the rate is fixed by the statute and that the claim must be made out in detail according to the rates specified. I do not think that Sections 1077 and 1078 apply to the case under consideration. These sections only apply to cases specified in Sections 1069 to 1076 inclusive. Section 1077 says distinctly "shall be made out in detail according to the rate named in the foregoing sections," which are the sections I have named. They could not apply to all services performed by the auditor, as there are services performed by him that the compensation is not fixed at a specified sum or rate, but is left to the discretion of the commissioners. Take for instance services performed under the provisions relating to boards of education. Section 4064 provides:

"The commissioners of each county shall allow the county auditor, annually, a reasonable compensation for his services under this title, not to exceed five dollars for each city, village, special and township school district in his county, to be paid out of the county treasury."

Again under Section 4898, relating to improved roads, the auditor is to serve as clerk of the board of directors, which is the commissioners, and in Section 4903 it is provided that the clerk shall receive such compensation as shall be agreed upon by the board, but not to exceed two dollars and fifty cents per day for time actually employed.

In neither of these cases is the amount or rate of compensation fixed. Yet shall it be said the auditor is not entitled to compensation.

By taking time no doubt other sections might be referred to of like character and they tend to show, as we have said, that Sections 1077 and 1078 are intended only to apply to the services directly referred to in the preceding sections.

There is another fact worthy of consideration and that is that Section 1029 has remained on the statute books as it now is for at least forty years, and during all that time county auditors have received compensation for their services in preparing and furnishing blanks to assessors without any question being made; the state bureau of public inspection officially approving the payment. Furthermore the Attorney-General of the state in a written opinion to the prosecuting attorney of Pike county, June 9th, 1904 (see annual report of Attorney-General Ellis for year 1905, page 181) has said that they are entitled to be paid for their services under Section 1029.

In addition to this as stated by my associate in his opinion, the Circuit Court of Delaware County in the case of *The State, for use, etc.*, v. *Lewis, Auditor, et al*, decided July 2d, 1903, unreported, a case precisely similar to the one we have, by a unanimous court held that under Section 1029 auditors were entitled to payment for their services for preparing and furnishing blanks to assessors. This being so, a co-ordinate court should hesitate to hold otherwise unless it was very clear that such other court was wrong in the prior holding.

The question involved in this case was not before the court in the case of *Jones, Auditor,* v. *Commissioners,* 57 O. S., 189, and that case has no bearing upon it.

For these reasons I do not think an injunction should be allowed.

AN INDIVIDUAL PARTNER MAY BE GUILTY OF EMBEZZLEMENT OF MONEY RECEIVED BY THE PARTNERSHIP.

Circuit Court of Geauga County.

FORD v. STATE.

Decided, February Term, 1908.

Criminal Law—Embezzlement—Individual Partner Guilty of—When Money Received by, as Agent, is Converted to Use of the Partnership—Evidence—Abstracts of Books and Documents, Prepared by Expert Accountant, Admissible When—"Thing of Value"—Section 6842, as Amended.

1. An individual member of a partnership who receives money as an agent and secrets it with intent to embezzle and convert it to the use of the partnership may be convicted under Section 6842, Revised Statutes. The fact that the money is received by him as a member of a partnership makes no difference.
2. Where books and documents are multifarious and voluminous, abstracts and schedules which have been prepared therefrom by an expert accountant may be admitted in evidence, but in such case the books and documents must either be first offered in evidence or be in the custody of the court so that the party against whom such abstracts and schedules are offered may have an opportunity from their examination to verify their correctness.
3. Under Section 6842, Revised Statutes, as amended April 29, 1902 (95 O. L., 303), in order to convict the accused "the thing of value" must come into his possession after the passage and taking effect of the act as amended.

N. H. Bostwick and *W. H. Boyd,* for plaintiff in error.

W. G. King, Prosecuting Attorney, and *G. W. Alvord*, contra.

COOK, J.; LAUBIE, J., concurs; BURROWS, J., concurs in the conclusion.

George H. Ford and Robert N. Ford were jointly indicted by the grand jury of this county for the crime of embezzlement and for secreting with intent to embezzle and convert to their own use $108, the money of Annie Marsh, the same being intrusted to them as her agents.

The accused demanded separate trials and Robert N. was placed on trial upon two counts of the indictment, one of which charged him with embezzling the $108 and the other with secreting with intent to embezzle and convert to his own use the same money. He was convicted of the crime of secreting and found not guilty of embezzlement.

The facts show that the two Fords, who are brothers, were engaged in the banking business as partners in this county for many years, the name of the partnership being Boughton, Ford & Co.—Robert N. Ford managing the business. They did a large business; had a large number of depositors, and the general confidence of the community. The partnership failed in 1903, making a general assignment for the benefit of creditors, both as a partnership and individually, and afterwards they were forced into bankruptcy.

For many years previous to the assignment, the Fords, both as partners and individuals, were hopelessly insolvent—their deposits being over a million dollars with not one-fifth of actual assets to pay or indemnify the depositors. During all these years they resorted to all kinds of schemes and devices to keep the bank afloat; and during all this time they received deposits, even up to the day of the assignment. Kiting of checks, issuing of fictitious notes in the names of clerks and even of persons deceased for the purpose of securing money to carry the bank along, was of daily occurrence.

The $108 which the Fords were charged in the indictment with secreting was left at the banking house in the early part of August, 1900, by one O. P. Williams to be paid upon a note of Annie Marsh which had been left at the bank by her for collection and which money the bank had full authority to receive as the agent of Annie Marsh. The money was paid by Williams to Robert N. Ford, and he immediately placed it in the general funds of the bank. Upon inquiry being made of him afterwards, at different times, he gave false accounts respecting the matter, saying to Mr. Williams when asking for the note that it had not been left with him as yet, when in fact he had the note long before the payment of the money. These false statements were

made at many different times and on or about September 1, 1902, he said to Mr. Marsh, the husband of Mrs. Marsh, upon direct inquiry that no money had been paid by Williams upon the note, showing at least at that time he did not propose to pay the money over and had appropriated the same or designed appropriating it.

Three distinct grounds of error are relied upon for reversing the judgment.

First. The money having been paid to Ford as a partner of the partnership of Boughton, Ford & Co., he and his brother being then the sole members of the firm, and he having placed it among the other moneys of the partnership, that the partnership was the agent and not Robert N. Ford; and that there is no provision in the statute making a partnership liable.

Second. The court erred in receiving the testimony of the expert, Carl Nau.

Third. That the verdict is against the evidence; that in fact the evidence shows no crime was committed under the indictment.

As to the first ground of error: The partnership had no distinct entity from the individuals composing it; each partner acts for himself as well as the partnership; each member is individually liable even in a civil action. Robert N. Ford received the note of Mrs. Marsh for the purpose of receiving payment from O. P. Williams. He received the money from O. P. Williams to pay on the note, and instead of paying it over to Mrs. Marsh he commingled it with the money of the partnership and afterwards secreted it there for the purpose of converting it to the benefit of the partnership. Robert N. Ford had control of the whole transaction, all the false statements showing criminal intent were made by him.

As to the second ground: That the court erred in receiving the testimony of the expert, Carl Nau.

In order to prove that there was a motive for Ford to embezzle or secrete with intent to embezzle this money, the State properly sought to show that both the banking firm of the Fords and also Robert N. Ford were insolvent. For this purpose the

books of the firm were important. These books were voluminous and were in possession of the trustee under the bankruptcy proceeding. Carl Nau, who was admitted to be a competent accountant, was employed by the State to go through these books and make a tabulated statement from the same showing his conclusions from the books as to the solvency or insolvency of the firm, and of the Fords individually. He did so and testified as to what the books showed. His conclusions from the books and the tabulated statement were also introduced in evidence. But a small number of the books which Nau examined and from which he made up his statement and derived his conclusions were introduced in evidence or were within the control of the court or in the court room. Nau also testified as to the insolvency of a number of persons that were indebted to the bank. The evidence of Nau was objected to in whole and also as to each item. The court admitted the evidence and proper exceptions were noted. We think the court committed error in admitting this evidence. There is no doubt but what in cases of this character a competent expert accountant may testify as to the result of his examination of the books; but the books must be first introduced in evidence or at least be under the control of the court so that the accused may have the use of them. It was the right of the accused to test the correctness of the tabulated statements of the expert, and also the correctness of his deductions from the books as testified to by him. How could that be done when the books were not there? Counsel for accused demanded that the State bring the books that its expert, Nau, had examined into court: and insisted that he should not testify until that was done, but the court made no order and the books were not produced. We think this was error.

In the case of *Boston & Worcester Ry.* v. *Dana*, 67 Mass. (1 Gray), 83, it was held:

"When books and documents introduced in evidence at a trial are multifarious and voluminous, and of such a character as to render it difficult for the jury to comprehend material facts, without schedules containing abstracts thereof, it is within the discretion of the presiding judge to admit such schedules, verified by the testimony of the person by whom they were pre-

pared, allowing the adverse party an opportunity to examine them before the case is submitted to the jury."

On page 104 in the opinion by Justice Bigelow, it is said:

"The defendant further objects, that schedules, made from the original papers and documents previously proved in the case, showing certain data and results obtained therefrom, and verified by the witness by whom they were prepared, were improperly admitted. But it appears to us, that questions of this sort must necessarily be left very much to the discretion of the judge who presides at the trial. It would doubtless be inexpedient in the most cases to permit *ex parte* statements of facts or figures to be prepared and submitted to the jury. It should only be done where books and documents are multifarious and voluminous, and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements, and even in such cases they should not be admitted, unless verified by persons who have prepared them from the originals in proof, and who testify to their accuracy, and after ample time has been given to the adverse party to examine them and test their correctness. Such was the course pursued in the present case, and there can be no doubt that, in a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of books and documents were put in evidence, it was the only mode of attaining an intelligible view of the cause before the jury."

Furthermore, Nau, the expert, was permitted to testify over objection, as to the insolvency of many persons that had obligations in the bank. It was not shown that he had any special knowledge of the financial standing of these parties, but without any qualification in that regard whatever, he was permitted to state over objection that numerous persons indebted to the bank were wholly insolvent and their obligations worthless. We think this was also error. But was the error prejudicial. As we have said the only object of this evidence was to show that the firm was solvent as was also Robert N. Ford, and counsel for the accused both before and after the introduction of the evidence of this expert admitted in open court that both the firm and Robert N. Ford were insolvent at the time of the claimed criminal act and had been for several years previously.

So that while the evidence was wholly incompetent, and it was error to admit it, the error was not prejudicial.

The next ground of error insisted upon is that the verdict is not sustained by the evidence. The indictment charged that Robert N. Ford on September 1, 1902, secreted and hid away the money for the purpose of embezzling it and converting it to his own use.

Section 6842, Revised Statutes, respecting embezzlement and the secreting with intent to embezzle or convert to his own use anything of value, was amended April 29, 1902 (95 O. L., 303), and the original section repealed. It is true that the amendment was very slight, only adding other parties that might be guilty of the crime, such as officers of lodges, etc., and in no manner changed the law as to the crime of which Ford was charged, yet as to this case it was very important.

In *Campbell* v. *State*, 35 Ohio St., 70, it was held:

"Under an indictment for embezzlement, which charges the offense to have been committed after the act of May 5, 1877 (74 O. L., 249, Section 11), took effect, the defendant can not be convicted of an offense committed before the taking effect of said act, notwithstanding the right of the state to prosecute for the violation of a former statute (66 O. L., 29, which was repealed by the act of May 5, 1877), was saved by the act of February 19, 1866 (S. & S., 1)."

In the opinion by Judge McIlvaine on page 77 it is said:

"The indictment charged that the offense was committed on the twenty-eighth day of January, 1878. The statute against embezzlement then in force took effect from and after the first day of July, 1877. Testimony had been offered, tending to prove that the offense was committed previous to the taking effect of that act, and other testimony tending to show that the offense was committed subsequent to the taking effect of the act. The court refused to charge the jury, though requested to do so, that the defendant could not be convicted upon the indictment under which he was on trial, unless the jury should find that the offense was committed after the act of May 5, 1877, took effect, to-wit, at least as late as July 1, 1877. In this refusal, we think, the court erred.

"The theory upon which the State seeks to maintain the conviction, notwithstanding the refusal to charge as above stated,

is this: The act of March 15, 1869 (66 O. L., 29), which was repealed by the act of May 5, 1877, defined the crime of embezzlement, and provided for its punishment. It is true the offense, as defined in the act of 1869, differs in some respects from that of 1877, but the difference is not material to the disposition of the question here decided. Although the act of 1869 was repealed by the act of 1877, the right of the State to prosecute offenses committed in violation of the former was saved by the act of February 19, 1866 (S. & S., 1), and hence the State claims that the defendant might have been properly convicted, upon the trial below, of embezzlement committed in violation of the repealed statute. This claim on the part of the State can not be supported. If the indictment had charged the offense to have been committed in violation of the repealed statute at a time when it was in force, the act of 1869 would have supported the prosecution. But this was not done. The offense was charged to have been committed after the act of 1869 had been repealed, and therefore the act of 1869 does not apply. Whether or not an offense punishable by law is charged in an indictment, must be determined by the state of the law at the time the offense is alleged to have been committed. For the purpose of determining this, the question of time as laid in the indictment is material, otherwise an indictment would be good although the facts averred did not constitute an offense under any law, at the time when they are alleged to have been committed, provided a law was in force at the time laid in the indictment, which made them an offense."

It therefore follows that the criminal act being alleged to have been committed September 1, 1902, it devolved upon the State to show that each and every essential element constituting the crime must have been committed after the passage of the amendatory act of April 29, 1902.

What are the essential elements of the crime of which Ford was charged? First, he must receive the money as the agent of Annie Marsh; second, he must secret and hide it away; and, third, he must secret and hide it away with the intent to embezzle or convert it to his own use.

The contention of the plaintiff in error is that the whole evidence shows that if any embezzlement or secreting with intent to embezzle took place that it was done by the accused long before April 29, 1902.

Two members of the court are of the opinion that this contention is not well founded. It is true that there is some evidence showing that the accused made false statements respecting the transaction previous to April 29, 1902, but the material false declaration and overt acts on his part showing an intention to secrete with intent to embezzle and appropriate to his own use the money, did not take place until about September 2, 1902, several months after the passage of the amendatory act.

While this is true, yet the whole evidence does show that the accused received the money from Williams as the agent of Mrs. Marsh some time in August, 1900, and the receipt of the money by him as agent is one of the essential elements of the crime and as one of the essential elements of the crime it must take place after the taking effect of the act. This is the plain reading of Section 6842, Revised Statutes:

"An agent * * * who embezzles or converts to his own use, or fraudulently takes or makes away with, or secretes with intent to embezzle or convert to his own use, anything of value which shall come into his possession by virtue of his employment or appointment * * * as such agent * * * is guilty of embezzlement and shall be punished as for the larceny of the thing embezzled."

This is also the identical language as used in the act amended and repealed. Mark the language "which shall come into his possession," not had come, or has come, nor shall have come; but "shall come." Come when; it seems to us—the entire court—that no other construction could be given upon the language than that the thing of value must come into the possession of the agent after the passage of the act making it a crime.

In so holding we are directly in line with the decision, *Young* v. *State*, 6 C. C.—N. S., 53, where it was held, that where the statute defining embezzlement is repealed during the period when the amounts were received, and a new statute is enacted, it is error to admit evidence of the alleged embezzlement of the sums received prior to the enactment of the new statute; and where confessions of the accused are so lacking as to time and

amount as to render it impossible to determine whether reference is made to sums received before or after the change in the statute, the confessions are incompetent.

We are therefore of the opinion that no crime was committed by the accused under the indictment.

We are not unmindful that this holding in some cases will permit the guilty to escape and possibly does so in this case; as for instance where an agent received the "thing of value" before the amendment and secretes it after the amendment, he can not be prosecuted under the statute repealed for the reason that one essential element of the crime, the secreting, took place after the repeal and he can not be prosecuted under the amended act, for the reason that one essential element took place before the amended act took effect. This result should have great weight in determining the intent of the Legislature and were not the language of the amended act plain and unambiguous it might work a different result, but we can not construe the language in any other manner than that the receipt of "the thing of value" must be after the amended act went into effect.

"All penal statutes must be construed strictly and the difficulty arising out of the wording of the act must be cured by the Legislature.

The language of the statutes respecting embezzlement is very different in the states respecting this matter. Our statute is copied after the English statute.

The New York statute reads:

"A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person * * * or having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, or article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such prop- deemed guilty of larceny."

The Illinois statute reads:

"Whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny."

The Massachusetts statute reads the same as the Illinois.

The California statute reads:

"Every clerk, agent, or servant of any person, who fraudulently appropriates to his own use, * * * any property of another which has come into his control or care by virtue of his employment, * * * is guilty of embezzlement."

The Alabama statute reads:

"Any officer, agent, or clerk of any incorporated company, or municipal corporation, or clerk, agent, servant, or apprentice, of any private person or persons, who embezzles or fraudulently converts to his own use, * * * any money or property which has come into his possession by virtue of his office of employment, shall be punished, on conviction, as if he had stolen it."

The judgment, for the reason that the money came into the custody of the accused before the amendment of April 29, 1902, must be reversed, and there being no controversy about the evidence in that respect the accused will be discharged at the costs of the State.

BURROWS, J.

I concur in the conclusion, and am of opinion that the alleged crime was committed in respect to every element of it, prior to the time that the amended statute went into effect.

DISREGARD BY SERVANT OF WARNING OF DANGER.

Circuit Court of Hamilton County.

ILIFF ET AL v. CAVEY, ADMINISTRATRIX.

Decided, May 23, 1908.

Negligence—Master and Servant—Assumed Risk—Error in Overruling Motion to Take Case from the Jury.

Where a master orders a servant away from the place where he is at work, and gives as the reason therefor that he is afraid a wall will fall on him, and the servant disregards the order and continues his work without changing his position, and the wall falls and he is killed, an action for damages against the master because of his death should be taken from the jury on the ground that the risk was assumed.

Keam & Keam, for plaintiff in error.
Thos. L. Michie and *W. W. Symmes*, contra.

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

The negligence charged in the petition is the failure of the defendants to furnish the plaintiff's intestate a safe place to work; that the defendants knew and plaintiff's intestate did not know the dangerous condition of the brick wall which afterwards fell upon and killed him.

The undisputed facts disclosed by the record are that about fifteen or twenty minutes before the accident occurred one of the defendants discovered the dangerous condition of the brick wall near which the workmen, including plaintiff's intestate, were engaged; that he so informed them and ordered them away to a safe place; that two of the workmen—the deceased and one Bradley—disobeyed the order, the latter willfully and the former apparently so; that the deceased in the full possession of his sense of hearing must have heard the order, and had abundant time and opportunity to obey the same.

It is clear therefore, that the deceased with full knowledge of the danger, and against the order of one of the defendants, voluntarily assumed the risk, and the court erred in overruling

the motion of the defendants at the conclusion of the evidence to arrest the case from the jury.

It necessarily follows that the judgment must be reversed, and judgment rendered for the plaintiffs in error. *Davis* v. *Somers-Cambridge Co.*, 75 O. S., 215.

SALE OF TREASURY STOCK TO DIRECTORS.

Circuit Court of Hamilton County.

EDWARD C. HALL v. WILLIAM H. HALL ET AL.

Decided, March, 1908.

Corporations—Rights of Stockholders with Reference to New Issue of Stock—Waiver—Stock of the New Issue Becomes Treasury Stock, When—Sale of Treasury Stock Otherwise than in the Open Market —Combinations of Stockholders to Control—Cumulative Voting.

1. Where full opportunity was given stockholders to take their *pro rata* share of a new issue of stock and they failed to do so, they will be deemed to have waived their right thereto, and purchasers from them four years later of their stock of the original issue acquire no rights thereby in the new issue, but such new stock remaining untaken becomes treasury stock, which may be legally sold by the board of directors.
2. In the absence of fraud or other illegal action, complaint will not lie because of the obtaining of control of a corporation by a combination of stockholders or by cumulative voting; nor will a sale of treasury stock in furtherance of such a design be set aside by a court, where made in the presence of all the parties and by the proper officers, and in the absence of any claim that the stock would have sold for more in the open market or that it would bring more at a re-sale.

Albert Bettinger, for plaintiff.

Wm. L. Dickson, for Wm. H. Hall, Chloa Hall Kemper, Fred S. Kemper.

W. C. Cochran, for the Hall's Safe Company.

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

The plaintiff seeks to set aside the sale of fifty-four shares of the capital stock of the defendant corporation, the Hall's Safe Company, to the defendant, Chloa H. Kemper, upon the ground

that these shares being part of an increase of capital stock should have been apportioned ratably to the holders, including the plaintiff, of the original stock of the company, and that any sale thereof without the consent of the stockholders was illegal and void.

The testimony shows that plaintiff received more than his proportion of such increase, when based upon the number of original shares held by him at the time of the increase, and that those stockholders who did not receive their full quota, having every opportunity to do so, waived their right thereto.

A. Acton Hall and Mr. and Mrs. Clark, as original stockholders, declined to take any of the increase, and when four years later they transferred the stock to the plaintiff the right which they had surrendered did not survive as an incident to the stock, and could not be rightfully asserted by him.

The fifty-four shares, therefore, became treasury stock, which could be legally sold by the board of directors.

The control of the board of directors and the sale of the stock was effected by cumulative voting and by the defendant stockholders combining against the plaintiff, which in the absence of fraud or other illegal element are binding upon him. The stock was sold at a regular meeting of the board of directors, at which plaintiff was present and stated that he would give $250 per share; but a written proposal from the defendant, Chloa H. Kemper, to purchase at $300 per share was accepted and the sale made.

It is not claimed that the stock is worth more, nor that the company will be benefited by a resale; but the whole controversy arises from a determination on the part of plaintiff to retain a majority of the stock, and thereby the control of the company, and a like determination on the part of the defendant stockholders to secure such control; and having decided that the plaintiff as an original stockholder is not entitled to any of the fifty-four shares, the court will not interfere and set aside a sale which although not made in the open market yet was in the presence of all the parties by the proper officers and not illegal.

The petition will be dismissed.

LOSS OF A LEASE IN ITS REFORMATION.

Circuit Court of Fairfield County.

LOUIS W. MARKS v. RUSHVILLE GAS & OIL CO.

Decided, September 18, 1908.

Lease—Agreement to Reform—Record of Cancellation on Margin—Failure to Record New Lease—Property Re-leased to a Third Party—Knowledge—Possession—Injunction—Section 4112a.

1. Where at the request of an owner of land an oil and gas company holding a lease of the land consents that the lease shall be reformed, and by agreement this is done by cancelling the old lease and executing a new one, but the lessee fails to have the new lease recorded, and the owner of the land subsequently re-leases it to a third party, the company holding the first lease will not be heard to claim that the cancellation of its lease was without effect because its president in signing the cancellation acted on the belief that the cancellation would not be effective until the new lease was recorded.
2. The fact that the company had drilled within certain territorial limits of the tract described in the lease but not on the leased land does not constitute such actual and open possession of the land as to give effect to the unrecorded lease under the provisions of Section 4112*a*.
3. Where a lease provides by its terms that it may be surrendered by the parties, the endorsement thereon of its cancellation and surrender, whether such endorsement is entitled to record on the margin of the lease record or not, constitutes a legal surrender and cancellation and surrender of the lease, notwithstanding the statutory provision that any interest in land must be granted by an instrument duly executed, acknowledged and attested by witnesses.
4. A lease for oil or gas has no force or validity except between the parties until the same is filed for record in the recorder's office of the county in which the leased land is situated, and a subsequent lessee with knowledge, whose lease is recorded, is entitled to hold the premises as against all persons claiming under the prior unrecorded lease.

C. W. McCleery, F. M. Acton and *M. A. Daugherty*, for plaintiff.

C. D. Martin, A. W. Mithoff and *F. S. Monnett*, contra.

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

This case comes into this court on appeal and is an action brought by the plaintiff, Marks, to enjoin the Rushville Gas & Oil Company from interfering with his possession of thirty-two acres of land described in his petition, and from drilling thereon for oil or gas, he claiming to be the owner of the right by grant from Coplin, the owner of the land. The Rushville Gas & Oil Company answers that petition, averring that Marks is not the owner of any right in said property, but that the Rushville Gas & Oil Company is the owner of a valid lease duly executed and acknowledged by Coplin, who it is admitted was the owner of the property in fee simple, dated the 22d of June, 1906, and recorded March 11, 1907, long prior to the execution of this plaintiff's lease, and that the same was never surrendered or canceled, but that a pretended cancellation was obtained by fraud and placed on record, and that notwithstanding this they are the owners of the same. That is denied by the reply, and upon the trial of this case in this court leave was taken to make other parties defendants, who were jointly interested with plaintiff in this case claiming that Marks was only holding as trustee for himself and others who were jointly interested with him in the lease, and who participated in the taking of the same from Coplin, and that the lease was fraudulently obtained, and that these other parties entered into a guaranty to protect Coplin against any damages that he might suffer by reason of any suit being brought against him by the defendant for any violation of the terms of his lease to it. To this amendment to answer and cross-petition of the defendant there is a general denial filed.

The lease to Marks is dated April 8th, 1908, and was recorded April 9th, 1908. This action was commenced April 11, 1908, to enjoin the Rushville Gas & Oil Company.

The lease under which the Rushville Gas & Oil Company claims was dated the 22d day of June, 1906, and recorded March 11, 1907. What is claimed to be a surrender and cancellation is dated February 29, 1908, and was entered on the margin of the record of the lease in the recorder's office on March 17, 1908. The evidence shows its physical delivery on the 2d of March, 1908.

It also appears that contemporaneously with the surrender of this lease of June 22d, 1906, a new lease was executed by Mr. Coplin to the Rushville Gas & Oil Company. That lease was never placed on record. The reason for this change of lease was the fact that in the original lease a cemetery lot was included by mutual mistake, when it was not intended by either party to be included. Mr. Coplin applied to the directors to have a change and reformation of that lease and it was agreed that might be done. At the meeting at which that was done, the evidence informs us that a suggestion was made by the attorney of the defendant company, who was also the secretary of the company, that the lease could be reformed by canceling it, and a new lease executed, and it is apparently the uncontradicted evidence that that was the method acceptable to all parties concerned. It is not important to this court whether that was the best method; it was one method that would work a reformation, and it seemed to be the understanding of all parties—the directors of the company, Coplin and the attorney of the company—that it would be done in this way at the time the reformation was agreed upon. There is some discrepancy in the testimony as to how that was to be accomplished—in regard to the surrender of the old lease and the delivery of the new lease. It is insisted that the intention was that the old lease should be surrendered with a cancellation on the back thereof, after the new lease was consummated; or some of the witnesses say the motion originally put was, after the new lease was recorded; that is, that the motion was proposed in that language, and put by the president of the company to the directors "after the new lease should be consummated."

It is now claimed by the Rushville Gas & Oil Company that this secretary and the "plaintiff, Marks, and others," is the language of the cross-petition, entered into a fraudulent conspiracy with the intent and purpose of working a fraud upon this company and depriving it of its rights in this property and secured by fraud the signature of the president to this cancellation. It would seem unnecessary for this court to say that that allegation of the cross-petition is not sustained by a single syllable of evidence in this case. The evidence is uncontradicted that

Marks and the other gentlemen identified in interest with him had nothing whatever to do with this lease, until the day the contract of lease was entered into with them—April 8th, 1908. There is no evidence of any kind or character that points to a conspiracy between the secretary of this company and Marks and the other persons made parties by this amendment to answer and cross-petition. In fact, when they knew the condition of this lease, all had been done that was contemplated to be done under the arrangement made at the meeting of the directors at the time they kindly consented that the reformation might be made. There is no showing that the secretary acted in bad faith. He might have exercised bad judgment in this matter. There might have been carelessness connected with the performance of his duties, or with the performance of the duties of the president, but there is nothing to show that either of them acted fraudulently, or that Mr. Kerr's signature was obtained by fraud in that transaction, or that any fraud entered into the negotiations, or into the mind of the secretary, or any one charged with the duty of reforming this lease.

It is true that there is some evidence that, when this lease was offered to Mr. Kerr for his signature, it was simply shoved over to him with the statement, "here is another paper for you to sign," and he signed it. That is no excuse for Mr. Kerr. He was charged with the duty of guarding and defending the interests of this company. He can read and write. He is a man learned in the sciences and learned in the law, a man who knew that he would be held to answer for his acts and that he could not negligently and carelessly put his signature to any paper and say, "I did not know what I was doing." Courts of equity are organized to protect the weak and ignorant, who are swindled by the machinations of others, because of their inability to protect themselves, but a man who is clothed with reason and charged with responsibility, when he signs his name to a paper, courts will hold that he contemplated the effect of the paper and the consequences thereof. That act was the voluntary act of Mr. Kerr; he was not under duress and it was not procured by fraudulent misrepresentation of any kind or character. If he did not under-

stand it, the secretary did, and we hold he was acting in good faith. We might say that it is an unfortunate thing that through later manipulation these men are called on to suffer a loss by reason of a disposition to do a kindness to Mr. Coplin.

The alleged cancellation on the back of the lease is as follows:

"RUSHVILLE, OHIO, Feb. 29, 1908.

"In consideration of one dollar and other considerations, the within lease is hereby canceled and surrendered and not binding on either party.

"THE RUSHVILLE GAS & OIL COMPANY,
"By R. W. KERR, *Pres.*"

What is the effect of that cancellation and surrender of this lease? What is the effect of the new lease which is made and unrecorded?

If a court of equity were to pay no attention to statutory law, it would not take this court long to declare that transaction did not deprive this company of its interest in its lease, and that they are still the owners of the same, and are entitled to all the rights of a lessee in the property; but equity must follow the law. One of the maxims of equity is that equity must follow the law and it is not for this court to pretend to more wisdom than the Legislature of the state; it is our duty to apply the law as we find it, for the public conscience is reflected in the statutory law of the state, just as much as in the principles of equity. [Here the court read Section 4112*a*, Revised Statutes of Ohio, also the paragraph of the syllabus relating to this section, 59 O. S., 420].

There is some claim made that this defendant company was in actual possession of the land, because it had drilled within certain territorial limits named in the lease but not on the lease itself. We think that was not an actual possession, not an open, notorious and adverse possession.

When a man is in possession of another's farm, exercising authority over it, doing that which without grant or license he would have no right to do, any person buying or leasing that land takes it with whatever rights the person in possession has—

whatever they may determine to be. This defendant not being in open possession of the land, this court can not say that it is within the provisions of this section. Its unrecorded lease is absolutely a nullity for all purposes and the evidence touching knowledge of that lease is not important.

That being true the sole question remaining is whether this case in fact was a cancellation. Was there a surrender of the original lease? The statute authorizes the recording of this cancellation on the margin of the lease. Counsel have argued with a good deal of vigor and have cited quite a number of authorities to the effect that there is no provision made for the cancellation of a lease in this way, and that the statutory provision is that any interest in land must be granted in certain ways —that is to say it must be duly executed, acknowledged and attested by witnesses. But turning to this particular lease we find that it has within its terms a provision for its cancellation and surrender, which is as follows:

"It is agreed that the second party, its successors and assigns shall have the right at any time to surrender up this lease and be released from all moneys due and conditions unfulfilled, then and from that time this lease and agreement shall be null and void and no longer binding on either party and the payments which have been made, be held by the party of the first part as the full stipulated damages for the non-fulfillment of the foregoing contract, that all conditions between the parties hereunto shall extend to their heirs, executors, administrators, successors and assigns, which is fully understood and agreed to by party of the first part."

This lease in terms provides that it may be surrendered by the parties. We think that this indorsement upon it expresses a cancellation or surrender, and whether it is entitled to record upon the margin of the lease record or not, certainly it carries with it the effect of a surrender and cancellation that would prevent and estop either party from bringing an action upon it. Suppose that all had been done to protect the rights of this company required by law, and that instead of neglecting to file the lease that was given in exchange for this, that on the next day after

its execution it had been recorded in the recorder's office of this county, and some dispute arose between Coplin and the Rushville Company, under the terms of that paper, would not the rights of the Rushville Company be determined under the new lease taken and recorded in the place of the old one? The fact that they failed to record this could not change the result of this lawsuit. The same law would apply except as to the right of the parties taking a lease afterwards and recording it first.

We have already said that up to the time of the cancellation or making of the new lease that we think no fraud entered into the mind of anybody. Suppose that Coplin had such a notion in his mind; it was hardly possible he had, because he would suppose that the Rushville Company would attend to its business. After he talked to Shaeffer the idea grew upon him; the first time that he knew that he had a right to re-lease it and that a new lease would take precedence over the prior unrecorded lease, was the day he actually re-leased it. Whatever was done by his counsel can not have a retroactive effect; it can not reach back to the day when everybody to this lease agreed to reform it.

So that we must measure that contract by what transpired then; and we must measure this new lease by what occurred upon that day it was executed. It is not the business of this court to say what these men should have done morally. That is not our affair. We have filled our mission when we have determined the law of this case, and it is our duty to apply the law as it is written and as the Supreme Court of Ohio has expounded it. With this statute and adjudication before us, the truth is that evidence touching knowledge is not important. The only questions are: Was this cancellation obtained by fraud? If it is not obtained by fraud, what effect as a legal proposition is to be given this lease to Marks? We think there is absolutely no fraud proven at the time this cancellation was made, and the first lease to the Rushville Company was surrendered to Coplin and a new lease executed and delivered. There was no intent on the part of anybody to wrong the company, at least not on the part of its officers. With Coplin it must deal at arm's length; if through courtesy, kindness and consideration

it correct a mistake in his lease and neglect to protect itself—that is no defense here. With their own agents, attorneys and officers, they are not supposed to deal at arm's length. If we found that the officers of this company had entered into a fraudulent conspiracy with Marks and others, it would be not only our duty but our pleasure to declare the cancellation void. But we find no evidence to warrant such conclusion; we think the cancellation was in good faith with proper motives and proper purposes. After that cancellation and surrender of the old lease and the execution of the new lease, that new lease then became the muniment of title of the Rushville Gas & Oil Company, and it can not protect the company, because it was unrecorded.

Therefore we conclude that the injunction should be made perpetual, the answer and cross-petition with amendment thereto will be dismissed with costs, motion for a new trial may be filed and will be overruled, and exceptions noted on behalf of defendant, statutory time for filing bill of exceptions, and twenty days for finding of fact.

SUFFICIENCY OF NOTICE OF STREET ASSESSMENT.

Circuit Court of Hamilton County.

JOHNSON v. CITY OF CINCINNATI.

Decided, May 23, 1908.

Assessments—Streets Notice of Proposed Improvement—Sale for Taxes —Confirmation—Life Estate—Title—Sections 1536-212 and 2268.

The owner of a life estate was served with notice of a proposed street improvement thirty days after the property was sold for taxes and two days before confirmation of the sale. *Held:*

That on the day notice was served the life tenant was the owner of the life estate, and as such was the proper person to be served, and the assessment thereafter levied was not rendered invalid for want of sufficient notice.

William F. Chambers, for plaintiff.

Charles F. Hornberger, Assistant Solicitor, contra.

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

This is an action in this court on appeal from the court of insolvency. The plaintiffs seek to enjoin the collection of an assessment for a street improvement on Linwood avenue. The ground relied on is that there was not a proper notice given. The property in question belonged to one Kennedy, who died intestate, giving a life estate to Anna E. Kennedy and the remainder to Louis B. and Nellie Kennedy. The estate of Louis B. and Nellie Kennedy was purchased by the plaintiffs at judicial sale. The property became delinquent for taxes and was forfeited to the state. Thereupon the treasurer of the county brought an action to sell the property to pay the taxes, and said property under said proceedings was sold to the plaintiffs by the sheriff on March 4, 1905. This sale was confirmed by the court on April 6, 1905. Two days prior to the confirmation of this sale, to-wit, on April 4, 1905, the notice of the improvement as required by the statute was served on Anna E. Kennedy, the life tenant.

Was this a good service under the statute? We think it was. Section 2268, Revised Statutes, says that special assessments shall be payable by the tenant for life. Evidently the life tenant is the proper person to be served with the notice for the improvement required, for the life tenant is the one charged with its payment.

Section 1536-212 (M. C., Section 52), Revised Statutes, should be read in connection with Section 2268, Revised Statutes, and requires service of notice on the life tenant. It is claimed, however, that when the sale was confirmed by the court and the sheriff's deed made that the title of the purchaser reverts to the time of the sale. This is a settled principle of the law and is thus stated in the syllabus in the case in 59 O. S., 540:

"A deed for real estate, executed by an officer of a court pursuant to its order confirming a judicial sale previously made,

takes effect by relation on the day of the sale and vests in the purchaser the right to 'intermediate rents.'"

The court say in its opinion:

"The equity of the rule is manifest, because the purchaser can not escape from the sale because he may think it disadvantageous to him, and he is required to pay interest from the day of the sale on so much of the purchase price as he has not actually paid. That the right to the intermediate rents passes to the purchaser as one of the results of confirmation has been held in numerous cases."

This is a fiction of the law founded in equity, and is for the protection of the purchaser, and goes no further. It does not mean that the purchaser was the owner before the confirmation of the sale.

In the opinion of the court in *Reed* v. *Radigan*, 42 O. S., 294, the court say:

"It will be found upon an examination of the authorities that in states where a confirmation is required, the purchaser obtains no vested rights until after the sale is confirmed, and if the confirmation * * * is refused the right of the purchaser falls to the ground."

It seems evident therefore that on April 4, 1905, the time when Anna E. Kennedy was served with the statutory notice she was the owner of the life estate in the property; that she continued to be the owner until April 6, 1905, when the court confirmed the sale, and under the statutes she was the proper person to serve and the assessment is not invalid for want of sufficient notice.

ASSESSMENT FOR TOWNSHIP DITCH IN EXCESS OF BENEFITS.

Circuit Court of Fairfield County.

BENONI STEMEN v. BAKER G. HIZEY ET AL.

Decided, September 18, 1908.

Ditches—Injunction Lies against Assessment by Township Trustees, When—Appeal—Error—Sections 4533, 4539, 4560 and 4491.

1. There is no provision for an appeal by a property owner who complains that the assessment which has been levied on his land for the improvement of a township ditch is unjust and unreasonable in that it is grossly in excess of the benefits which he will receive from the improvement.
2. Nor will error lie in such a case, inasmuch as there is no provision for a bill of exceptions, and even if the transcript of the record of the township trustees were brought up, it would be of no assistance in determining the question whether the assessment exceeds the benefits.
3. But where the complaining owner alleges that the assessment laid upon his land is grossly in excess of the benefits conferred, injunction will lie notwithstanding it is directed against the action of a judicial board, and in such a case a court of equity may do justice even though no error is found in the proceedings.

W. H. Lane and *C. O. Beals*, for plaintiff.

C. W. McCleery, contra.

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

Benoni Stemen vs Baker G. Hizey et al is an action brought in this court by appeal from the court of common pleas and the questions presented to this court are raised by a motion to strike out certain matters from the petition; and also a demurrer is filed, and we think the demurrer reaches the questions in this case. The demurrer reads as follows:

"Now come the defendants, trustees, and demur to the petition for the following reasons:

"1st. That the court has no jurisdiction of the subject of the action.

"2d. That the petition does not state facts sufficient to constitute a cause of action.

"3d. It appears from the petition that the plaintiff has an adequate remedy at law."

Briefly stated the history of this case is as follows:

The trustees of Violet township, Fairfield county, Ohio, on petition of certain property owners, passed a resolution for the construction of a township tile ditch. In the construction of that ditch they assessed a portion of the expense upon this plaintiff. The plaintiff claims that this amount so assessed upon him was unreasonable and unjust and that he should not be compelled to pay any part of it, for the reason that he received no benefit from the tiling of the ditch; and he brought an action in the court of common pleas to enjoin the collection of that assessment upon him so made by the trustees. The defendant filed a motion asking to have certain matters in the petition stricken out, and while that motion was pending the plaintiff filed a motion to strike off that motion, which the court sustained. Thereupon a demurrer was filed to the petition, which was overruled by the court of common pleas and a judgment was taken on the petition and evidence of the plaintiff below, without any controversy on the part of the defendant, and the case was brought into this court, and the demurrer is up for hearing here. The contention of the defendant is this: that a court of equity can not attack by injunction the judgment of a judicial board; that if the plaintiff has any remedy at all, it is by appeal or error. With that contention of the defendant, we are in accord, if there is a provision for error or appeal.

The question presented then is this: Could this plaintiff appeal or could he prosecute error from the judgment of the trustees of Violet township in assessing him for the construction of this ditch, when he received no benefit from it? We are cited to certain sections of the statutes.

The court then read from Section 4533, as follows:

"Any person interested in the location of such ditch, or in the amount of compensation and damages determined upon by the trustees, may take an appeal from the proceedings of the trustees to the probate court of the county."

Then when the appeal has been taken, the probate court un-

der Section 4536 shall examine the same and determine whether the preliminary steps for the appeal have been taken properly. If it finds that the steps have been taken properly, the matter is submitted to a jury and Section 4539 provides what the jury may find. [Here the court read Section 4539.]

It will be noticed from the section just read, an appeal may be taken from three questions enumerated in the section; but whether or not this plaintiff has been assessed an amount exceeding the benefits derived from it, is not one of the questions that may be appealed from. So that no appeal lies from the question in this lawsuit.

The next question is: Does error lie? Appeal does not lie, but counsel for defendant claims that error lies thereto. [The court here read Section 6708.]

Here was a board of township trustees that was exercising judicial functions, and under the section of the statutes their proceedings may be reversed, vacated or modified by the court of common pleas. We think that is where the error appears upon the record of that board. If an error appears upon the records of the board that would be upon the minutes of the township clerk. We suppose that a transcript of that record might be brought up, and the court might review it, but the question whether or not the amount assessed against the plaintiff was just or unjust, or whether he received full value, is a matter that we insist can not appear upon that record. There is no provision for a bill of exceptions, and how could that question be raised in the court of common pleas on error under this particular statute?

We are also cited to another section of the statute, Section 4560. This is under the head of township ditches. [Section 4560 read.]

In other words, this section of the statute provides that when an action is brought to enjoin an assessment the same proceedings shall be had as provided in the case of county ditches. That is found under Section 4491, which is as follows:

"The court in which any proceeding is brought to recover any tax or assessment paid (that is not the case here), or to declare void the proceedings to locate or establish any ditch (that is not the case here) or to enjoin any tax or assessment levied or ordered

to be levied to pay for the labor and expense aforesaid (that is the case here)."

The court read this section to the end thereof and continued:

All these things may be done. It seems that the court may go into all these incidents, as to whether it is conducive to the public health; whether the assessment is unjust or unfair, when an action is brought to enjoin the assessment. But here is a man that under the allegations of his petition claims the assessment is unjust. I will read that portion of the petition:

"Plaintiff further says that said apportionments and costs as assessed against him by the defendants, the said trustees of Violet township, are grossly unjust and unfair, and that had the same been made according to benefits, no part of the cost and expenses of said Bowen ditch improvement would have been apportioned or assessed against him, for any part of said tile ditch, and that said apportionment to this plaintiff is grossly in excess of benefits conferred upon him by said ditch improvement."

Does not that constitute ground for injunction? It is pretty fundamental and needs no discussion that you can not take private property for public use, unless the person owning it gets full value received. It is the principle of assessment that you must give the owner value for it. He must derive some benefit from that improvement equal to the amount he may have to pay. He says it is unjust; there is no provision for appeal; there is no provision for error. He comes into a court of equity and asks that the trustees be enjoined. When he makes a *prima facie* case in his petition, the court may hear it and do all things found under that section of the statute. Even if the court find no error, it may go ahead and give him complete justice.

We think this action is properly brought and that the demurrer in this case should be overruled, because the petition does state a cause of action. As to the motion, it will be overruled too because it simply performs the office of a demurrer. We think this action is properly brought, as this section provides for injunction and it recognizes the fact that injunction may be brought under some circumstances.

Judgment will be rendered for the plaintiff with costs. Exceptions will be noted for defendant.

SUFFICIENCY OF PETITION UNDER JONES LAW.

Circuit Court of Hamilton County.

IN RE PETITION TO PROHIBIT THE SALE OF INTOXICATING LIQUORS IN A RESIDENCE DISTRICT (WINTON PLACE). *

Decided, May 23, 1908.

Liquor Laws—Examination of Petition Under the Jones Law—Burden of Proof as to Facts—Number of Signers Necessary—Judicial Notice as to Politics of Newspapers Publishing Notice—Withdrawal of Names—Depositions—98 O. L., 68.

1. A petition under the Jones local option law can not be taken as *prima facie* evidence of the facts necessary to decide upon its sufficiency, except in the absence of a request upon the part of any elector to be heard.
2. The burden of proving the facts alleged in the petition rests upon the petitioners; and the burden of proving that a signature was procured through fraud or misrepresentation rests upon the party who alleges that he was misled and is asking for the withdrawal of his name from the petition.
3. The number of signatures to the petition must equal a majority of the votes cast at the last regular municipal election.

Yeatman & Yeatman, for the petition.
Jerome D. Creed and *Fred P. Muhlhauser*, contra.

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

Under the act of May 15, 1906 (98 O. L., 68), the provision that "the mayor or judge shall examine the petition at a public hearing" requires a trial or investigation of the facts necessary to decide upon the sufficiency of the petition and in no event shall the petition be taken as *prima facie* evidence of such facts, except upon failure of any person or persons, who are electors of the district, to ask to be heard thereon.

The burden of proving such facts rests upon the petitioners; but if any elector wishes to withdraw his own or authorized signature from the petition, the burden falls upon him to prove to the mayor or judge that it was secured through fraud or misrepresentation.

* Affirming *In Re Petition*, 5 O. L. R., 517.

The petition must be signed or authorized to be signed by as many qualified electors as equal a majority of the votes cast at the last regular municipal election in such residence district.

It is common knowledge in this jurisdiction that the two newspaper known as "The Cincinnati *Daily Enquirer*" and "The Cincinnati *Daily Commercial Tribune*" are of opposite party politics, hence the court will take judicial notice of that fact.

Of the thirty-eight petitioners who sought to withdraw their names from the petition upon the ground of misrepresentation that the liquor dealers intended to establish a saloon upon a lot near a church in such residence district, only fifteen were induced, according to their own testimony, to sign such petition by any misrepresentation of a present intention on the part of such dealers to locate a saloon near a church.

The statements made to the other twenty-three petitioners recording to their own testimony, rely upon such statements, and lated to facts, the truth or falsity of which could be ascertained by reading the petition. Many of the petitioners did not, acnone had a right to so rely.

We deem it unnecessary to weigh the evidence in rebuttal on the question of misrepresentations, because if we should find that the fifteen names were improperly counted, there were still enough remaining to equal a majority of the votes cast at the last regular municipal election.

The fifteen names above referred to are as follows:

Isaac J. Fieler, W. J. Williams, Chris. Seibert, James Finn, Adolph Lukens, Fred Schillins, George Maffey, Harry E. Shaffer, Peter Heuel, John Doberrer, Jr., Fred Goetz, Clifford Campbell, George Huber and Philip Kuntz.

While the depositions taken during the progress of the trial were not and could not be filed in accordance with Section 5282, Revised Statutes, yet it appears from the whole record which is before us that no prejudice resulted to the plaintiff in error on that account.

The judgment will therefore be affirmed.

ACTION AGAINST LANDLORD FOR INJURY TO TENANT.

Circuit Court of Hamilton County.

JACOB MUELLER v. MARGARET BUSCH.

Decided, July 3, 1908.

Landlord and Tenant—Action by Wife of a Tenant for Damages on Account of an Injury—Pleading—Variance—Burden of Proof—Error in Refusing Special Charges Before Argument.

1. In an action against a landlord on account of injuries to a tenant due to a defective step, the fact that proof discloses the plaintiff to be the wife of one of the tenants of the building, does not present a material variance.
2. Where the averment is that the landlord had knowledge of the defect and the plaintiff did not, and the landlord negligently permitted the defect to continue, the plaintiff assumes the burden of proving these allegations; and, upon request therefor, the landlord is entitled to special instructions delivered to the jury before argument embodying the law with reference to such knowledge and negligence.
3. Error in refusing to give special instructions before argument, where of a proper character and correctly expressed, is not cured by the giving of like instructions in the general charge.

C. W. Baker and *Thorne Baker,* for plaintiff in error.

A. C. Ross and *Smith & Hawke,* contra.

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

The plaintiff avers in her second amended petition that she was at the time of her injury the tenant of the defendant, but the proof shows that she was the wife of one of the tenants. This variance is not material in view of the averment that the defective steps causing the injury were a part of a common passageway used by plaintiff and other tenants, and that there was a covenant on the part of defendant to make repairs. The rule in such case is stated in Jones on Landlord and Tenant, Section 614, as follows:

"The prevailing rule seems to be that a landlord who leases separate portions of the same building to different tenants, and

retains exclusive control, for the purpose of repairs and construction, of the porches, galleries and stairways, used in common by all the tenants, is under an implied obligation to use reasonable diligence to keep such reserved parts in a safe condition for the use of a tenant occupying a part of the premises and for the members of his family. For failure to perform that duty the law attaches to him liability for injury to such tenant or to a member of his family."

The particular defect of the steps is not stated, but plaintiff avers that defendant had knowledge of the defect and negligently permitted it to continue, and that she had no knowledge of it. She thereby assumed the burden of proving that the defendant had knowledge, or by the exercise of ordinary care would have known of the defect; and that she did not know, nor by the exercise of ordinary care could have known that the steps were out of order, or knowing it gave notice to the landlord.

These propositions were fairly embraced in the first and last special instructions requested by the defendant to be given to the jury before argument, and refused by the court. The error in refusing to give such instructions *before argument*, was not cured by giving like instructions in the general charge and was prejudicial.

Judgment reversed and cause remanded.

DISPOSITION OF MONEY GARNISHED IN A VOID PROCEEDING.

Circuit Court of Hamilton County.

BRANDT ET AL V. RABENSTEIN ET AL.

Decided, June 6, 1908.

Attachment and Garnishment—Reversal of Proceedings before Justice of the Peace for Lack of Jurisdiction—Speaks as of the Date of the Reversal—Disposition of Money Garnished—Dismissal.

Where it has been adjudged on review of a suit in attachment that the justice of the peace was without jurisdiction, any order which the justice may have made as to payment of the money is void

and it becomes his duty to return it to the garnishee, notwithstanding the dismissal of the petition by the reviewing court may have been erroneous.

Otis H. Fisk, for plaintiff in error.
Gideon C. Wilson, contra.

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

While there is some confusion in the petition as to what order or judgment of the justice of the peace was reversed by the common pleas court, it is made definite and certain by reference to the number of the case in the latter court, the essential averment being that the common pleas court dismissed the action pending before the justice, and that judgment being affirmed by the circuit court remains unreversed. The motion upon which the judgment is founded was not merely to discharge the attachment, but to dismiss the action for want of jurisdiction of the person of the defendant, and is almost identical with that considered in the case of *Smith* v. *Hoover*, 39 O. S., 249. The judgment of reversal and final judgment of dismissal speak as of the date of the judgment reversed. *Rupp* v. *Phillips et al*, 1 C. C., 108.

Even if it be conceded that the courts erred in dismissing the action, and that it was still pending before the justice, it being adjudged that the justice was without jurisdiction, any order he made disposing of the money otherwise than by payment to the garnishee was null and void; and the omission of the judgment debtor to give an undertaking for a stay of execution did not relieve the justice of the obligation to return the money to the garnishee, who, although not the absolute owner, had paid it to the justice upon his order and was liable to account to the real owner.

We find no prejudicial error in the record and the judgment will be affirmed.

VALIDITY OF MORTGAGE EXECUTED BY CORPORATION.

Circuit Court of Hamilton County.

FRITSCH MANUFACTURING CO. v. ELMONT BUILDING & SAVING CO.

Decided, May 23, 1908.

Corporations—Authority of Officers of, to Sign Mortgage—Parties Dealing With, not Bound to Know that Every Formality has been Complied With.

The certificate of authority for the signing of a mortgage by officers of a corporation will not be held insufficient because the certificate does not appear to have been recorded in the minutes of the company, where there is evidence that a certificate was authorized by the board of directors and both parties to the mortgage relied on its correctness. *Boesch* v. *Toledo Horse Displaying Co.*, 14 C. C., 289, followed.

L. J. Dolle and *W. C. Taylor,* for plaintiff in error.
R. A. Powell, contra.

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

From an examination of the evidence in the above case we are of the opinion that the judgment of the court below should be affirmed. While the testimony discloses loose conduct upon the part of the president and treasurer of the plaintiff in error company, who also was treasurer of the defendant in error company, yet the fact remains fairly established that the Clara Fritsch mortgage was assumed by the Fritsch Company and, when the new mortgage was executed in October, 1894, Fritsch, as treasurer of the building association, had cash in his hands which, with the refunding of the balance due on the first mortgage, was within a few hundred dollars sufficient to make the $10,000 loan, and also pay quite a sum to other parties.

A part of the consideration of the mortgage in suit was the cancellation of the Clara Fritsch mortgage, and it is apparent from all the evidence that the Fritsch Company received the benefit of the loan in question and the consideration therefor.

The certificate of authority to the officers to sign the mortgage under the evidence in the case, we think, is sufficient. It is a proper certificate, and while it may not appear recorded in the minutes of the company, yet this would not justify its rejection, where there is evidence that such action was taken by the board of directors, and that both companies acted and relied upon its correctness.

Parties dealing with officers of a corporation are not bound to know that every formality required of such officer has been performed. *Bosche* v. *Toledo Horse Displaying Co.*, 14 C. C., 289.

The form of the mortgage also would not affect the right to recover for the reason, as already stated, the Fritsch Company received the benefits of the transaction.

We, therefore, think the equities of the case are with the defendant in error, and the judgment below will be affirmed.

AUTHORITY TO SUSPEND A BRIDGE OVER A STREET.

Circuit Court of Hamilton County.

CATHERINE OFFUTT, ON BEHALF OF THE CITY OF CINCINNATI, v. JOHN ROTH PACKING COMPANY ET AL.

Decided, February 29, 1908.

Municipal Corporations—Validity of Ordinance Authorizing the Connecting of Properties on Opposite Sides of Street by a Bridge—Easement as to Light and Air does not Exist against a Municipality—Nuisance—Obstruction of Street—Ingress and Egress—Section 28 of the Municipal Code.

An injunction will not lie on the petition of a property owner against the connecting of buildings on opposite sides of the street by a bridge twenty feet above the pavement, where the ingress and egress of the plaintiff is in nowise impaired, and the injury which he will sustain, if any, is not different in kind from that suffered by the public at large.

J. T. Harrison, for plaintiff in error.
Geoffrey Goldsmith, for the city.
Denis F. Cash, for the Roth Packing Company.

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

We are of the opinion that the ordinance passed by the council of the city of Cincinnati, granting to the defendant, the John Roth Packing Company, the right to maintain a bridge across Oehler street, is valid. It does not contravene Section 28 of the municipal code, which provides as to streets that council "shall cause the same to be kept open and in repair and free from nuisance." The ordinance provides that said bridge shall be twenty feet above the street. No part of it is placed upon the surface of the street, and the city can still keep the street open, in repair and free from nuisance. Nor do we think the ordinance unreasonable, exclusive or indefinite.

The plaintiff seeks an injunction against maintaining this bridge, on the ground that it is an impairment of her easement of light, air and view. Such an easement does not exist, we think, in Ohio by prescription against a private owner (*Mullen* v. *Stricker,* 19 O. S., 135; *Letts* v. *Hessler,* 54 O. S., 73). And we do not think it exists against a municipality.

Nowhere in the petition does plaintiff complain of any obstruction to the ingress and egress of her lot. Her property is some distance removed from the property of the defendant, the Roth Packing Company, and the bridge in question, and does not nor can it, under the allegations of the petition, abut upon the portion of the street which she claims is obstructed. The injury, if she suffers any at all, is not different in kind from that of the general public. The access to her property is not impaired or destroyed, and as we have already stated, of this she does not complain. We do not think, therefore, that the construction of the bridge in question is such an obstruction of the street, under the allegations of the petition, to the injury of the plaintiff, as would entitle her to the relief sought.

The judgment of the court below will be affirmed.

ENJOINING IMPROVEMENT OF DITCH WITH INADEQUATE OUTLET.

Circuit Court of Fairfield County.

JOHN LOVE v. JACOB SIMON ET AL.

Decided, September 18, 1908.

Ditches—Improvement of Joint County Ditch—For Purpose of Affording a More Adequate Outlet for Lateral Ditches—Jurisdiction of County Commissioners—Assessment of the Cost—Flooding the Lands of a Lower Owner—Injunction.

1. Neither county commissioners nor individuals have any right to collect water and by turning it into a ditch with an insufficient outlet cause an overflow of the lands of a lower owner, and an injunction will lie against a ditch improvement where the testimony warrants the conclusion that such a result will ensue.
2. While the improvement of a joint county ditch may not be effected by proceedings for the establishment of a ditch wholly within the county, yet a joint county ditch may be widened and deepened by the commissioners of one of the abutting counties, where the purpose is to provide a more adequate outlet for streams emptying therein, and the cost of such an improvement may properly be assessed upon those most benefited thereby.

William Davidson, for plaintiff.
C. A. Radcliffe and *Moore & Moore*, contra.

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

Heard on appeal.

The case of John Love v. Jacob Simon et al. (the Board of County Commissioners of Fairfield County, Ohio) is a petition for injunction. The plaintiff says he is the owner of certain property consisting of about 175 acres in Perry county, Ohio; that these premises lie partly on the eastern terminus of a proposed county ditch that was petitioned for by Maggie Miller and others. The further averment is made that the eastern terminus of this ditch is in an alleged joint county ditch which had been attempted to be established and located some seventeen years ago between the counties of Fairfield and Perry. The petition further avers that in consequence of the location and estab-

lishment of the proposed ditch and that if the same is established as proposed, more water in times of flood will be precipitated into the said joint county ditch than the same is capable of carrying away, there being several ditches uniting at or near the said eastern terminus of said proposed ditch, and that in consequence of bringing the water to this point near the eastern terminus of the proposed ditch that the plaintiff's said lands will be flooded to a greater extent, and he will be injured in consequence of the establishment of the proposed ditch. He further avers that the defendants, the county commissioners of Fairfield county, utterly regardless of their absolute want of jurisdiction to widen, deepen, straighten and clean out said joint county ditch, and the part thereof lying in Perry county, Ohio, and regardless of the rights of others owning land in Perry county, along the line of this ditch, threaten to and unless restrained will proceed to construct said proposed county ditch and throw the surplus water upon the lands of this plaintiff, to his great damage and irreparable injury and against which this plaintiff has no adequate remedy at law.

In brief it is the claim of the plaintiff in this case that some seventeen years ago the commissioners of Fairfield and Perry counties sought to establish a joint county ditch, extending from Perry county westward into a portion of Fairfield county; that near the western terminus of this ditch is the confluence or meeting of a county line ditch (the Love ditch as it is often designated) and another ditch extending from the south, there being three streams of water—water-courses or ditches near the western terminus of this joint county ditch.

It is claimed that no notice was given to the commissioners of Perry county of the proposed action, and, secondly, that there is no adequate outlet furnished for the proposed improvement. This case was heard in the common pleas court and judgment entered therein, and an appeal taken to this court.

Several things are clearly established by the testimony in this case:

1st. The entire watershed or territory sought to be drained by this improvement is the same as has been drained into this

joint county ditch for many years—certainly more than seventeen or eighteen years; that is to say, the testimony does not show that any new territory is brought in, but only the natural watershed which has always drained eastward.

2d. That during the years last past there has been drainage of this territory, that has not been under the provisions of the ditch law, but it has been by individual effort of the various land owners; it has not been entirely systematic; yet it has been so concurrent that much of the water of this watershed reached the point which would have been the outlet of the eastern terminus of the proposed ditch.

3d. The attempted location of this joint county ditch some fifteen years ago, while it may not have been under the forms of law, and while it might be that it could not be put through under the present ruling of the Supreme Court, yet it was attempted and the order was made by the joint board of county commissioners of the two counties, that the creek which was the head waters of Rushcreek was straightened, and was intended to furnish an outlet for the confluence of the streams that were turned into it at its western terminus.

4th. It does appear clearly from the testimony that the plaintiff's lands before this attempted location of the joint county ditch were overflowed and overflowed to a very considerable extent.

5th. It also appears that since that time the plaintiff's lands have been overflowed.

Now this suit is brought to enjoin this proposed improvement on the ground principally that there is not sufficient outlet under the law as required to be found by the commissioners. And, secondly, that great and irreparable injury will be done to the plaintiff by the concentration of the waters at this point of the confluence of those streams and projecting of them down and over his land.

If the testimony in this case would establish either of these propositions, the court are unanimous in the opinion that it would have full right and authority to enjoin this improvement. It is a jurisdictional fact that must be determined by the commis-

sioners that there is a sufficient outlet for a ditch before it can be established. And we take it, that it is a matter of law that neither the commissioners of a county nor individuals have a right by the industry of man to gather together waters and project them down on and over the lands of an owner lying below a proposed improvement to his injury and damage, for that is *pro tanto* an appropriation of his land, and unless he receives compensation therefor it is violative of the Constitution of the state.

The testimony in respect to the question of outlet is somewhat in conflict. If we look to the cross-sections of this stream and to the profile that is presented in this case, showing the bottom of this ditch and the grade of the bottom of this ditch, we might be constrained to hold that the commissioners could not under such a showing have established this ditch with a sufficient outlet. If we look to the testimony of the witnesses in the case, we have a division of opinion in that respect; certain of the witnesses who are property owners and have an opinion concerning the action of the waters at the western terminus of the joint county ditch say that this joint county ditch or Rushcreek is wholly inadequate to receive the waters from these three streams that are now meeting there, and if the new ditch is established the outlet is wholly inadequate. We have the commissioners of the county, who have investigated this matter and in whom is reposed the duty of determining whether a sufficient outlet is provided; they say that they found a sufficient outlet for the proposed ditch. The engineer in charge on whom the law puts the duty of laying out this improvement says that a sufficient outlet is provided. So that with this divided sentiment in respect of the improvement we can not say that the preponderance of the evidence is with the plaintiff upon this proposition. There is as much testimony here and as satisfactory evidence that there is a proper and sufficient outlet, as that they have failed to provide a sufficient outlet.

Now the next proposition—the equitable proposition that the plaintiff has the right to be protected from an increased flow of water down and over his lands. We have the testimony in this

case and we think the great weight of the testimony is that the drainage for years back has been better along the line of this watershed than it is now; we think that by the concurrent act of the land owners they had practically the same drainage as is sought to be given by this proposed improvement; we think by the drainage going on for years and acquiesced in by the plaintiff, that the plaintiff received the same amount of water formerly and the same watershed was projected upon his land as will be projected by the proposed improvement. The engineer says that no greater amount of water will come down upon his lands than came before. This is also the opinion of the owners of the land affected by the improvement.

While the improvement of the joint county ditch may not be made by proceedings to establish a ditch, yet it can certainly be improved. We do not understand the Supreme Court to say that a water-course can not be widened, straightened or deepened. If it can be widened and deepened to furnish a more adequate outlet for the benefit of those three streams, the cost of that improvement may be assessed upon those most benefited thereby, rather than that the court should use the drastic and extraordinary writ of injunction.

So that taking all these things into consideration, we think that the judgment in this case ought to be for the defendants, and that the petition of the plaintiff should be dismissed with costs; exceptions will be noted on behalf of plaintiff; motion for a new trial may be filed and overruled; the statutory time will be allowed for bill of exceptions; and twenty days will be allowed for findings of fact, and if that can not be agreed upon. submit it to us and we will settle it.

CORPUS DELICTI.

Circuit Court of Hamilton County.

MAX PREMACK v. STATE OF OHIO.

Decided, July 18, 1908.

Criminal Law—Corpus Delicti—Charge of the Court—Erroneous Assumption by the Court That a Crime Occurred—Province of the Jury Invaded.

Where a defendant enters a plea of not guilty, he puts in issue all the material facts, including the *corpus delicti*, and a charge to the jury in such a case to the effect that the theft of the goods was not disputed or open to controversy is an evasion of the province of the jury and constitutes reversible error.

Thomas H. Darby, Louis P. Pink and *Eugene Adler*, for plaintiff in error.

Froome Morris, contra.

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

The grounds of error relied upon by the plaintiff in error are —first, the court erred in admitting testimony of a prior larceny; and second, the court erred in its charge to the jury.

As to the first we do not think the testimony admitted by the trial court and objected to by plaintiff in error disclosed a prior larceny on the part of the defendant, but that it was properly admitted as tending to show guilty knowledge on the part of the plaintiff in error that the property, for receiving which he was charged, was stolen. Besides the record does not disclose an objection and proper exception to the substance of the testimony, but rather to the time of its introduction by the state.

Second. We think there was error in the charge of the court in stating to the jury that "certain facts were not disputed and not open to controversy," that is, "does not controvert nor open to controversy that the goods or some of them set forth in the indictment were stolen at the time alleged from a freight car belonging to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company."

The plea of not guilty of the defendant put in issue all material facts to be proven by the state, and one of the facts thus to be proven was the *corpus delicti*. The defendant did not take the stand in his own behalf, and he did not by his testimony or otherwise as shown by the record admit the claim of the state as to the body of the crime. This was an issue to be tried by the jury and not by the court. In substance the trial court told the jury that the crime of larceny had been committed, and the statement also would tend to fortify the evidence given by the accomplices in the case who testified on behalf of the state to the commission of the crime, where such evidence, as the court properly instructed the jury, was to be scrutinized with care. It is the province of the jury to determine whether or not a crime has been committed, and if it is has then the time and manner of it, as well as who are the perpetrators. *Morgan* v. *State*, 48 O. S., 371.

For the above error of the court the judgment will be reversed, and new trial granted.

INTERPRETATION OF EVIDENCE.

Circuit Court of Hamilton County.

HOUSTON v. CINCINNATI, MILFORD & LOVELAND TRACTION COMPANY.

Decided, July 13, 1908.

Error Proceedings—Misconduct of Counsel Must be Shown by the Record—Accident and Surprise—Evidence—Charge of Court.

1. Misconduct of counsel for the prevailing party in his remarks to the jury can not be considered as ground of error, unless it has been properly brought into the record.
2. Nor can error be predicated upon accident or surprise with reference to testimony offered by the opposite side, where a fair interpretation of the testimony complained of discloses nothing which could not have been anticipated.

A. A. Ferris, for plaintiff in error.

Thorne Baker, contra.

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

The grounds of error relied upon by counsel for plaintiff in error are:

First. Misconduct of counsel of the prevailing party in his remarks while addressing the jury.

Second. Accident and surprise which ordinary prudence could not guard against.

Third. That the verdict was against the weight of the evidence.

Fourth. That the charge of the court was such as to mislead or confuse the jury.

As to the first ground of error, if there was misconduct of counsel of the prevailing party in his remarks to the jury, such ground can not be considered by this court under the case of *State* v. *Young*, 77 O. S., 529, as the same is not properly brought upon the record.

The accident or surprise complained of relates to the claim of the plaintiff in error that the testimony of the motorman tended to show that there were curtains on the sides of his vestibule which he had down, when as a matter of fact upon investigation the vestibule had no side curtains.

We do not think this ground of error is well taken, as the motorman in describing the vestibule of his car on the night of the accident says: "It was a closed vestibule car. I had my curtains down, center and sides, and my right hand door was open as I had just turned the switch at Sixth and Broadway." This answer is very plain and can only refer to the curtain in the center of the car at the door opening into his vestibule, and the two curtains on each side of the center door.

As to the claim that the verdict and judgment is against the weight of the evidence, this was for the jury to determine, and we can not say that the verdict is wrong on this account.

We see no error in the general charge of the court as complained of by plaintiff in error, whereby the jury was misled or confused on the question of negligence or contributory negligence, and there being no errors in the record, the judgment of the trial court is affirmed.

MAKING NEW PARTIES FOR PURPOSE OF DISTRIBUTION.

Circuit Court of Hamilton County.

ALEX. M. HAZELGREEN ET AL v. THE CINCINNATI & INDIANA WESTERN RAILROAD COMPANY ET AL.

Decided, November, 1907.

Parties—May be Brought in for Purposes of Distribution—Contractors —Railways—Claims of Material-men and Laborers—Error.

In an action by a contractor against a railway company for damages for breach of contract it is not error, where judgment has been obtained by the contractor, to permit the railway company to make material-men and others asserting claims against the contractor parties to the action for the purpose of distribution.

L. W. Goss, for plaintiff in error.

John W. Peck, for the railroad company.

Per Curiam.

The court is of the opinion that there is no error in this case. The petition below was filed by Henry S. Hazelgreen, doing business as H. S. Hazelgreen & Co., against the Cincinnati, Indiana & Western Railroad Company to recover for a breach of contract. The railroad company filed its answer and cross-petition asking judgment in a certain sum against said plaintiffs. These two questions were submitted to a jury who found in favor of the plaintiffs against the defendant in the sum of $1,231.91. Thereupon the railroad company made various persons, claiming to have performed labor, furnished supplies, food, board, etc., to the contractor, parties defendant, and asked that said sum so recovered against it be distributed among said labor and material men.

It can not be claimed that the amount found by the jury as due the plaintiffs, was outside and above the other sums that the defendant railroad company owed for labor and supplies furnished, and that these amounts were deducted from the entire sum due. The verdict returned fixed the entire amount that was owing from the railroad to plaintiff, and in this amount the

various laborers and material men were interested. We see no error in having them made parties to the action for purposes of distribution.

The judgment therefore will be affirmed.

JUDGMENT IN EXCESS OF AMOUNT ENDORSED ON SUMMONS.

Circuit Court of Hamilton County.

AMERICAN AUDIT COMPANY v. JAMES A. MILLER.

Decided, December 28, 1907.

1. Where a court exceeds its jurisdiction by rendering judgment for an amount greater than that endorsed on the summons, the error can not be cured by a remittitur.
2. It is not error to set aside such a judgment at a subsequent term.

Closs & Luebbert, for plaintiff in error.
James M. Riddle and *Charles F. Hornberger,* contra.

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

We think that the Court of Common Pleas had no power to render a judgment for $6,500, on June 13, 1907.

Section 5034, Revised Statutes, provides "that when the action is for money only, there shall be endorsed on the writ the amount to be stated in the precipe for which with interest judgment will be taken if the defendant fails to answer, and if he fails to appear judgment shall not be rendered for a larger amount and the costs."

In this case the amount endorsed on the summons was $5,900. The court was without jurisdiction to render judgment for an amount greater than was endorsed on the summons (35 O. S., 107); and this could not be cured by an offer to remit.

The action of the court in setting this judgment aside at a subsequent term was right.

LIABILITY UNDER BOND OF A VILLAGE CLERK.

Circuit Court of Hamilton County.

GEORGE SAUER AND GEORGE HACK v. VILLAGE OF MADISONVILLE.

Decided, February 29, 1908.

Fiduciary Bonds—Duties of Village Clerk—Sureties of, not Liable for Failure to Account for Assessments Collected Under Authority of an Ordinance—Section 1762.

The collection and disbursement of street assessments is not a statutory duty of a village clerk or a duty pertaining to his office, and where such service is performed by him under authority of an ordinance his sureties are not liable for his failure to account for such collections, when the condition of the bond is that he will "faithfully perform the duties of the office of clerk of said village during his continuance in said office for said term."

W. A. Hicks and *W. F. North*, for plaintiffs in error.

L. A. Ireton and *W. M. Schoenle*, contra.

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

The condition of the bond sued upon in this case is:

"Now, if the said Bennett Carter shall faithfully perform the duties of the office of clerk of said village during his continuance in said office for said term, then this obligation shall be void, otherwise it will and remain in full force and effect."

In *State* v. *Griffith*, 74 O. S., 80, it is decided:

"A public officer is personally and may be even criminally liable for malfeasance in office; but the sureties on his official bond are answerable only within the letter of their contract for faithful performance of his official duties, and not for dereliction outside of the limits of his official duties."

The question is, does or does not the bond in this case come within the terms of this decision? We are of opinion that it does.

In *State* v. *Carter*, 67 O. S., 422, while the Supreme Court of Ohio holds that Carter was legally chargeable with the funds collected by him under the ordinances passed by the village

council of Madisonville, and if he fraudulently converted them to his own use he was guilty of embezzlement under the provisions of Section 6841, yet in their opinion the court say that "the moneys which came into his possession, custody and keeping while he was village clerk, were moneys which he had collected and received under the provisions of said ordinances and not in the discharge of any purely statutory duty imposed upon him." Further on in its opinion the court say that "the clerk was an officer of the village and not of the state, and while his general duties are defined by statute, it is within the legitimate exercise of municipal authority to add other duties, which are not inconsistent with the statutory duties, and which relate solely to the local affairs of the corporation."

We do not think this new duty imposed upon Carter was one pertaining to his office as clerk that might be prescribed by council as provided in Section 1762. In holding Carter guilty of embezzlement the court say:

"That he availed himself of the provisions of the ordinances so far as to receive from the village tax-payers sums of money which they were required to pay within a certain period to avoid certification of the same by him to the county auditor."

In becoming surety for Carter, the bondsmen were only liable in case Carter "failed to faithfully perform the duties of the office of clerk of said village." And this no doubt would include such other duties "pertaining" to his office as council might prescribe. The duty of collecting and disbursing the assessments set out in the ordinance was not a duty imposed upon him by statute, or one pertaining to his office as village clerk. His appointment and selection for this purpose was as though the village council had selected any other individual, and under the terms of the bond such duties were not included.

We are of opinion, therefore, that the court erred at the close of the defendant in error's testimony below to grant the motion of the plaintiffs in error to arrest the testimony from the jury and instruct a verdict for the plaintiffs in error.

Judgment reversed.

EVIDENCE AS TO RELATION OF A DECEDENT TO A NOTE.

Circuit Court of Madison County.

BUTT, EXECUTOR, v. WORTHINGTON. *

Promissory Note—Principal and Surety—Evidence—Deceased Party—Competency of Testimony Under Section 5242.

Where one of the four makers of a note, claiming to be a surety, having paid the balance due after the death of two of such makers, both of whom he alleges were principals as to him, brings an action against the administrator of one of the alleged principals, and issue is joined as to who were principals and who were sureties, the other remaining maker, not being a party to the action, is not incompetent under Section 5242, Revised Statutes, to testify as to the relation existing between the deceased and the plaintiff.

Lincoln & Lincoln and *Howard Black,* for plaintiff.
Durflinger & Emery, contra.

SUMMERS, J.; WILSON, J., and SHEARER, J., concur.

The only question presented in this case is as to the competency of Delilah Worthington as a witness. Plaintiff in error claims that she was incompetent under the amendment to Section 5242, Revised Statutes, which provides that if the case is not within the letter, but is plainly within the reason and spirit of the three preceding sections, the principles shall be applied. We have examined all the cases but think it necessary to notice only two.

In *Hubbell* v. *Hubbell*, 22 Ohio St., 208, 221, the court says. "That both the parties disqualified and the reverse party referred to must be parties to the record."

In *Cochran* v. *Almack*, 39 Ohio St., 314, 316, the court say: The clause of Section 5242, Revised Statutes, under consideration, "calls for the application of the principles of the three preceding sections, only *when the case is not provided for by*

* Affirmed without report, 57 Ohio St., 636.

either of these sections" and "that if a case is provided for by the terms of either of the sections, no occasion can arise for invoking the spirit and reason of the statute to supply the omission of its letter or terms."

Delilah Worthington is not a party to the record, and being made competent by the terms of the preceding sections, the latter clause of Section 5242, Revised Statutes, has no application.

Finding no error on the record, the judgment will be affirmed.

LOSS OF LIEN ON REAL ESTATE FOR DEBT OF DECEDENT.

Circuit Court of Hamilton County.

KEMPER, ADMINISTRATOR, v. APOLLO BUILDING & LOAN COMPANY ET AL. *

Decided, May 23, 1908.

Administration of Estates—Laches in Enforcing Mortgage Claim—Protection of Innocent Purchasers—Equity—Estoppel.

A mortgagee is guilty of laches when, in acting upon the theory that his security is ample, he delays enforcement of his claim for a number of years, and until after the estate has been closed and other realty belonging thereto has been sold to innocent purchasers for value, who have erected valuable improvements thereon; and in such a case the mortgage is estopped from proceeding against such innocent purchasers for recovery of a balance remaining due after exhausting his security.

W. A. Hicks and *D. F. Cash,* for the plaintiff.

Willis M. Kemper, Pogue & Pogue, Roettinger & Gorman, David Davis, Charles M. Leslie, William Walker Smith, Jr., and *J. H. Charles Smith,* contra.

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* Affirming *Kemper, Admr., v. Apollo Building & Loan Co.,* 5 N. P.—N. S., 403.

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

In our view of this case, we are of opinion that the defendants, Thomas C. Welch, or T. J. Couden, assignor of the claim of Welch, have been guilty of such laches that they are estopped from asserting any claim against the other defendants herein, the innocent purchasers for value and mortgagees of the Kemper real estate.

The account of the administrator of Parke F. Kemper was filed in the probate court showing distribution to the creditors then existing. Couden, having a mortgage upon a certain piece of property, relied upon this security, no doubt believing it would be sufficient to pay his mortgage debt.

Some eight years passed without any effort being made to enforce the payment of his claim. When the claim accrued the security was regarded as worth considerable more than the claim, and it was not until years after the various tracts of land were sold and valuable improvements made thereon, that, finding on a sale of the mortgaged premises that the same was not sufficient to pay his debt in full, he undertook to enforce his claim for the balance against the property held by the present owners who paid value for the tracts and were innocent purchasers thereof.

To determine whether a party is guilty of laches each case must be decided according to its own particular circumstances, taking into consideration all the elements which affect the question. Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time and other circumstances, causes prejudice to the adverse party, and therefore operates as a bar in a court of equity. We are of the opinion that the time allowed to pass and the circumstances in this case are such that, in the hands of innocent purchasers, the claim of Couden or Welch can not be asserted against the property now held by them. The doctrine of laches proceeds upon the question of the iniquity of permitting a claim to be enforced, which iniquity is founded upon some change in the condition or relations of the property or the parties interested.

Having reached this conclusion, and basing it upon the doctrine of laches, it is unnecessary for us to consider whether or not the enforcement of the claim of Welch and Couden is barred by the statute of limitations.

The petition therefore of the appellant will be dismissed.

MALICIOUS PROSECUTION—PLEADING.

Circuit Court of Hamilton County.

GROSSE V. OPPENHEIMER ET AL.

Decided, January 18, 1908.

A petition in an action for damages for malicious prosecution states no cause of action, where the petition merely alleges "that the said cause was terminated by plaintiff being obliged to pay the costs of said prosecution."

John C. Rogers, for plaintiff in error.

Benton S. Oppenheimer, pro se.

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

This is an action in this court on error to the judgment of the court of common pleas. In that case it was an action for malicious prosecution. A general demurrer was filed to the petition, which the court sustained. In doing so, we think the court committed no error. The petition alleges, "that said cause was terminated on the 13th day of November by said plaintiff being obliged to pay the costs of said prosecution." We take this allegation to mean that she was found guilty of the charge and fined the costs. There is no allegation in the petition that the judgment of conviction was procured by fraud or by any other improper means.

"The general rule is that a conviction in criminal proceedings is conclusive proof of probable cause unless procured by false or fraudulent testimony or other unlawful means." 19 Am. Ency., 666.

There is no cause of action stated in the petition.

Judgment affirmed.

ADVANCEMENT TO A SON-IN-LAW OF INTEREST OF DAUGHTER.

Circuit Court of Fairfield County.

FISHER v. FISHER ET AL.

Decided, September Term, 1907.

Advancements—May be Made to Son-in-law, How—Intention of Donor —Acquiescence of Daughter—Trusts and Trustees—Probate Practice.

A gift of a tract of land to a son-in-law and payment by the donor of part of the purchase price of another tract, the daughter of the donor and her husband, the son-in-law, uniting in a receipt for the property by way of advancement, constitutes neither an implied nor a resulting trust, but is an advancement to the son-in-law of the daughter's interest with her acquiescence.

C. W. McCleery and *A. W. Clutch*, for plaintiff in error.

M. A. Daugherty and *W. K. Martin*, for defendants in error.

TAGGART, J.; DONAHUE, J., concurs; MCCARTY, J., not sitting.

Error to Fairfield Common Pleas Court.

This is a proceeding in error prosecuted in this court to reverse the judgment of the court of common pleas. The question arises on a demurrer to the first and second causes of action in plaintiff's petition and, concretely stated, it is this: Does the giving by a father to his son-in-law of a tract of land and payment by the father to the son-in-law of a part of the purchase price of another tract of land, the son-in-law and daughter uniting in a receipt for the property by way of advancement, constitute an implied trust or a resulting trust under the law. The averments of the first and second causes of action are simply the relationship of the parties, and that the father conveyed to the son-in-law one tract of land and paid part of the purchase price of another tract of land, and that thereupon the daughter and son-in-law executed a receipt acknowledging

getting this property by way of advancement; and it is claimed that, out of this transaction alone, an implied trust or resulting trust arose. It is distinctly averred that the bestowal of this property by the father upon the son-in-law was by way of an advancement to the daughter and the receipt was given as an advancement.

This can not be an advancement and at the same time either a resulting trust or an implied trust. The two are at variance with each other and a brief analysis of what constitutes an advancement negatives the idea of a trust. Rockel, Probate Practice, Section 929, defines an advancement as follows:

"An advancement is a gift by a person to a presumptive heir of certain property with the intention that the value of such property shall be deducted from the portion that such presumptive heir would otherwise be entitled to receive out of such person's estate after such person was deceased. * * * The gift in order to constitute an advancement must be irrevocable, divesting entirely all the ancestor's interest, and forming no part of the property to be administered; hence the donee can in no case be compelled to refund what he has received."

The author further goes on and discusses the character of an advancement—that it is a gift and can not be changed to a debt. It is not intended that it should ever be refunded or repaid by the donee. The gift is to an heir presumptive, or one standing in the nature of an heir, or one who is entitled to inherit.

That being the case the question arises: Can there be an advancement to a son-in-law? This question has been settled in the case of *Dittoe* v. *Cluney*, 22 Ohio St., 436:

"A gift to a son-in-law, intended by the ancestor to be charged as an advancement against his daughter, and not subsequently converted by him into a gift absolute, will be so charged against her in the distribution of his intestate property, if she, knowing the fact and intention of the gift, shall have acquiesced therein."

So that there can be an advancement to a son-in-law with the knowledge and consent of the daughter, and after that appears, it is then an advancement to the daughter.

Let us look briefly to a definition of an implied trust. Perry, Trusts, says:

"Implied trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts from the whole transaction and the words used, imply or infer that it was the intention of the parties to create a trust."

So we must gather from the transaction whether it was the intention of the parties to create a trust, because there is no express trust in this case insisted upon.

"An implied trust arises where, upon the purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration or a part of it is given or paid by another, not in the way of a loan to the grantee; the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds."

So we see the distinguishing feature in those two transactions. In both instances the intention of the parties must govern. If it was the intention that there was to be an implied trust, that must be gathered from the transaction. If it was the intention to be an advancement, that must be inferred from the intention of the donor and the acts and intention of the donee.

Looking to this transaction and the averments of the petition, there is only the averment that this was an advancement, in which event it was an irrevocable gift. The donees were never called upon to account for any payment of this sum except in the distribution of the estate. If they were donees they could not be called upon in any other way for an accounting. If the daughter was the donee of this gift and the son-in-law was a participant in the reception of the gift, he certainly could not be called upon to account for the principal or for any interest in the proceeds of that gift. There would be no control over this transaction except as the representative of the donor would account for it in the administration of the estate.

Another test—If she is the *donee of this gift* she could hardly

insist that she was the *cestui que trust* of which her husband was the principal trustee; that could hardly be claimed.

Now we have *Thompson* v. *Thompson,* 18 Ohio St., 73, holding distinctly that no such trust is either implied or results therefrom. *Stump* v. *Stump,* 26 Ohio St., 169, holds similarly. It is claimed that the case of *Stayner* v. *Bower,* 42 Ohio St., 314, is contrary to this doctrine, but we think there is a very distinguishing feature which differentiates it from the other cases cited. In that case the daughter did not consent or in anywise acquiesce in the bestowal of the money upon her husband. The father bestowed it upon the son-in-law as an advancement intending to charge it against the daughter's estate; she not acquiescing therein, it could not be said to be an advancement to her, nor chargeable out of her share in her father's estate. It was not strictly speaking an advancement, but it was in the nature of property bestowed upon the son-in-law for her benefit and use, for which she would be entitled to recover against her husband. There was no acquiescence on the part of the donee that the transaction should constitute an advancement against her.

In the case at bar there was the intention of the donor to give, and there was an acquiescence of the donee in the nature of an advancement, as to which there was to be no recovery of the principal or of the rents and profits, and no accounting except in the manner provided in the distribution of the estate.

So we think that in this case, after careful review of all the authorities and on principle, the demurrer to the first and second causes of action were properly sustained. We find that the court committed no error in dismissing the first and second causes of action, and the others being contingent upon them and the parties not desiring to plead further, we find no error in the record and the judgment of the lower court will be affirmed with costs.

INJURY TO FIREMAN WHILE UNDER HIS ENGINE.

Circuit Court of Hamilton County.

THE CINCINNATI, HAMILTON & DAYTON RAILWAY CO. v. JOHN H. TANGEMAN.

Decided, June 13, 1908.

Negligence—Fellow-Servant—Pleading—Special Findings by Jury—Inconsistencies in—Evidence.

1. In the absence of proof to the contrary an engineer will be regarded as superior to his fireman, and a finding by the jury that the injury to the fireman was caused by the negligence of fellow-servants is inconsistent with a finding that the engineer assured the fireman it was safe to go under the engine, although no precautions had been taken to protect him while there.
2. A finding by the jury that the injury was the result of an accident may be interpreted as merely negativing the charge against the defendant of malice and willfulness contained in the petition.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.
Frank H. Kunkel and *Thos. L. Michie*, contra.

Plaintiff, a fireman, was injured while under his engine cleaning out the ash pan, by a cut of freight cars being allowed to run against the engine. He recovered a verdict below of $7,500.

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

The omission to close the switch after the engine passed onto the siding is neither charged nor proved as an act of negligence by the defendant company, and does not support the general verdict for plaintiff.

The special finding of the jury that the negligence of the defendant consisted in part of "the word from engineer Dumphy to fireman Tangeman, *i. e.*, 'alright John,'" supports the averment in the petition that "the defendant neglected to place a flag or some other signal of warning to other engines and cars in the said yard for the protection of the plaintiff while under

the said engine" because it shows not only a positive notice of safety to the fireman, but also the absence of any precaution by the engineer to protect him.

The finding of the jury that the plaintiff was hurt through the negligence of one or more fellow-servants is inconsistent with the finding that he was hurt through the negligence of the engineer, who must, in the absence of proof to the contrary, be regarded as a superior servant.

The finding of the jury that the injury was the result of an accident, was intended merely to negative the charge in the petition of malice or willfulness.

There was no error in overruling the motion of defendant for judgment upon the special findings of the jury, and the judgment will be affirmed.

LIABILITY FOR SAFETY OF MONEY DEPOSITED BY A GUEST.

Circuit Court of Hamilton County.

HERMAN ROECKERS v. JOSEPH HART.*

Decided, April, 1908.

Where one who pays a stipulated amount for his board and lodging deposits a sum of money with his landlord for safekeeping, the latter is liable for the money so taken, whether he be regarded as an inn-keeper or a boarding house keeper.

Wm. C. McLean, for plaintiff in error.
W. A. Rinckhoff, contra.

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

The defendant in error paid the plaintiff in error a stipulated sum of money for his board and lodging, and the latter agreed to safely keep over night the sum of $152, belonging to the former.

* Affirming *Hart* v. *Roeckers*, 7 N. P.—N. S., 395, which see for statement of the case.

The next morning the plaintiff in error gave the money to his servant for redelivery to the defendant in error, but the servant appropriated the same to his own use.

The plaintiff in error was liable for the money so taken, whether he be regarded as an innkeeper or a boarding house keeper. The defendant in error was his guest in either event (Beale on Innkeepers & Hotels, Sections 188 and 293).

While it is true that the defendant in error testified that he had no home except at Rockers (plaintiff in error), yet he explained his meaning in his redirect examination by saying, "I consider that my home wherever I pay my bills for my board."

What he meant, and what the jury evidently understood was, that he had no permanent home, and that wherever he stopped for board and lodging, no matter for how short a time, that place he regarded as his temporary home. In other words, he was a transient person or guest, and recognized as such by the plaintiff in error, who was accustomed to receiving such guests. *Hancock* v. *Rand*, 94 N. Y., 1.

DISSOLUTION OF PARTNERSHIP.

Circuit Court of Hamilton County.

THEO. M. HARSCH v. WILLIAM BROWN, SR., ET AL.

Decided, July 8, 1908.

Partnership—Action for Dissolution of, Equitable—Division of Partnership Assets—Appeal.

Healy, Ferris & McAvoy, for the motion.

W. J. Davidson, contra.

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

The motion to dismiss appeal will be overruled. The petition states facts which show a partnership. An action which seeks a dissolution of the partnership and a division of partnership assets is equitable in its nature.

INJURY FROM TILTING OF LOOSE BOARD IN SIDEWALK.

Circuit Court of Hamilton County.

CITY OF CINCINNATI v. GUTH.

Decided, January 18, 1908.

Contributory Negligence—Board Sidewalk in Bad Repair—Action for Injury thereon—Municipal Corporations.

Where the only contributory negligence which can be imputed to a plaintiff, suing for damages for an injury, was in using a board sidewalk known to be in bad condition, but at a time when other parts of the street were also unsafe for travel, the issue is one of fact to be determined by the jury under proper instructions by the court, and the finding of the jury thereon, as implied by the general verdict, will not be lightly disturbed.

Edward M. Ballard, City Solicitor, for plaintiff in error.
Kelley & Hauck, contra.

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

It appears at page 114 of the bill of exceptions that the plaintiff, when she entered upon the defective sidewalk, knew that the boards were loose and liable to tilt when stepped upon, but the testimony also tends to prove that the other parts of the street were in an unsafe condition for travel, and that she could not easily avoid the danger from the boardwalk.

The question of contributory negligence was therefore one of fact to be determined by the jury, under proper instructions from the court. Such instructions were given at the request of the defendant, and are numbered eight and nine in the bill. *Schaefler* v. *City of Sandusky*, 33 O. S., 246; *Norwalk* v. *Tuttle*, 73 O. S., 242.

The testimony shows that the plaintiff exercised care commensurate with the known danger; that the accident occurred by reason of her companion, a boy about sixteen years of age, stepping upon one of the loose boards and causing it to tilt in front of the plaintiff while walking, whereby she tripped and

fell to the ground. The only act therefore, if any, of contributory negligence was in using the walk when known to be in a dangerous condition, and we are not disposed to disturb the finding of the jury necessarily implied in the general verdict given under proper instructions.

We find no prejudicial error and the judgment will be affirmed.

FRAUD IN OBTAINING JUDGMENT AGAINST A WIFE.

Circuit Court of Stark County.

ULMAN, EINSTEIN & Co. v. EFFINGER. *

Judgment—Fraud in Obtaining, Against a Wife—Sufficient Averment of Fraud—May be Set Aside, Notwithstanding There was Service of Summons, but no Defense was Interposed.

N. J. and *J. S. McLean,* for plaintiff in error.

Peter J. Collins, contra.

ADAMS, J.; POMERENE, J., and DOUGLASS, J., concur.

First. A judgment may be set aside for fraud notwithstanding the fact that no defense was made at the time it was rendered, although the defendant was properly served with summons by copy thereof left at her usual place of residence.

Second. A judgment procured against a party on an account which she never owed, nor became either directly or indirectly liable for its payment, constitutes a fraud on the court rendering such judgment, which should be set aside in a proper proceeding brought for that purpose.

Third. An averment in a petition that goods or merchandise were sold to a husband, and that afterwards and before suit is brought to recover the price thereof, the plaintiffs inserted the name of the wife of such husband in said account, and without her knowledge or consent, is a sufficient averment of fraud to constitute a cause of action and a demurrer to such petition and pertinent interrogatories attached thereto is properly overruled.

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* Affirmed by the Supreme Court without report, 60 Ohio St., 579.

INSPECTION BY STOCKHOLDERS OF CORPORATION BOOKS.

Circuit Court of Hamilton County.

OHIO HUMANE SOCIETY v. WILLIAM C. BILES.

Decided, June 27, 1908.

The provision found in Section 3254, Revised Statutes, requiring that the books and records of corporations shall be open to the inspection of stockholders at all reasonable times, has no reference to corporations not for profit.

Ellis B. Gregg, for plaintiff in error.
Province M. Pogue, contra.

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

We are of opinion that Section 3254, Revised Statutes, wherein it is provided that "the books and records of such corporation shall at all reasonable times be open to the inspection of every stockholder," has reference to corporations organized solely for profit. It speaks of "stockholders," "certificates of paid up stock," the "assignment" and "transfer of certificates of stock." This section therefore has in contemplation property rights, while in corporations "not for profit" there is no stock and no property right of a member is involved.

The statutes relating to the establishment of the Ohio Humane Society are contained in Chapter 13, Sections 3714 to 3725-2, and not being a corporation for profit it can not come under Section 3254, and for this reason also we do not think the case of *Cincinnati Volksblatt Company* v. *Hoffmeister,* 62 O. S., 189, is applicable to the present one.

While upon the face of the petition perhaps a demurrer would not lie, the answer sets up a good defense and it was error to refuse to allow the same to be filed.

Judgment reversed.

RECOVERY OF MONEY ILLEGALLY PAID TO COUNCILMEN FOR SERVICES.

Circuit Court of Jefferson County.

WALKER ET AL v. VILLAGE OF DILLONVALE, ON RELATION OF THOMAS MCCABE.

Decided, May Term, 1908.

Office and Officer—Compensation of Councilmen—Where Illegally Paid May be Recovered Back—Action for, by Tax-payer—Parties—Community of Interest—Municipalities—Section 197 of the Municipal Code, and 1536-667-668 and 5008, Revised Statutes.

1. Councilmen of a municipality are not entitled to receive compensation for their services until the same is authorized by ordinance, and money received by them therefor prior to the passage of such ordinance may be recovered back in a proper action.
2. Where there is no statute providing for recovering back money so paid to councilmen, a suit in equity may be prosecuted for that purpose by any tax-payer on behalf of the municipality or on behalf of himself and other tax-payers, and in such suit all the councilmen so illegally receiving money may be joined in one action to prevent a multiplicity of suits.

Erskine & Smith, for plaintiff in error.

W. C. Brown, contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to Jefferson Common Pleas Court.

Harry Walker with five others were elected members of council of the incorporated village of Dillonvale in April, 1905, and went into office in May of that year.

Section 197 of the municipal code passed October 22, 1902, provides:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided in this act. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or

appointed; provided, that members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year, and they shall have such other powers as are conferred upon councils of villages by Section 1678 of the Revised Statutes of Ohio."

In December of 1905, council passed a resolution to pay members of council for meetings theretofore held. The amount was paid to each of them, and this suit was instituted by the village of Dillonvale, on relation of Thomas McCabe, a tax-payer, against each of said parties to recover back the amount so paid, they all being joined in the action. The suit is really one in equity to require them and each of them to pay back into the village treasury said sum of money and for a decree against each of them for said sum which, as claimed, was illegally taken from the village treasury.

The court of common pleas so treated the action and ordered each of the defendants to pay to the clerk of the court the amount received by him, to be turned over by the clerk to the village treasurer for the benefit of the village.

Three questions are made: First, was the money illegally paid to these councilmen? Second, had Thomas McCabe, as a tax-payer, a right to bring and prosecute the suit on behalf of himself, or for the benefit of the village? Third, was the suit properly instituted and prosecuted against all the councilmen in one action?

As to the first question. Council did not fix the compensation of the councilmen until after the performance of the services. It is well settled in this state that where services are performed by a public officer where no compensation is provided for, that he is presumed to perform the services gratuitously, and that he can not recover any compensation for such services.

We have had this section before us before, and we have held that council must fix the compensation before the services are performed or none can be received. The statute says council shall fix the compensation and bonds of all officers. When fix compensation? Clearly before the services are performed. We, therefore, hold the money was illegally paid to these defendants.

The next and important question is: Had McCabe the legal authority to bring the suit? There is no statute authorizing him to bring such suit. There is statutory provision providing that a tax-payer may call upon the solicitor to restrain the paying out of money illegally and, in case the solicitor fails, the tax-payer may bring suit in his own name, but none to recover it back after its illegal payment.

The provisions as to counties (Section 1277, Revised Statutes) and municipalities (1536-667 and 1536-668), are different in this regard. In such case are the people helpless; that is the claim of plaintiffs in error? If that is so, then the law is indeed lame and impotent. If the money is still in the hands of the treasurer then there is relief; if it has left his hand then there is no relief.

It is one of the principal objects of equity to afford relief when there is no remedy at law; and certainly a case of this character affords a striking illustration of this very salutory principle of equity.

Judge Dillon, in his work on Municipal Corporations, goes into this question quite exhaustively. In Section 914 (731) it is said:

"In this country, the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the tax-payers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property under circumstances presently to be explained—has, without the aid of statute provision to that effect, been affirmed or recognized in numerous cases in many of the states.

"It is the prevailing, we may now add, almost universal doctrine on this subject. It can, we think, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct and adequate preventive relief against their misuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own

names than to compel them to rely upon the action of a distant state officer. The equity jurisdiction may, in such cases, usually rest upon fraud, breach of trust, multiplicity of suits, or the inadequacy of the ordinary remedies at law. It is advisable, in view of its importance, briefly to examine the doctrine above mentioned, and the grounds upon which it rests, in the light of some of the leading judgments of the courts, the better to see its scope, limitations, and application.

"The doctrine of the preceding section is also supported by an analogy supplied by a settled rule of equity applicable to private corporations. In these the ultimate *cestuis que trust* are the stockholders. In municipal corporations the *cestuis que trust* are in a substantial sense the inhabitants embraced within their limits. In each case the corporation, or its governing body, is a trustee. If the governing body of a private corporation is acting *ultra vires* or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such an action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of a corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant, be allowed to maintain in behalf of all similarly situated a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the tax-payers and property owners on whom the loss will eventually fall are without effectual remedy."

In the case of *Newmeyer* v. *Missouri & Mississippi Railroad Company*, 14 American Reports, 394, and in *Russell* v. *Tate*, 20 American State Reports, 193, the rule as enunciated by Judge Dillon is approved and affirmed. In the latter case it is held: "The relief granted may be either injunctive or affirmative." And in the opinion it is said:

"There is no foundation in the authorities for the claim that the power of chancery is only injunctive. It would be a reproach to justice if it were true. In the present case the appropriation was made, the warrant was drawn, and the money paid by the treasurer, before an attorney could have comprehended the situation, and have written the caption of a complaint. Chancery has ample power to prevent further wrong and require reparation for that which has been done."

Many authorities are referred to sustaining the opinion.

The third objection to the preceeding below is, that no action could be brought against all the defendants jointly, but that the suit should have been against each individual councilman. That there was no such community of interest as is required to permit a joint action.

What is such community of interest under the provisions of equity regarding the prevention of multiplicity of suits; must each and all the parties be interested in the identical thing? We think not. There is a community of interest where all the parties are interested in the same subject-matter and where the same facts and rules of law govern them all; and in such case they may all be joined in the same suit, plaintiffs or defendants.

In Pomeroy's Equity Jurisprudence from Section 255 to 260 there is an elaborate discussion of this question, and in Section 260 the learned author says:

"The only community among them is in the questions at issue to be decided by the court; in the mere external fact that all their remedial rights arose at the same time, from the same wrongful act, and depend upon the same questions of law. This sort of community is sufficient, in the opinion of so many and so able courts, to authorize and require the exercise of the equitable jurisdiction, in order to prevent a multiplicity of suits."

This would seem also to be in accordance with Section 5008 of the Revised Statutes.

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

PLEADING IN AN ACTION FOR A QUANTUM MERUIT.

Circuit Court of Richland County.

DOUGLASS V. DOWNEND ET AL.

Decided, October 28, 1908.

Pleading—Confession and Avoidance—Plea of, not Inconsistent with the Allegations of the Petition—Error.

1. In an action for a *quantum meruit* for professional services rendered by an attorney, it is a complete defense that the plaintiff agreed before entering upon the case that he would, if necessary, prosecute it to the court of last resort for a contingent fee of one-third of the amount of the judgment recovered, and that subsequently, after losing the case in the court below, he refused to prosecute it to the highest court unless paid for so doing, and thereupon he was dismissed from further participation in the case.
2. A confession and avoidance is not inconsistent with the allegations of the petition, and where the reply denies nothing in the answer except what is "inconsistent with the petition," a court may properly give judgment for the defendant on the pleadings.
3. But where this was not done, and the case was tried to a jury who found for the defendant and judgment was rendered on their verdict, it is immaterial whether or not improper evidence was admitted, or the jury was misdirected, or other errors intervened at the trial.

Douglass & Mengert and *Reed & Beach*, for plaintiff in error.
S. L. Americus, contra.

HENRY, J.; WINCH, J., and MARVIN, J. (all of the Eighth Circuit, sitting in place of the Judges of the Fifth Circuit), concur.

Error to the Court of Common Pleas of Richland County.

In this proceeding in error the parties stand in the relation in which they stood below. The petition below counts upon a *quantum meruit* for professional services as attorney, rendered to defendant "in and about prosecuting a certain action in the Court of Common Pleas of Richland County, Ohio, said cause being styled Ethel Downend, plaintiff v. The Board of Education of Madison Township, Richland County, Ohio, and

performing other business as such attorney, in counselling and advising defendants in matters relating to said action."

The defendants filed separate answers, which are, however, largely identical.

The fourth defense of Ethel Downend Wilson (for it appears that Ethel Downend had meanwhile married), alleges "that the plaintiff, A. A. Douglass, contracted and agreed with her, before entering into said services, that he would prosecute her case, entitled Ethel Downend vs The Board of Education of Madison Township, Richland County, Ohio, through the common pleas, circuit and Supreme Courts of Ohio, if necessary; that his fees were to be contingent upon his sucessfully prosecuting the case to judgment and execution; that he was to receive one-third of the amount of the judgment if he won the case; and he was to receive no compensation whatsoever if he lost the case. The said A. A. Douglass tried the case in the common pleas court and lost the case. * * * The said A. A. Douglass after he had lost said case in the court of common pleas, absolutely refused to prosecute said case any further than the circuit court, unless this answering defendant would pay him for so doing. Whereupon, and shortly thereafter, he was dismissed by this answering defendant from further participation in the prosecution of said case, for the following reasons, namely: * * *

"6. Because he refused to comply with his contract and agreement made with this answering defendant for the prosecution of said case."

The reply is as follows:

"Now comes the plaintiff and for reply to the separate answer of Jennie Downend and the separate answer of Ethel Downend Wilson, says that he denies each and every allegation in said separate answers contained inconsistent with his petition herein, and having fully replied prays as in his petition."

We think that the defense embodied in the quotation above made from the answer is a complete defense by way of confession and a voidance to the cause of action stated in plaintiff's

petition. Being a confession and avoidance, "it is not inconsistent with the allegations of the petition."

The reply denies nothing in the answer except what is "inconsistent with the petition." On this state of the pleadings it would have been proper for the court below to have rendered judgment thereon. The court, however, tried the case out to a jury, which found for the defendants below, and judgment was rendered accordingly. In the view we take of the matter, it is wholly immaterial whether improper evidence was admitted, whether the jury were misdirected, or whether any other error intervened during the trial, for, as has already been stated, judgment against the plaintiff might well have been rendered upon the pleadings, and the judgment below is therefore affirmed.

ANTICIPATORY BREACH OF CONTRACT.

Circuit Court of Cuyahoga County.

ROOSFELD, ADMINISTRATOR, v. GLASGOW ET AL, AND GLASGOW v. ROOSFELD, ADMINISTRATOR, ET AL.

Decided, October 26, 1908.

Attachment—Renunciation of Contract Sufficient Ground for—Agreement Relating to the Proceeds of Life Insurance—Bond—Sections 5521 and 5563b.

In an attachment proceeding where the affidavit alleges that the defendant has repudiated the contract upon which the claim in suit is based and refuses to carry out his agreement, the action is one on contract in the sense in which that word is used in the statute, and a motion to discharge the attachment on the ground that no breach of the contract has occurred will not lie.

Higley & Maurer, for Bertha Glasgow et al.

Conway W. Noble, for George M. Roosfeld et al.

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

Error to the court of common pleas.

Both of these cases grow out of proceedings upon motions to discharge attachment made by the court of common pleas in a

suit pending in that court, where George M. Roosfeld, as administrator of the estate of William McQueen Teetzel, deceased, brought suit against Bertha Glasgow and James V. Teetzel.

The petition in the case alleges that a policy of insurance upon the life of William McQueen Teetzel in the State Life Insurance Company of Indiana, was taken out in the sum of $5,000; that the beneficiary named in the policy was the defendant, Bertha Glasgow, the sister of the insured; that a contract was made between the insured and his said sister by which it was agreed that this policy should be for the benefit of said Bertha only to the extent of an indebtedness of $850 owing by the insured to said Bertha, and evidenced by a promissory note, and also as security to her for whatever amount she might pay on premiums on said policy. The petition further says that Bertha paid the premiums on said policy in such an amount as that, together with the $850 indebtedness, the debt to her, in the aggregate, from the deceased is $1,400; that the contract between Bertha and the insured was that, except to the extent necessary to pay this indebtedness to her, the policy should be for the benefit of the estate of the insured; that upon his death she should collect the amount owing upon the policy, pay herself what should then be due to her and pay the balance over to the representative of the estate of the insured. The petition avers that the insured is dead; but does not aver that the amount owing upon the policy has been paid, but says that upon the facts Bertha is indebted to the plaintiff in the sum of $3,600. The petition further avers that the defendant, Bertha Glasgow, has assigned said policy to James V. Teetzel, her brother; that said assignment was without consideration and done simply for the purpose of convenience to said Bertha Glasgow, and that the said James V. Teetzel has no interest whatever in said policy. The prayer of the petition is for judgment against the two defendants in the sum of $3,600.

On the day of the filing of the petition the plaintiff filed an affidavit, setting out substantially what is averred in the petition, and averring further that said Bertha has repudiated her said contract to pay the avails of this policy, after deducting the amount due to her on the promissory note and the

premiums paid by her, and that she refuses to carry out the same. It further avers that each of said defendants is a non-resident of the state of Ohio; that the claim upon which the suit is brought is just and that he ought to recover thereon the sum of $3,600. It is further averred in the affidavit that the State Life Insurance Company of Indiana is indebted to said defendants in the sum of $5,000.

Upon the filing of this affidavit an order of attachment was issued against the two defendants, and garnishee process was issued and served upon an agent of the insurance company.

Each of the defendants, appearing for the purpose of the motion only, filed a motion to dissolve this attachment, the court sustaining the motion of James V. Teetzel and discharging the attachment as against him, but overruling the motion of the defendant, Bertha, and sustaining the attachment as against her. Thereupon Bertha comes into this court seeking to reverse the judgment overruling her said motion, and the plaintiff comes into this court seeking the reversal of the judgment discharging the attachment as to James V. Teetzel.

First, as to the attachment against Bertha. The ground of the attachment being non-residence of the defendant, it must appear, under Rev. Stats., 5521, that the claim is for a debt or demand arising upon contract, judgment or decree, or for causing death, or a personal injury by a negligent or wrongful act. It is urged here on behalf of Bertha that the claim made against her does not bring it within these provisions of the statute. Of course if it does, it is because it is upon contract. It is said, however, that if it is upon the contract set out in the affidavit and in the petition, that that contract only requires payment to be made by her when she has recovered from the insurance company, but it is settled that a suit brought for the breach of a contract is a suit brought upon that contract. See *Halbert* v. *Armstrong,* 14 C. C., 296, where the suit was for a breach of a contract of marriage. Also *Railroad Company* v. *Peoples*, 37 O. S., 537, where the suit was based upon the contract of the railroad company to carry a passenger, and a breach was alleged in that defendant did not carry the passenger in safety. But, it is said, there was no breach of the contract here,

because nothing was to be paid by Bertha until she had recovered from the insurance company, and therefore, until she does so recover from the insurance company, she owes nothing to the plaintiff.

It is held, however, in numerous cases that there may be an anticipatory breach by a renunciation of a party to a contract and an absolute refusal to be bound by it, and where that renunciation is complete the other party may bring suit, founded upon such renunciation. See *Roehm* v. *Horst*, 91 Fed. Rep., 345. The second clause of the syllabus reads:

"Where one party to a contract gives notice of his intention not to perform, the other is justified in treating such action as an anticipatory breach, and may sue for damages without waiting for the time of performance to arrive or making tender of performance."

Also *McCormick* v. *Basal*, 46 Ia., 235. The first clause of the syllabus reads:

"Where before the time of performance of a contract the promisor expressly renounces it, the promisee is authorized to treat it as broken, and may maintain an action for the breach at once."

Other authorities, to the same effect, are found in 9th Cyc. of Law and Procedure, beginning at page 635.

In view of the allegation of the affidavit that "said Bertha Glasgow has repudiated said contract and refuses to carry out the same," we hold that the plaintiff had a right to begin the action; that it was an action upon contract, in the sense in which that word is used in the statute, and that with the other allegations of the affidavit, the plaintiff showed a proper case for the allowance of the attachment, and that the action of the court in overruling the motion to discharge the same was right, and that judgment is affirmed.

As to the motion made by James V. Teetzel, the court was clearly right in sustaining that motion and discharging the attachment. There was no contract between the plaintiff and James V. Teetzel, and the ground of the attachment being the non-residence of Teetzel, it is clear that the plaintiff was entitled to no attachment, as against him.

It was urged on the hearing that because of the failure of Teetzel to file the bond required by Rev. Stats., 5563*b*, his case was not properly in this court. Since the result here must be that the judgment of the court of common pleas is to stand, because if we dismiss the proceeding, it would be left to stand, and if we affirmed the judgment, it will stand, we affirm the judgment below without committing ourselves upon the question of whether bond should have been given by the plaintiff in error, under Rev. Stats., 5563*b*.

TITLE TO INTEREST IN LAND BELONGING TO HEIR WHO DISAPPEARED.

Circuit Court of Monroe County.

WARD V. WARD ET AL.

Decided, November Term, 1907.

Co-Tenancy—Title—Interest in Share of Co-parcener Believed to be Dead—Quit-Claimed Before Expiration of Seven Years—Operation of a Deed According to Its Intent—Possession—Improvements—Estoppel—Partition—Descent—Statute of Limitations.

Where a tenant in common releases for a valuable consideration to a co-tenant by quit-claim deed all his right, title and interest in certain land therein described, expressly including the interest inherited by him from a brother, then believed to be dead; and where also the grantee goes into actual possession of the land upon which he and his heirs make valuable improvements and continue in peaceable possession thereof for more than twenty-one years, such grantee and his heirs acquire a good title to such interest as against the grantor and his heirs although the brother was not dead at the time of the execution of the deed of release.

Mallory, Jeffers & Sears, for plaintiff.
Tallman & Spriggs and *Jennings & Walton*, contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Moses Ward, the grandfather of plaintiff, Cyrus A. Ward, died intestate May 25th, 1861, leaving eight children his heirs at law, two of whom were named Seth and Stephen. There was another son by the name of George Washington Ward.

George Washington, then a young man unmarried, left home some time in 1854 to 1856 and has not been heard of since. At the time of his death Moses Ward was the owner of a farm in this county. On the 16th day of April, 1862, Seth Ward purchased the interest of his brother, Stephen, in the farm, as he also did from all the other six of his brothers and sisters, taking separate quit-claim deeds from each, similar in form. The purchase price and consideration expressed in the deed of Stephen was $400, which was its fair value. The deed to Seth from Stephen contained this clause: "And this instrument it is understood and agreed conveys any interest that he may have of George Washington Ward's, whom it is believed is dead." The language in the petition is "presumed to be dead," instead of "believed to be dead"; but that it immaterial.

Seth Ward immediately upon securing these deeds in 1862 went into the actual possession of the farm and made valuable improvements upon the same and he and his children have been in the possession of the same ever since. In 1906, forty-four years after the making of the deed, some of the heirs of Stephen Ward gave out in divers conversations that they were entitled to an interest in said farm as nephews of George Washington Ward, for the reason that their father, who was deceased, had no power to convey to his brother, Seth Ward, by quit-claim deed the interest of George Washington Ward, the deed being made before the expiration of seven years from the date of the departure of George Washington Ward, Stephen Ward then having but a mere possibility which was not the subject of release. 4th Kent's Com., 206.

Cyrus A. Ward, a son of Seth Ward, who was then principally interested in the farm, upon hearing of this claim of the heirs of Stephen Ward, commenced an action against George Washington Ward and all parties claiming under Moses Ward, the grandfather of plaintiff and defendants, and under George Washington Ward, to quiet his title.

Plaintiff in his petition and the contesting defendants in their answer all aver that George Washington Ward had not been heard of for nearly fifty years and was presumed to be dead. George Washington Ward was sought to be brought into

court by service of summons by publication but this could not be done, and no decree can be taken against him, as all the parties rely upon his death before the commencement of the action. *Young* v. *Heffner*, 36 O. S., page 232.

Judge Boyston on page 237 says:

"The plaintiff was not, and from the nature of the case could not have been a party to the proceedings for partition instituted by two of his brothers in 1863, as those proceedings and rights therein asserted were founded and for their validity depended on the assumption of his death. The alleged title or interest of his brothers and sisters, which was purchased by defendant Heffner, rested wholly on the presumption that the plaintiff was dead, such presumption being founded on the fact that the plaintiff had been absent and unheard of, for the period of seven years."

This disposes of the case as to George Washington Ward. His absence is only *prima facie* evidence of his death, and upon it being shown that he is alive his rights in the property may be asserted at any time. In the case referred to it is held:

"The presumption of death which arises from the absence of one from his home for the period of seven years, and who in the meantime is not heard of is but *prima facie* evidence of the fact and may be rebutted by counter proof."

The only question, therefore, is between the plaintiff, the son of Seth Ward, and the contesting defendants, the sons of Stephen Ward.

The claim of defendants is that at the time Seth bought the interest of Stephen, and the quit-claim deed was executed, George Washington Ward had not been gone from his home and unheard of for seven years, and that therefore, as before said, the interest of Stephen was a naked or remote possibility, and not the subject of release. Much reliance is placed upon the case of *Needles, Executor*, v. *Needles, et al*, 7 O. S., 432, but we do not think that case is applicable to this case. In that case the son simply gave a receipt in consideration of an advancement made by the father that the advancement was to be in full of all claims he might have against his father's estate after his death as one of his heirs, and it was held that such agreement imposed no obligation for the obvious reason, that

an executory contract could not be made to control the distribution of the father's estate after his death.

This case is entirely different. Stephen sold to Seth for a valuable consideration all the interest he might have of "George Washington Ward, who is presumed to be dead." Stephen claimed to be the owner of the interest of George Washington Ward and so sold it and gave a deed for such interest, practically setting forth that he was the owner of the interest.

True it was a quit-claim deed containing no covenants; simply a deed of release; but we think that makes no difference, and that by such sale and deed Stephen and those claiming under him are now estopped from making any claim to such interest as against the heirs of Seth. Such we understand to be the holding in the case of *Magruder* v. *Esmay*, 35 O. S., page 221. It is there held:

"A patent issued by the United States, in the name of one who had purchased the land, and made entry under the act of Congress of April 24, 1820 (3 U. S. Stat. at Large, 556), inures to the benefit of the grantee and his heirs and assigns, under a quit-claim deed executed by the purchaser before the patent issued. The patent founded on such entry, relates back, and takes effect from the time the same was made."

In the opinion it is said:

"The plaintiff having succeeded to the title of Mrs. Farrell, and a legal estate being essential to the maintainance of the action, the question at once presents itself, whether the patent to Porter so far inured to the benefit of Mrs. Farrell as to vest in her a legal estate. Had the deed to Arnet been with warranty of title, there is no doubt, that on the receipt by Porter of the patent from the government, an estoppel would have arisen in favor of Mrs. Farrell. Nor is there any doubt that a party is estopped from denying the operation of a deed according to its intent, where, either by recital, admission, covenant, or otherwise, it appears that a certain estate was intended to be conveyed. Rawle on Covenants for Title, 338; Shepard's Touchstone, 82."

In the case of *VanRensselaer* v. *Kearney et al*, 11 Howard, 297, on pages 324 and 325 it is said:

"If the seizure or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privity."

We are not so sure from the evidence that George Washington Ward was known to be alive within seven years from the execution of the deed by Stephen to Seth; indeed we are of opinion that the strong tendency of the evidence is the other way; but whatever the evidence may show upon this question as we have seen makes no difference.

Again, is not the bar of the statute of limitations conclusive? The claim of defendants is that as these parties are all tenants in common the statute of limitations has no effect. This claim is not well founded in this case. If Seth were living he would have a right to rely on the bar of the statute, and his children have the same right. The deed was made in 1862, and Seth went into possession under the deed and made valuable improvements and paid taxes on the entire interest. This was an assertion of an independent absolute title under the deed as against Stephen and indeed against all the heirs of the grandfather, as he obtained like deeds from all of them. These deeds were placed upon record. It was a direct assertion of entire title and a public proclamation to all persons that he was such owner. He took the property under color of title at least; he went into possession under such title, and he and his heirs continued in such possession openly and adversely as against these claimed tenants in common for more than forty years. Taken altogether "it was an overt act of an unequivocal character clearly indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant." *Young* v. *Heffner*, 36 O. S., 232, *supra*.

Judgment in favor of plaintiff quieting his title at costs of contesting defendants, and same judgment may be entered in favor of defendants who are making same claim as plaintiff on their cross-petition.

CORPORATIONS WITHOUT AN INSURABLE INTEREST IN THE LIVES OF DIRECTORS.

Circuit Court of Hamilton County.

SECURITY MUTUAL LIFE INSURANCE COMPANY v. THE J. M. SCHOTT & SONS CO.*

Decided, November 14, 1908.

Life Insurance—Insurable Interest—Corporations—Ultra Vires Acts by—Assent by Individual Directors not Equivalent to Action by the Board.

1. The execution of a corporation note is unauthorized unless it is in furtherance, either directly or indirectly, of the purpose for which the company was chartered.
2. A corporation has no insurable interest in the lives of members of its board of directors who are not indebted to it.
3. But were this not true, policies for the benefit of the company, procured by the secretary and general manager on the lives of members of the board, without authority therefor by the board acting as a board, are void where the premiums are to be paid out of the company's treasury; and an action by the company will lie for the cancellation of such policies and recovery of the premiums paid.

The brief of Herron, Gatch & James, attorneys for plaintiff in error, cited with reference to insurable interest: 50 O. S., 595; 63 O. S., 478; 3 Nisi Prius, 216; 94 U. S., 561.

That it is immaterial whether the beneficiary pays the premium: 94 U. S., 561.

That a creditor of a corporation has an insurable interest in the life of the manager of the corporation who is indebted to him in no way whatever: 72 N. H., 12.

That an insurance policy, though valid in its inception, may be assigned to a person having no insurable interest in the life of the insured: 41 O. S., 323; 132 Fed., 444.

Where the business of a corporation is usually done without formal meetings of the board of directors, the necessity for such

* Affirming *Schott & Sons Co. v. Security Mutual Life Insurance Co.*, 7 N. P.—N. S., 548.

formal meetings is done away with: 41 O. S., 558; 174 U. S., 552, at 573; 11 Col., 551; 30 Vt., 159.

That a rebate does not invalidate a policy and, unless the policy itself is void, there can be no recovery of the premium already paid: 11 N. W. Rep., 660; 24 O. S., 67; 17 C. C., 531.

That statements in the nature of promises, or approximations as to what a policy will yield, do not give rise to an action based upon fraudulent representation: 23 Fed., 438; 96 U. S., 544; 120 Mass., 495.

The brief of John J. Gasser cited the following authorities:

That a corporate act can only be exercised by a board as such, and not by members thereof not acting as a board: Young Lumber Co. v. Taylor Street Methodist Church, 5 Nisi Prius, 378 (Cuyahoga County Circuit Court); 1 Morawetz on Corporations, Section 531, and cases cited.

That there is no insurable interest where the persons insured are not indebted to the company and not under contract of employment, taken on life insurance: Section 249.

That a building association has no insurable interest in the lives of the stockholders: Bunyon, Life Insurance, 14-25; Trinity College v. Travelers Ins. Co., 113 N. C., 244; May on Insurance, Section 102*a*-107; Gilbert v. Sykes, 16 East., 157; Evans v. Jones, 3 H. & C., 77; Hartley v. Rice, 10 East., 22; O'Hara v. Carpenter, 23 Mich., 410.

That policies are rendered void by the allowance of a rebate: 93 O. L., 348 (R. S., 3631-35, Sec. 12); also 3631-567, Sections 2, 3, 4; Tillinghast v. Craig, 17 C. C., 531; Urwan v. North Western Life Ins. Co., 34 Ins. Law Journal, 727; Mount & Wardell v. Waite, 7 Johns Rep. (N. Y.), 433; Insurance Co. v. Pyle, 44 O. S., 31-32; Insurance Co. v. Wright, 33 O. S., 533; Metropolitan Life Ins. v. ————, 33 Ins. Law Journal, 643; New England Mutual Life Insurance v. Swain, 34 Ins. Law Journal, 1016.

That the contract was entered into upon fraudulent representation and the premiums are therefore recoverable: 30 O. S., 656.

Fraud of the agent is fraud of the principal, etc.: Cooley, Brief on Insurance, Vol. 3, pp. 2849-50; Equitable Life Ins. Co.

v. Maverick (Tex. Cir. App.), 78 S. W., 560; 183 U. S., 25; 4 Ins. Law Journal, p. 899; Tennessee Sup. Court, Dec. Term, 1874; Martin & Cline et al v. Aetna Life Ins. Co.; McCay v. New York Life Ins. Co., 124 Cal., 270; Beckwith v. Ryan, 66 Com., 589; U. S. Life Ins. Co. v. Wright, 33 O. S., 534-5.

Where a policy is void by reason of unintentional misrepresentation, an action will lie to recover premiums paid: Insurance Co. v. Pyle, 44 O. S., 19; 183 U. S., 25; 33 O. S., 534.

Mr. Gasser also cited: Equitable Life Insurance v. Wavebrick, 78 S. W., 560; McArthur v. Home Life Insurance Co., 73 Iowa, 336; Agricultural Insurance Co. v. Montague, 38 Mich., 268 to 272; 46 Mich., 473; British Workmen Ins. Co. v. Cunliffe, 18 Times Law Reporter, 502; Washington Life Ins. Co. v. Menefees, 9 Ins. Law Journal (Old Series), 118; Franklin Ins. Co. v. People, 32 Ins. Law Journal, 455.

For the facts of this case see the opinion below. *The J. M. Schott & Sons Co.* v. *The Security Life Insurance Co.*, 7 N. P.—N. S., 548.

Herron, Gatch & James, for plaintiff in error.
John J. Gasser, for J. M. Schott & Sons Co.
Renner & Renner, for the Brighton German Bank.
Rogers Wright, for A. Wolfsohn.
Smith, Simonton & Hawke, for C. B. Smith, trustee.

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

The defendant in error, the J. M. Schott & Sons Co., was incorporated for the purpose of manufacturing cooperage, and unless the promissory note in suit was executed and delivered in furtherance of such purpose, either directly or incidentally, is unauthorized and void.

The insurant under each of the five policies was not indebted to the company, and under no obligation to it other than as stockholder, director or manager. The company was not investing surplus funds, but was incurring an obligation through its secretary and manager, without the assent of the board of directors, for the purpose of securing a policy of insurance for $5,000 on each of five directors, an object wholly foreign to its incorporation.

While it is true, as suggested by counsel, that each insurant might have taken out a policy, paid the premium, and made the corporation the beneficiary, yet in this case the applicant incurs no liability, and it is expressly agreed that the corporation shall pay all premiums, and did execute and deliver its note for the first two annual premiums.

We think that the company had no insurable interest in its directors, and if it did that the secretary and manager was unauthorized to enter into the contract without the assent of the board of directors. *Straus & Brother* v. *Eagle Insurance Company of Cincinnati,* 5 O. S., 59; *Ryan* v. *Rothwiler et al,* 50 O. S., 595; *Bradford Belting Co.* v. *Gibson,* 68 O. S., 442.

Judgment affirmed.

ALIMONY.

Circuit Court of Cuyahoga County.

W. F. HRIBAL v. MARIE HRIBAL.

Decided, October 26, 1908.

Husband and Wife—Allowance of Alimony—May be Modified Because of Changed Circumstances—But a New Action for a New Allowance not Permissible.

While a former decree of court allowing a wife permanent alimony in a lump sum remains unimpeached, she will not be permitted after exhausting the amount awarded her to maintain a new and independent action for a new allowance.

Conway W. Noble, for plaintiff in error.

F. C. Friend, contra.

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

Error to the court of common pleas.

Marie Hribal filed a petition in the court of common pleas against W. F. Hribal, averring that she is a *bona fide* resident of Cuyahoga county; that she is the wife of the defendant, W. F. Hribal; that the defendant, wholly disregarding his duty and obligations toward her, has grossly neglected his duty to her; and she says that on the 1st of September, 1904, the defendant willfully deserted her, and from that time forward

has refused to live with her or to contribute anything to her support. She says, however, that in September, 1904, she brought suit against defendant for alimony; that she obtained a decree for alimony in that suit in the sum of $600; that this has been paid to her, and that she has expended it, all in her reasonable and necessary support; that she is now destitute; that the defendant has property and has an income as a practicing physician, and she prays for a judgment for alimony against him.

After the bringing of this suit she filed a motion in the court for alimony *pendente lite.* Upon the hearing of this motion the court ordered that the defendant should pay to the plaintiff the sum of $25 per month, and an additional sum of $25 as for attorney's fees. To this order the defendant below prosecutes error here.

The position taken by the plaintiff in error being, that with the former decree of the court allowing the plaintiff $600 alimony remaining unimpeached, she is not entitled now to an order for further alimony.

In this contention we think the plaintiff in error is right. There are numerous cases where by reason of the change in circumstances of the parties, in cases where alimony has been allowed, the court has, upon motion, modified the former order and allowed additional alimony, but we know of no case in Ohio where additional alimony has been allowed after the decree for permanent alimony, except by modification of the former order, and it seems to us upon principle that one should not be permitted to maintain a new and independent action for alimony, after having recovered a judgment for permanent alimony, and such alimony has been paid. If this might be done, litigation, almost endless, might result. The wife at any time, after having obtained a decree for alimony, might bring a new suit and again recover alimony and so on month after month and year after year. *Bursler* v. *Bursler,* 22 Mass. (5 Pick.), 427.

Holding as we do that the plaintiff below is not entitled to prosecute the action brought by her, it follows that the court erred in allowing alimony *pendente lite,* and because of this the judgment is reversed.

PAYMENT OF INSURANCE MONEY TO LEGAL REPRESENTATIVES.

Circuit Court of Muskingum County.

CHARLES HAGUE v. THE EXECUTORS OF THE ESTATE OF THOMPSON HAGUE ET AL.

Decided, October 23, 1908.

Legal Representatives—May be Shown to Mean "Heirs and Next of Kin" Instead of "Legal Representatives," When—Appeal—Distribution of Life Insurance.

1. The words "legal representatives" in their strict, technical sense, mean executors or administrators; but these words appearing in a life insurance policy may be shown, by the context and surrounding circumstances, to mean "heirs or next of kin."
2. Whether an action is for the "recovery of money only," and hence not appealable, is not to be determined by the pleader's conclusions, or the prayer of the petition; but by a consideration of whether from the facts plead, any relief is necessary, other than a judgment for money.

Winn & Bassett, for plaintiff.

J. J. Adams and *John R. Stonesipher,* for defendants.

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

Heard on appeal.

Thompson Hague insured his life in the sum of three thousand and eighty dollars ($3,080), the policy providing that said sum should be payable to his "legal representatives" after the death of said Thompson Hague. Later Thompson Hague died and the insurance company paid said sum of three thousand and eighty dollars to the executors of said Thompson Hague, who retained the same and treated the money as assets of the estate of Thompson Hague.

After this had been done, Charles Hague, a son of Thompson Hague, brought an action in the Court of Common Pleas of Muskingum County against the executors of Thompson Hague and made the other heirs and next of kin of said Thompson Hague parties defendant, and in his petition alleged the issuance

of the policy; the death of said Thompson Hague; the payment of said money by the insurance company to the executors; the retention of the same by them as assets of the estate of Thompson Hague; and the relation of the other defendants to said Thompson Hague. The petition further alleged that said sum was to be paid, by the strict language of the policy, to the "legal representatives" of said Thompson Hague, but that in fact it was the intention of said Thompson Hague and the insurance company, at the time of the issuance of said policy, that said sum should be paid to the heirs or next of kin, and that the true meaning of said words "legal representatives" was the "heirs or next of kin" of said Thompson Hague and not his executors or administrators; that the insurance company, in paying said sum to the executors, did so in trust and for the benefit of the heirs and next of kin of said Thompson Hague; that the executors had refused to pay said sum to the plaintiff and the defendants, who were children of said Thompson Hague, and was treating said sum of money as assets of the estate, and prayed for personal judgment against said executors and asked the court to determine what part of said sum belonged to the plaintiff and what belonged to each of the other children of said Thompson Hague, who had been made parties defendant, and for such other relief as might be proper.

Later an amendment to the petition was filed, in which the plaintiff pleaded more specifically the meaning of the words "legal representatives" and the intent and understanding of Thompson Hague and the insurance company at the time of the issuance of the policy, and in the prayer asked for a decree against the executors, directing them to pay said sum of money to the several heirs or next of kin in such proportion as the court should find them severally entitled.

A demurrer was filed to this petition and the amendment thereto, on the grounds of a misjoinder of parties defendant (not for a defect of parties plaintiff), and because the petition and the amendment thereto did not state a cause of action, which demurrer was overruled and exceptions noted.

An answer having been filed and issue taken, the case was tried to the court, without the intervention of a jury, and on

such hearing the court found the several amounts due each, and ordered and directed the executors to pay said sums to said plaintiff and the other heirs in the amounts found due them respectively.

Thereupon the executors brought the cause to this court as by appeal proceedings, and also by error proceedings. In this court a motion was filed to dismiss the appeal for the reason that it was an action for the "recovery of money only" and this court considered the motion to dismiss and the proceedings in error jointly. Whilst there were other errors alleged in the petition in error, the principal contention was that the words "legal representatives," found in the policy, meant executors or administrators and that no other meaning could be given these words; that if the intention was to pay the money to the heirs or next of kin, there should have to be a reformation of the policy, which had never been attempted.

This being the state of the proceedings before us, two leading questions were considered, viz:

1. Can the words "legal representatives" be shown to mean "heirs or next of kin"?

2. Was this cause appealable?

I think when this question was first presented to the court, each member thought that the words "legal representatives" could mean nothing more or less than their plain import, and that the money passed to the executors or administrators to be administered upon as assets of the estate, but upon an examination of the authorities we found that the consensus of authorities were to the effect, that the words "legal representatives" may mean "heirs or next of kin" and that the sense in which they were used is to be determined by the context and surrounding circumstances. The 125 N. Y., 411, is a case directly in point and cites numerous authorities to support this contention. The Encyclopedia of Law cites many authorities to the same effect, and upon an examination of these authorities, we are well satisfied that the law is that the words "legal representatives" may be shown to mean "heirs and next of kin" instead of "executors or administrators."

The next question is, was this cause appealable?

The right of appeal is not a common law but a statutory right. There have been many decisions in this state attempting to illustrate when an appeal will lie, but as the Legislature has so clearly described under what conditions a cause may be appealed, it would be useless to refer to the many decisions upon the subject. Section 5226, Revised Statutes, furnishes the criterion for appeals. Under its provisions, before an action can be appealable, it must appear:

1st. That the court of common pleas had original jurisdiction.

2d. That the action is a civil one.

3d. That a judgment or final order has been rendered by the court of common pleas.

4th. That the right to demand a jury in the court of common pleas did not exist.

If all of these requisities exist, then the cause is appealable, but if any one of them is wanting, the action is not appealable. In the case at bar every element existed, unless it be the last one, viz: that the right to demand a jury did not exist, and hence if upon a consideration of the cause, a right to demand a jury in the court of common pleas did not exist, then clearly the case is appealable, but if on the other hand, a right to demand a jury in the court of common pleas did exist, then there can be no appeal. Did a right to demand a jury in the court of common pleas exist? Section 5130, Revised Statutes, provides the issues of fact, to determine which a jury is demandable and reads as follows:

"Issues of fact, arising in actions for the recovery of money only, or specific real, or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered, as hereinafter provided."

The test is not whether a personal judgment is asked, but whether or not the action is for the "recovery of money only." If the action is brought to recover some equitable relief, and the facts necessitate such relief, in order to give the party an adequate remedy, then the action is not for the "recovery of money only"; but if money only is the object of the recovery,

and no equitable relief is necessary, then the cause is triable to a jury as a matter of right.

If the insurance company had not paid the money to the executors and the words "legal representatives" under the circumstances meant "heirs or next of kin," then the beneficiaries would have had nothing more than a plain action at law against the insurance company on the policy. The insurance company, however, paid this money to the executors. The plaintiff in this action alleges in his petition that the money was paid in "trust," but we think that allegation was simply a conclusion of the pleader. There may have been some semblance of trust in it, but there was no such trust as is administered by a court of equity. The insurance company, in contemplation of law, simply paid the money over to the executors for the benefit of the beneficiaries. The executors stood in the nature of persons who received money to the use of the plaintiff and the other heirs or next of kin. When the executors refused to pay this money over to the proper parties, an action at law for the recovery of that money was the proper remedy. There was no equitable relief necessary or appropriate. When the plaintiff and the other heirs obtained a judgment against the executors for the money paid by the insurance company, that was all the relief they were in any manner entitled to, and this being true, the action was an action for the "recovery of money only," and hence not appealable.

If upon the trial of the case it should have been found that the words " legal representatives" meant executors or administrators, then the verdict or finding should have been for the executors; but if it had been found that the words "legal representatives" meant heirs or next of kin, then a verdict or finding for $3,080 should have been for the heirs.

It is true the petition asked the court to determine the proportionate amount of this money each of the heirs was entitled to, but that was a matter in which the executors were not interested. In the adjustment of the amount due each of the heirs, there was an element of equity jurisprudence, but so far as the issues between the plaintiff and the other heirs and executors were concerned, it was one for money only, and a jury was demandable. Had the heirs attempted to appeal from the de-

cision of the court fixing their relative rights, another question might have been presented, but we do not pass upon that question in this case, for the reason that no attempt to appeal was made by any of the heirs. The only attempt to appeal was by the executors, and our holding is, that, as between the heirs or next of kin, and the executors, the action was one for the "recovery of money only" and hence not appealable.

The motion to dismiss the appeal will be sustained.

EFFECT ON TAXABLE VALUE OF LAND OF REMOVAL OF COAL AND TIMBER.

Circuit Court of Harrison County.

F. E. JOHNSON v. JOHN S. LACEY, AUDITOR, ET AL.

Decided, May Term, 1908.

Taxation—Severance of Taxable Value of Coal Strata and from Surface of the Land—Removal of Timber—Changes in Tax Valuations by County Boards of Equalization—Sections 2753 and 2792a.

1. Where coal is sold and conveyed after the regular decennial appraisement, it is the duty of the county board of equalization under Section 2792*a* of the Revised Statutes, passed April 23, 1904, upon application by the owner of the surface to equitably apportion the valuation between the owner of the surface and the owner of the coal according to the relative value of their respective interests.
2. The sale and removal of timber from land does not entitle the owner of the land to any reduction of the decennial appraisement under Section 2753 of the Revised Statutes.

Hollingsworth & Worley, for plaintiff.

E. S. McNamee and Perry & Rowland, contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

This action is before us on appeal. Plaintiff, F. E. Johnson, is the owner of a large farm in this county and was such owner at the time of the decennial appraisement in 1900. The farm consists of tilable land, woodland, and buildings; and is underlaid with a valuable vein of coal. The tilable land, woodland

and buildings were appraised separately; nothing being said by the appraiser in his return about the coal. In the trial before the common pleas court, the evidence in which case is by consent used as the evidence before us, the decennial appraiser testified that the coal was not taken into consideration in the appraisement.

Johnson paid for the farm $14,000 but a short time before the appraisement, and it was appraised at $8,800.

January 30th, 1903, Johnson sold the coal underlying the farm for the sum of $4,320, the consideration mentioned in the deed being $1. The auditor placed the coal upon the tax duplicate at $4,320 against the purchaser, claiming that the company purchasing it had failed to list it for taxation.

Some time after the sale of the coal Johnson cut the timber off the land and sold it for about $4,000. After the sale of the coal and timber Johnson made application to the auditor, under Section 1025 of the Revised Statutes, to deduct from the appraisement of his land the amount which had been placed upon the tax duplicate against the purchaser of the coal, to-wit, $4,320. This the auditor refused to do. In refusing to make the deduction under this section, we think, the auditor acted right. No proof was made by Johnson as to the actual value of the coal as compared with the valuation of the whole farm as required by the section. *Dye* v. *State,* 73 O. S., 231.

Furthermore, we are fully persuaded that Section 1025 does not apply to cases of this character, but only to cases where there has been a separation by sale, or otherwise, of the surface of the land. That would seem to be so from the plain reading of the statute: "part only of any tract or lot." This would hardly include the severance of the coal or other mineral from the surface.

In the case already referred to, *Dye* v. *State,* in the opinion on page 237 it is said:

"It may be seriously doubted whether this statute authorized the severance of the surface of the land from the coal or other mineral embodied beneath it, so as to transfer the latter to a purchaser leaving the other parts of the land to stand in the name of the vendor."

Johnson then made application to the county board of equalization at its annual meeting to apportion the valuation of his farm at the preceding decennial appraisement between him and the purchaser of the coal. This the county board of equalization refused to do. Johnson also made application to the auditor to deduct the value of the timber, which he had cut off the farm and sold, or an equitable part thereof, from the value as fixed at the decennial appraisement. This the auditor refused to do. He then brought a suit in the court of common pleas against the auditor and the commissioners, as the county board of equalization, to enjoin the auditor from continuing upon the tax duplicate the full amount of the decennial appraisement of his farm, and to require the auditor to deduct from the same $4,320, the value of the coal sold; and also the sum of $4,000, the value of the timber which he cut off the farm.

The court of common pleas refused to deduct the value of the coal sold, or any part of the same, but allowed the claim for the timber cut off and sold, set up in the second cause of action, and enjoined the auditor from continuing on the tax duplicate the full amount of the decennial appraisement, and ordered him to deduct the value of the timber cut from the farm.

As to the claim made in the first cause of action we see no reason why an injunction should not be allowed prohibiting the auditor from continuing on the tax duplicate the equitable value of the coal sold according to the relative value of the coal with the surface. This is the plain provision of Section 2792*a*, passed April 23, 1904, and we do not understand why the common pleas court decided otherwise.

As to the claim set up in the second cause of action it is clearly untenable. Plaintiff relies on Section 2753 of the Revised Statutes. This section has no application to cases where the owner voluntarily cuts off timber and sells it. That section applies to cases of "destruction by fire, flood, cyclone, storm or otherwise of any structure of any kind, or of orchards, timber, ornamental trees, or groves over one hundred dollars."

Webster defines destruction as: "The act of destroying, tearing down, subversion, demolition, ruin."

Plaintiff's claim in his first cause of action will be allowed, and in his second cause of action will be refused. It does not, however, follow that Johnson should be allowed the full amount of $4,320, as a reduction of the appraised value of his farm for taxation at the decennial appraisement, but only an equitable division; and the county board of equalization is directed to make such equitable division at its next annual meeting. Until such division is made by the county board of equalization, the auditor is enjoined from the continuing on the tax duplicate any greater sum than the amount of the decennial appraisement less the sum of $4,320.

The second cause of action of plaintiff's petition will be dismissed. The costs will be equally divided between plaintiff and defendants.

DEPUTY CORONERS.

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL BINYON, v. HOUCK ET AL.

Decided, November 4, 1908.

Office and Officer—A Deputy Coroner is not an Officer—Quo Warranto—Section 1209a.

A deputy coroner, appointed under the provisions of Section 1209*a*, is not an officer, and quo warranto will not lie to determine his right to hold the position.

Williams Howells, for relator.
M. P. Mooney, contra.

MARVIN, J.; HENRY, J., concurs; WINCH, J., not sitting.

This proceeding is brought to test the right of Dr. Houck to hold the position of deputy coroner for Cuyahoga county. The right to proceed in quo warranto depends upon the question of whether the position held by Dr. Houck is an office, under the laws of the state of Ohio.

Dr. Houck was appointed to the position named by the coroner of the county. The appointment was made pursuant to Section 1209*a* of the Revised Statutes of Ohio. This section provides, that the coroner in a county having a city of the first class of the second grade may appoint a deputy coroner, who shall have power to do and perform all the duties imposed by law upon the coroner of said county, in his absence, at a salary not to exceed $1,500 per annum.

If the deputy coroner, herein provided for, is an officer, after such appointment, quo warranto is the proper proceeding to test his right to hold the office. It will be noticed that no *duties* are, in terms, imposed upon the deputy coroner, and that the *authority* given him is to perform the duties, which under the general statutes are imposed upon the coroner. He has no independent duties whatever. Nor has he any independent authority, except that when the coroner is absent he may perform the coroner's duties. This seems to us clearly to indicate that his position is properly designated in the statute as that of a "deputy."

The word "deputy" is defined in Anderson's Law Dictionary as "one who acts officially for another"; "the substitute of an officer, usually a ministerial officer." The definition in Bouvier's Law Dictionary is "one authorized by an officer to execute an office or right which the officer possesses, for and in place of the latter."

The fact that the statute uses the word "deputy" is not necessarily controlling, but, as already said, the things which a deputy coroner may do, under the statute, being only to be done as a substitute for the coroner, that is to say, being only the things which it would be the coroner's duty to do if he was present, clearly make him a deputy only, and that being so, he seems clearly to be included in the general provisions of law relating to deputies. See Sections 9 and 10 of the Revised Statutes.

As against this, it is urged that this court in the case of *State, ex rel Vail,* v. *Craig,* 21 C. C. Rep., 175, held that certain parties holding positions as deputy supervisors of elec-

tions and a party holding a position as clerk of such deputy supervisors, were officers, and that this is in conflict with the present holding.

The statute under which the parties in that case claimed to hold, is found in 89 O. L., at pages 455 and 456. An examination of the statute will show that the duties imposed upon the deputy supervisors and the clerk were not to be performed in lieu of some other officer or officers, but are wholly independent, notwithstanding the title given to the supervisors is that of deputy supervisors, as the statute provides, in terms: "That there is hereby created the *offices* of state supervisor of elections and of deputy state supervisor of elections, with the powers and duties hereinafter prescribed for the conduct and supervision of all elections in this state, except for school directors and road supervisors." The fourth section of the statute provides: "for the election by the board of deputy supervisors of a chief deputy, and a clerk," and the duties of each are pointed out by the statute.

We think this clearly distinguishes the present case from that referred to. The conclusion is therefore reached that the party here sought to be removed is not an officer, and hence quo warranto can not be maintained against him, and the petition is dismissed.

Cause No. 4059, in which the same relator seeks to have Alice Lines removed from the position of stenographer, must be decided in the same way, because the reasons suggested in the cause against Dr. Houck apply with equal, if not greater force, to the defendant Lines, and the petition in that case is therefore dismissed.

REPLEVIN OF GRAIN FROM AN INNOCENT SUB-VENDEE.

Circuit Court of Hamilton County.

H. J. GOOD v. A. BENDER AND THE B. & O. S. W. RAILWAY CO.

Decided, May 23, 1908.

Sales—Vendor may Retake from Innocent Sub-vendee—Purchaser Must Look to Title, When—Constructive Delivery and Conditions Attaching Thereto—Replevin—Delivery Order and Bill of Lading Distinguished.

When grain is sold on the floor of a chamber of commerce, the rules whereof in the absence of a stipulation to the contrary require payment when the grain is weighed, subsequent purchasers are put upon inquiry as to title, and where payment has not been made, the vendor may replevin the property from an innocent sub-vendee for value.

Kelley & Hauck, for plaintiff.

L. W. Goss and *Harmon, Colston, Goldsmith & Hoadly,* contra.

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

The plaintiff as consignee and owner of a car load of oats held by the carrier, the C., H. & D. Railway Company, on the 22d day of September, 1905, sold the same to the defendant, A. Bender, for cash on delivery and on weighing, and gave him an order of delivery. The same day Bender sold the oats to Maguire & Company and endorsed the delivery order to them, receiving therefor a check for $400 or more. The same day Maguire & Company sold to the Gale Brothers & Company the car of oats, and the next day delivered to them the delivery order, receiving a check for $250. Thereupon the Gale Brothers Company surrendered the delivery order to the C., H. & D. Railway Company and directed the car to be delivered in the yard of the B. & O. S. W. Railway Company, which was done. On the 26th day of September, 1905, the plaintiff, H. J. Good, commenced an action in replevin upon the ground that Bender

did not pay for the oats upon delivery; that he was at the time of purchase insolvent and had no reasonable expectation of being able to pay for them.

It is clear that the constructive delivery to Bender was conditional on payment for the oats when received and weighed, and did not as between themselves prevent the plaintiff from reclaiming the oats upon failure to pay on such delivery. *Wabash Elevator Company* v. *Bank,* 23 O. S., 311.

But the chief question is whether he can retake them from the Gale Brothers Company, an innocent sub-vendee, for value.

A delivery order is not a negotiable instrument, nor does it have the same effect as a bill of lading, and even the latter conveys no better title to the assignee than his assignor had at the time of the assignment. *Emery's Sons* v. *Bank,* 25 O. S., 360.

The rules of the Chamber of Commerce where the sale was made require, in the absence of a stipulation to the contrary, payment when the grain is weighed, and the subsequent purchasers being members were therefore put upon inquiry as to the title.

In the case of *National Bank of Commerce* v. *Chicago, Burlington & Northern Railroad Company,* 44 Minn., 224, the second proposition of the syllabus is as follows:

"Where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods, even from an innocent subvendee for value, unless he has been guilty of such negligence or laches as would equitably estop him from so doing."

That case, which cites with approval the case of *Hodgson* v. *Barrett,* 33 O. S., 63, is decisive of this case, as the testimony discloses no negligence or laches on the part of plaintiff. The delivery order upon which the purchasers seem to have relied was not such evidence or ownership as calls for the application of the rule stated in the case of *Eaton & Company* v. *Davidson,* 46 O. S., 355, at 362: "That of two innocent persons, he must suffer who has placed the other in the power of the wrong-

doer''; but on the contrary, under the rules of the Chamber of Commerce it called for an investigation, if there was any doubt concerning the terms of the original contract, or of the solvency of the purchaser. The court erred in its charge to the jury by calling the delivery order and giving it the effect of a bill of lading, and overruling the motion for a new trial upon the ground that the verdict was contrary to the evidence and the law.

Judgment reversed and judgment for plaintiff in error on the undisputed facts.

DIVERSION OF HIGHWAY BY RAILWAY.

Circuit Court of Lorain County.

COMMISSIONERS OF LORAIN COUNTY v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Railways—Highways—Diversion of Highway in Changing Grade of Railway—Presumption of Necessity—Proof of, Required in Condemnation Cases—Words and Phrases—Sections 3284 and 3277-78—Crossings.

1. No judicial interpretation is necessary, under Section 3278, to authorize a railway company to change the grade of its line in order to avoid difficult grades or curves, the presumption being that the company would not undertake an expensive improvement unless the change is necessary; but where an appropriation of land is required in order to make the proposed change, proof should be made to the court as to the necessity of the change.
2. The word "construction" as used in Section 3284, providing that a railroad company in the construction of its road-bed may divert a road or stream of water when necessary, is not limited in its application to the original building of the railroad, but gives the right, in making a change of grade as authorized by Section 3277, to divert the course of a highway for the purpose of avoiding annoyance to the public and dangerous or difficult curves or grades.

A. R. Webber, Prosecuting Attorney, for the commissioners.
J. M. Lemmon, contra.

Heard on error.

Beginning in the spring of 1889, the Lake Shore & Michigan Southern Railway Company began making very extensive improvements in its road-way between Berea, in Cuyahoga county, and Toledo, Lucas county, Ohio. Prior to that time the grade of the road had been very irregular. In making these improvements it became necessary at some points to raise high embankments of earth and at others to deepen the cuts, so as to bring the road-way nearer to a uniform grade.

In making these improvements a high embankment was built across a county road running east and west in Brownhelm township, so as to entirely obstruct travel over the same. This embankment was built across the road about thirty rods east of its junction with a north and south road. The railway company, instead of building approaches to this embankment on either side, so that teams might pass over it, bought a strip of land and constructed a highway along the north side of its track until it intersected the north and south road above referred to, about twenty rods north of the intersection of the old road. This resulted in an abandonment of about thirty rods of the old highway.

The above action was brought by the commissioners against the railway company to recover damages because of the obstruction so placed in the road, on the claim that its usefulness had been entirely destroyed. The railway company filed an answer setting forth in substance that the changes made were necessary for the purpose of avoiding difficult and dangerous grades; that in pursuance of the right conferred upon it by Section 3277, Revised Statutes, did raise the grade at the point named as to entirely obstruct the highway; but that it had restored the same to its former usefulness by the construction of the road hereinbefore described.

The case was tried in the common pleas court, resulting in a judgment for the railway company. It was taken to the circuit court upon a petition in error and a bill of exceptions containing all the testimony.

UPSON, J.; CALDWELL, J., and BALDWIN, J., concur.

This case was submitted to the court below without a jury and decided by the court in favor of the defendant; a judgment was rendered and it is to reverse the judgment thus rendered that this proceeding in error is prosecuted. The bill of exceptions taken in the case sets forth the whole of the testimony, and it is claimed among other things that the decision of the court is not sustained by sufficient testimony.

The first point that is made with reference to the testimony is that it does not show that the railway company determined to raise this grade at the point named, or that it was necessary that it should be raised for the purpose of avoiding dangerous and difficult grades or annoyance to the public. The provision of the statute with reference to such change of grade is found in Section 3277, Revised Statutes, and is as follows:

"For the purpose of avoiding annoyance to the public travel, or dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations, or when the road-bed has been injured or destroyed by the current of any river, water-course, or other unavoidable cause, or for other reasonable cause, a company may change the location or grade of any portion of its road, whether heretofore made or hereafter to be made, but shall not depart from the general route prescribed in the articles of incorporation."

In a succeeding section (3278, Revised Statutes), it is provided that for the purpose of making any such change, the company shall have all the rights, powers and privileges to enter upon and appropriate lands, etc., and provides that such appropriation shall be made in the usual manner in the probate court.

It will be observed that in Section 3277, Revised Statutes, authorizing the railroad company to make a change of its grade for the purposes stated, there is no provision for any judicial determination as to the necessity for such change of grade. It is left by the law to the judgment and discretion of the railroad company itself to determine whether such a change of grade is or is not necessary, it being properly presumed that an expensive change of grade would be made by the company unless it,

in good faith, deemed it to be necessary for such purpose as that stated in the statute, and we think the whole of the testimony in this case shows such a state of facts as warranted the judge before whom the case was tried in finding that this change of grade was made for the purposes stated in the statute. If it had been necessary for the purposes of the change to appropriate land, then the rights of the land owner would have required and the statute, Section 3278, Revised Statutes, would have required that there should be proof made and judicial determination made of the necessity of the proposed change.

The next point in which it is claimed the testimony set forth in the bill of exceptions does not sustain the decision of the court, and the more important question, is that it does not sustain it in showing that the company had restored the highway to its former state of usefulness to the public. We have very carefully examined the testimony in that respect and under the rule well established in this state, that the decision of a court upon an issue of facts, as well as the verdict of a jury upon an issue of fact, is not to be set aside by a reviewing court unless it is clearly against the evidence, we think that we are not authorized to set aside this finding upon the ground that it is not sustained by the testimony; we think the court could fairly find from the testimony, which is conflicting, that the part of the highway substituted for that which was closed by the railroad company is as beneficial, if not more beneficial, to the public than the highway was originally at that point. We do not feel authorized in disturbing the decision of the court. The more important question and the one mainly relied upon is whether the statute itself confers authority in a case like this to divert a road from its course.

Section 3284, Revised Statutes, provides:

"A company may, whenever it is necessary in the construction of its road to cross a road or a stream of water, divert the same from its location or bed; but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness, and any or all railroads hereafter constructed, which shall cross any avenue or public highway leading from a city of the first or second class to a public cemetery of such city, situate within or without the limits of

any such city, shall be constructed so as either to pass under or over such avenue or public highway, at such elevation or depression, as the case may be, as will allow the unobstructed passage of all wagons, carriages, or other vehicles which it may be necessary for any person to use upon such avenue or public highway."

The argument made is that this can only be done when it is necessary in the original construction of the road; that after a railroad has been constructed and has been in operation for a great number of years, this section of the statute does not apply and that in order to authorize a diversion of a road, from its location, it is necessary for it either to procure additional legislation or it is necessary for the company to proceed under these provisions of the statute which relate to the occupation of roads and streets by agreement between the railroad company and the public authorities having charge of the road, in a municipal corporation, having charge of the streets, or commissioners having charge of a county road.

The statute, as has been seen, gives the absolute right to change the grade and to do that without a judicial determination of the necessity to do so. And while the language of the statute is that a road may be diverted whenever it is necessary in the construction of the road, it is claimed on the part of the railroad company that such a change of grade as this is a work done in the construction of its road; that it is not simply what comes under the ordinary name of repairing the road or making a slight change, but that it is fairly to be considered as work done in the construction of the road; that it is not limited to the original building of the road but to a construction such as was done in this case. It is shown by the record to have been a change in the grade of a road of a very extensive character, so as to make it entirely different in many respects from what it was when originally constructed.

As I have said, the question is one not without difficulty, because, if you give the literal and more common meaning to the word "construction," it might be limited to the original building of the road, but is also a word of more general meaning, and we think, taking the two Sections, 3277 and 3278, and reading

them in connection with this section, that it was not intended by the Legislature to limit this word "construction" to the original building of the road, and that it may be fairly held to give the right to divert a road from its location whenever such a change as this authorized by statute renders such a diversion of the road necessary, and we think the record in this case clearly shows that it was necessary to change the location of the road at that point in consequence of the change in the grade of the railroad.

For that reason and for the reason that we think the testimony shows no damage whatever was sustained by the commissioners representing the public, but that, in fact, the road is better for the public as changed than it was originally, we think the court did not err in its decision and that judgment is affirmed.

REDUCTION OF WIFE'S PROPERTY TO POSSESSION.

Circuit Court of Hamilton County.

ELLA A. MILLER, EXECUTRIX OF SAMUEL MILLS, v. WM. C. MCLEAN, ADMINISTRATOR OF SUSAN B. MILLS.*

Decided, November 14, 1908.

Husband and Wife—Reduction of Wife's Property into Possession of Husband—Assent of Wife—Declarations—Stale Equity or Laches with Reference to Right of Recovery—Presumptions—Payment of Wife's Debts—Gifts—Voluntary Payments—Newly-Discovered Evidence—New Trial—Sections 5242-6, 5307, 5309, 58 O. L., 54, and 68 O. L., 48.

1. The doctrine of stale equity or laches does not apply to an action at law governed by the statute of limitations, which does not begin to run during coverture.
2. Where a husband appropriates notes and money belonging to his wife to his own use, and during the remainder of his life covering a period of nearly thirty years renders no account to her as to either principal or interest, and she requested none but repeatedly said there was but one pocketbook in the family, and after his

* Reversing *McLean, Admr.*, v. *Miller, Excrx.*, 5 N. P.—N. S., 57.

death she elected to take under his will, which disposed of all property standing in his name without acknowledging any indebtedness to her, and the declaration was made by her that all her property had been given to him to dispose of as he saw fit, there is a clear reduction of the wife's property by the husband into his possession.

3. In an action by the administrator of the wife's estate to recover from the estate of the husband property which thus passed into his possession, it is error after final submission of the case to refuse to hear new evidence discovered by chance which is not cumulative, but relates to payment by the husband of debts of his wife, and is proffered as a new defense.
4. The presumption that, where the debt of a wife is paid by her husband with his own money, a gift is intended, does not apply where the debt was to a firm of which the husband was a member, and was a balance due for the construction of a building on a lot owned by the wife, which was soon afterward sold and the proceeds retained by the husband until his death.
5. But while such evidence, if uncontradicted, would necessitate a different judgment, it is not error to refuse to grant a new trial, where the application therefor was not made by motion under Section 5307, or by petition under Section 5309.

Healy, Ferris & McAvoy, for plaintiff in error.

William C. McLean and *Edward Barton,* contra.

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

A statement of the case may be found in 5 N. P.—N. S., 57.

If the evidence offered by the plaintiff in the original action is insufficient to show that Samuel Mills took possession of all the proceeds of sale of his wife's real estate, her admissions offered by the defendant make the proof complete even as to the $2,500 cash payment. It is plain also from all the evidence that she consented to such possession; but the chief question is whether he reduced the property into his possession with her assent within the meaning of the act of 1861 (58 O. L., 54) as to $20,500 and the act of 1871 (68 O. L., 48) as to $6,000 of the sum sued for.

The evidence clearly shows that the husband intended and did appropriate the notes and money of the wife to his own use. During the remainder of his life, a period of nearly thirty years,

he rendered no account to her of the principal or the interest, and she requested none; but on the contrary repeatedly said that there was only one pocket-book in the family, and after his death she elected to take under a will which purported to dispose of all the property standing in his name without acknowledging any indebtedness to or claim in favor of her, and at the same time she declared that her property had been "given over to Mr. Mills and he should dispose of it as he felt like; that she was satisfied." This declaration was not an attempt to dispose of her property at that time, nor merely a ratification of the acts of her husband, but was a statement of a past transaction whereby she had made a gift of her property to him. It was made when the subject under consideration was her property and property rights—when the influence and restraint, if any, of her husband were removed, and was a frank and natural explanation of the conduct of both of them with reference to her property, which could not have been explained in any other way without reflecting on the honesty and fidelity of her husband.

While it is true that Judge Ferris, who was present, does not recall this declaration, yet it does not affirmatively appear that he was in a position to hear everything that was said. He was there for the purpose of obtaining her election under the will of her husband, and was not concerned with other matters discussed. It appears also that he recalls a declaration that the witness Catherine Lynskey does not, although she did remember a like declaration made by Mrs. Mills at other times, to-wit, "There was only one pocket-book." This failure of the two witnesses to recollect all that was said on that day is not unusual, but rather to be expected.

The declarations of Mr. Mills "I have money of your aunt's to invest" and "This is your aunt's money" relate to no particular sum and were made many years prior to that of Mrs. Mills. While they could apply at the time to a part of the fund in controversy, yet they would cease to apply if Mrs. Mills subsequently assented to a reduction into possession of such fund by her husband, and that is the effect of her declaration. The

very term "reduction into possession" implies an initiative on the part of the husband and the assent, if given, is a subsequent act of the wife either expressed or implied. It seems clear to us that Mrs. Mills gave her express assent that her husband might use the fund in his possession for his own benefit.

The doctrine of stale equity or laches does not apply, the action being one at law and governed by the statute of limitations which did not begin running during coverture.

The refusal to open up the case after final submission to hear newly discovered evidence material to the defense which could not with reasonable diligence have been obtained before, is also a ground of error. The proposed evidence so far as it relates to payment by Samuel Mills of his wife's debts was not cumulative, but was an entirely new and distinct kind of evidence directed to a different defense. The circumstances of the discovery are such that it may fairly be said that the evidence could not with reasonable diligence have been sooner discovered. It was the result of chance or good fortune, more than diligent search and inquiry.

It is claimed, however, that the evidence is inadmissible, because the presumption is that when a man pays the debt of his wife with his own money a gift is made, and numerous authorities are cited which hold that where the husband buys land, pays for it, and causes it to be conveyed to his wife, or expends his own money in the improvement of her property, the law, in absence of proof to the contrary, presumes it to be a gift. In all of these cases the payment or conveyance was wholly voluntary and naturally led to the conclusion that it was a gift.

The proposed evidence showed that the wife was largely indebted to the firm of Mills, Spellmire & Co., of which her husband was a member, for a balance due for the construction of a building on one of the lots in question—that he paid such debt or a part thereof; that a short time thereafter the premises were sold, and that the proceeds of sale came into his possession and were retained until his death. While there was no legal liability imposed on him to pay the debt, it was not a mere voluntary pay-

ment intended to enhance the value of her property, but to preserve that which she had, and when he took possession of the proceeds of sale, ever after retaining them, the presumption of a gift is rebutted, or at least a reduction into possession with her assent is shown, to the extent of the debt paid. Counsel for defendant in error insists that Samuel Mills, almost from the date of his marriage, assumed control and management of his wife's estate and became her trustee or agent; but he seems to deny him the right to credit himself with payments made in the interest of the trust and while acting as such trustee or agent. The same rule that required him to account for all money received as agent or trustee allowed him a credit for all payments, made in that capacity. The cash book of Mills, Spellmire & Co. was competent evidence under Section 5242, Sub. 6, Revised Statutes, of payment by Samuel Mills of his wife's debt to the firm or other creditors.

The entry in his diary purporting to be the result of an examination of his account as shown by the books of Mills, Spellmire & Co., some of which had since been destroyed by fire, and being against interest when made, was admissible as evidence of payment or assumption of payment of his wife's debt.

The evidence offered, if uncontradicted, would have required a different judgment; but as the application was not made by motion for a new trial under Section 5307, Revised Statutes, nor by petition under Section 5309, Revised Statutes, there was no error in overruling the same.

The judgment, being manifestly against the weight of the evidence, is reversed and the cause remanded for a new trial.

LICENSE TO MAINTAIN STREET RAILWAY TRACK.

Circuit Court of Hamilton County.

PROPRIETORS OF THE CEMETERY OF SPRING GROVE v. CINCINNATI STREET RAILWAY COMPANY ET AL.*

Decided, November 14, 1908.

Contracts—Agreement for Occupation of Land by Street Railway Tracks—Construed to be a License—Conflicting Provisions of an Ordinance.

An agreement for the maintenance of a street railway loop on private property for a period not exceeding twenty-five years, for a consideration of one dollar per year while so maintained, and upon cessation of the use of said track it shall be removed upon demand of the owner of the land at the expense of the street railway company, is a mere permit or license to the street railway company for a period not exceeding that named, and the owner of the land can not insist on the operation of cars over the loop in the face of an ordinance providing for a different route.

Lawrence Maxwell, for plaintiff.
Paxton & Warrington and *Kittredge & Wilby,* contra.

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

We are of opinion that all the letters, reports, dealings, negotiations, etc., had between the plaintiff and the defendant, the Cincinnati Street Railway Company, relative to the subject-matter in dispute in this case culminated in the written agreement under date of April 21st, 1898. All matters, therefore, extrinsic of this agreement are eliminated, and the rights of the parties are to be determined under the terms and conditions thereof.

By the terms of the contract, the plaintiff granted to the defendant, the Cincinnati Street Railway Company, the right to maintain a loop or part of its railway on Gray road upon the

* For previous opinion in same case, see *Winton Place* v. *Cincinnati Street Railway Co. et al,* 3 O. L. R., 178 (affirmed by the Supreme Court without report, 76 O. S.)

property of plaintiff; to erect and place thereon certain poles, wires and other appurtenances necessary in the construction and operation of its railroad; and to construct and maintain a waiting room upon its said property, all in consideration of one dollar per year for a period not exceeding twenty-five years from April 21, 1898, while said track, appurtenances, waiting room, etc., should remain on the plaintiff's property; and that upon cessation of the use of either said track or said waiting room, both, at the demand of the plaintiff, should be removed by the defendant at its own charge and expense, and the property of the plaintiff should be restored.

It was further agreed that at the expiration of said twenty-five years the said defendant would remove said track, appurtenances and waiting room from the property of plaintiff, and would restore said property to as good order and condition as the other property of the plaintiff adjacent thereto. The contract also provided, that if the defendant failed to perform any of the agreements it had entered into for twenty days after any complaint made by the plaintiff the license and agreement entered into between the parties, at the option of the plaintiff, should be terminated, and plaintiff would have a right to remove the track with its appurtenances and waiting room, and to restore the ground whereon they stood to the good order and condition of the adjacent property of the plaintiff at the expense of the defendant.

In accordance with this agreement, said defendant built and operated through itself and its lessee said railway until May 10th, 1903, when it is claimed said railway company abandoned the operation of its line on Winton and Gray roads north of Epworth avenue, except on Sunday, on which day it ran a car from the intersection of Epworth avenue and Winton road. It appears that this abandonment was under the provision of an ordinance, No. 414, passed February 10, 1903, by the council of Winton Place to provide for the extension of Route No. 1 of Winton Place Street Railway as established by ordinance, passed November 2d, 1894, which gave to the Cincinnati Traction Company, lessee of the Cincinnati Street Railway Company, the

right, whenever it saw fit, to abandon the operation of so much of its street railroad as lay within the village, on Winton road north of Epworth avenue and on Gray road, and to remove the rails, poles, fixtures and appliances on that portion of Winton and Gray roads upon said abandonment; but, until it so determined to abandon this portion of its road, it should have the right to operate cars over the same at such times and upon such days as it might see fit.

This ordinance has heretofore been held by the Supreme Court to be valid and binding as between the village and the street railroad company, and when the contract of April 21st, 1898, was made, the parties thereto must be held in contemplation of law to have entered into the same under and with the knowledge of the law of the state and their rights thereunder. A contract such as in this case could only be made subject to the law relating to the control of and granting of franchises to street railway companies by the council of villages, as municipalities upon whose streets said railway was to be built and operated, and unless there is something in the contract itself which the plaintiff could enforce against the defendant company, notwithstanding the ordinance permitting the defendant company to abandon the operation of its road, to compel it to so operate for a period of twenty-five years, we are inclined to the opinion that plaintiff could not insist upon the operation of the railroad by the defendant company in the face of the ordinance in question.

Upon an examination of the contract we fail to find any such provision. The contract is merely a license or permit to the defendant to use for a period not exceeding twenty-five years the property of the plaintiff for street railway purposes.

It seems to contemplate just such a course as has happened in this case, for it provides what shall take place upon cessation of the use of the railroad track, for the payment of one dollar per year while said track, appurtenances, etc., should be upon the property of the plaintiff, and it also provides what shall take place upon the failure of the defendant to perform any of its agreements for twenty days after complaint made by the

plaintiffs. Nowhere in the agreement does the defendant bind itself to build, maintain and operate a railroad upon Gray road and Winton road for a period of twenty-five years, but rather a license or permission is given the defendant to use the property of plaintiff as specified in the agreement for a term not longer than twenty-five years, evidently meaning or contemplating thereby that the defendant might maintain and operate its track with its appurtenances for a shorter period. We think, therefore, that the equities of the case are with the defendants, and the relief prayed for in the petition will be denied.

APPROVAL OF AN UNDERTAKING.

Circuit Court of Hamilton County.

ALEXANDER MEYERS v. U. S. HEALTH & ACCIDENT INSURANCE COMPANY.

Decided, December 21, 1907.

Jurisdiction on appeal from a judgment by a justice of the peace is conferred by approval of the undertaking by another justice of the same township.

Louis P. Pink, for plaintiff in error.

J. T Harrison, contra.

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

An undertaking for appeal from a judgment of a justice of the peace, when approved by a justice of the same township, with the trial justice and at his request, shows a substantial compliance with the provisions of Section 6584, Revised Statutes, that the surety "be approved by such justice," and confers jurisdiction. *Job* v. *Harlan*, 13 O. S., 485.

Judgment affirmed.

ERROR IN VERDICT CORRECTED IN JUDGMENT.

Circuit Court of Hamilton County.

MARY E. SEAL v. HERMAN P. GOEBEL, EXECUTOR, ET AL.

Decided, December 5, 1908.

Verdict—Manifest Mistake in, Corrected in the Judgment—Surplusage—Wills—Evidence—Charge of Court—Burden of Proof—Preponderance of Evidence—Presumption from Probate.

1. Where the jury in an action to contest a will return a verdict establishing its validity, but by a manifest error insert the date of the execution of the will as the date of its probate, and the record shows that but one paper writing purporting to be the last will of the decedent was exhibited to the jury, and that were the date of probate as given by the jury correct the right to contest the will would have been barred, it is not error for the court to treat the date given by the jury as mere surplusage and enter a judgment upon the verdict correcting the error and establishing the validity of the will.
2. In an action to contest a will declarations by a party to the record, who is a legatee with others under the will, are inadmissible to prove that the will was contrary to the intentions of the testator or was procured by undue influence.
3. In such a case it is essential that the jury be instructed that the evidence of the contestants, in order to warrant the setting aside of the will, should not only outweigh the evidence adduced by the defendant but also the presumption arising from the order admitting the will to probate.

W. B. Stier and *J. C. Hermann*, for plaintiff in error.
Jacob Shroder, contra.

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

At the trial of this case, which was a suit brought to contest the validity of the will of Hannah D. Weber, deceased, the jury returned its verdict finding that the paper writing shown to them and admitted to probate in the Probate Court of Hamilton County, Ohio, on the 15th day of May, 1900, was the valid last will and testament of the said Hannah D. Weber, deceased.

In this verdict there was a mistake, in that said will was admitted to probate upon May 1, 1905, instead of May 15, 1900, the latter date being the date of the execution of the will.

A motion for a new trial being filed the same was overruled. The court thereupon proceeded to enter a judgment upon the verdict so rendered, and in its judgment found the foregoing mistake to exist therein, and adjudged that the paper writing shown to the jury in the cause and admitted to probate in the Probate Court of Hamilton County and executed by said Hannah D. Weber, on the 15th day of May, 1900, purporting to be her last will and testament was her valid last will and testament.

We see no error in the court entering this judgment. The court did not undertake to amend the verdict but entered its judgment construing the verdict. The petition alleges that Hannah D. Weber died on or about the 20th day of April, 1905, and that she executed a paper writing purporting to be her last will and testament upon the 15th day of May, 1900. In the light of the record the description of the will as to its probate in the verdict was erroneous, but as the jury was impanneled to pass upon the validity of the last will and testament of Hannah D. Weber which was exhibited to them, the fact that the date of its execution was inserted in the verdict as the date of its probate, is of no consequence.

The entire record extrinsic of any and all evidence shows there was but one paper writing purporting to be the last will and testament of Hannah D. Weber submitted to the jury for its consideration and this paper writing was declared by the jury to be her valid last will and testament.

If the verdict is to be construed as involving the will probated May 15, 1900, then the action is barred and such claim can avail nothing to the plaintiffs in error. We are therefore of opinion that the court had the right to consider the date of execution in the verdict, as relating to the date of probate, mere surplusage and enter this judgment as shown by the record. *Muller* v. *St. Louis Hospital Assn.*, 73 Mo., 242.

As to the proposed evidence in reference to statements made by Judge Goebel to Mrs. Seal, same was properly ruled out by

the court. We think it well settled that declarations of a party to the record of a case, who is a legatee with others under the will, in a suit to contest the will, are inadmissible to prove that the will was contrary to the testator's intentions or was procured by undue influence, other parties or legatees being affected thereby. *Thompson* v. *Thompson,* 13 O. S., 356; *Stull* v. *Stull,* 96 N. W. Rep., 196; *Matter of Meyer,* 184 N. Y., 54; *Matter of Kennedy,* 167 N. Y., 164 (99 Mass., 112).

We think there was no error in excluding the proposed evidence of Mr. Bettinger as to declarations made by Judge Geobel. The statements sought to be proved were not made while Mrs. Weber was present nor while she was engaged in the making of her will. It related rather to what he, Judge Goebel, had done and as to the proposed evidence with regard to Mrs. Weber coming to the office with memoranda for the purpose of having her will drawn. Mr. Bettinger testifies that at the time the will was drawn he was not constantly in his office and clients might come in and he not be advised of it.

No error was committed by the court in giving the special charges asked by defendants in error and refusing those asked by plaintiff in error nor in the general charge of the court. *Stull* v. *Stull,* 96 N. W. Rep., 196.

In the light of the judgment of the Supreme Court in the case of *Hall* v. *Hall,* 78 O. S., 416, the plaintiff in error has no ground of complaint as against the general charge of the court, for it was not only the duty of the court to have instructed the jury as it did, upon the burden of proof and the preponderance of the evidence, but the jury should also have been told that the evidence of the contestant should not only outweigh the evidence adduced by the defendants but also the presumption arising from the order of the Probate Court admitting the will to probate as the valid last will and testament of Hannah D. Weber.

There being no error in the record, the judgment of the court below will be affirmed.

NECESSITY OF SHOWING WHAT IT WAS PROPOSED TO PROVE BY AN EXCLUDED QUESTION.

Circuit Court of Hamilton County.

JOSEPH MILLER v. MARY MILLER-DONAHUE ET AL.

Decided, December 5, 1908.

Evidence—Exclusion of Record Must Disclose that Error Intervened Thereby—Presumption—Wills.

Where objection to a question propounded to a witness is sustained, but the record does not disclose what reply the witness would have made had he been permitted to answer, a reviewing court will not presume that the answer would have been material, or favorable to the plaintiff in error, or that the sustaining of the objection to the question was prejudicial, or that the rejection of the answer by the trial court was improper.

Jerome D. Creed and *Thorne Baker*, for plaintiff in error.

Denis F. Cash and *E. J. Babbitt*, contra.

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

This case is here on error to the judgment of the court of common pleas. In that court it was an action to set aside the will of Mary Miller, deceased. The main ground of error relied on is the refusal of the court to permit plaintiff in error to have certain questions propounded to Dr. B. F. Beebe, a witness for the plaintiff, answered. The plaintiff in error excepted to the ruling of the court in refusing to permit said questions to be answered by the witness, but did not say what he expected to prove by the witness if he were permitted to answer the questions.

The sixth proposition of the syllabus in *Bean* v. *Green*, 33 O. S., 444, is as follows:

"Where a question put to a witness on the trial is excluded by the court as incompetent, to have such rejection a valid ground for error it must appear in the record what was proposed to be proved thereby and that it was something material.

the rejection of which would be prejudicial to the plaintiff in error."

The court in its opinion at page 447, says:

"It has been ruled in this state as often as the question has come before the Supreme Court, that an exception to the overruling of questions in the form here made is insufficient. When a question is asked of a witness which is objected to and rejected, the party taking an exception to the ruling should bring upon the record a statement of what is proposed or expected to be proved by the rejected testimony, and this must appear to be something material, the rejection of which as evidence would be prejudicial to the party excepting."

In support of this the court cites numerous Ohio cases. The principle lying at the bottom of this decision is thus stated in the syllabus in *Seavern* v. *Ohio*, 6th O. S., 220, which is cited by the court and which is as follows:

"In order to justify the reversal of a judgment in error, the record must affirmatively show, not only that error intervened but that it was to the prejudice of the party seeking to take advantage of it."

The court may have erred in not permitting the questions put to Dr. Beebe to be answered, but how can the court say there was any prejudice to plaintiff in error in this ruling as long as the court can not know what Dr. Beebe's answer would have been to the questions. He may not have been able to have answered the questions or his answers may have been unfavorable to plaintiff in error, for we have no right to assume as a matter of fact that the answer would be favorable to plaintiff in error.

We find no other error in the record.

ADJUDICATED CLAIMS AGAINST BENEFICIAL ASSOCIATIONS.

Circuit Court of Franklin County.

STATE, EX REL KOEHLER, v. GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN. *

Decided, October 21, 1907.

Mutual Benefit Societies—Adjudication of Claims—Lien for the Amount Ordered Paid—Order Equivalent to a Cashier's Check—Subsequent Appointment of a Receiver Without Effect.

The adjudication of a claim by the duly authorized trustees of a fraternal organization with delivery of the order establishes a lien on the funds of the organization, which a court of equity will recognize as against a subsequently appointed receiver or assignee of the organization.

DUSTIN, J.; WILSON, J., and SULLIVAN, J., concur.

We are of the opinion that the issuing of the warrant in question by the proper authorities of the A. O. U. W. was the setting aside of the amount named for the claimant, Mrs. Koehler.

It was an order upon itself, duly certified, and needing no acceptance.

The action of an executive officer could not invalidate it nor render it non-effective. It was equivalent to what is known in banking as a cashier's check; and its legal effect is the same as if the money had been wrapped, labeled and set aside as belonging to the party named thereon.

Hence we think the authorities cited by counsel for the receiver with reference to checks and orders do not apply, and that Judge Hosea of the Superior Court of Cincinnati, Ohio, in the case of *Hunt* v. *Supreme Lodge A. O. U. W.*, took the proper view.

Decree accordingly.

* Approving *Hunt* v. *Supreme Lodge A. O. U. W.*, 5 O. L. R., 374, which see for the facts of a similar case.

PROTECTION OF INTERESTS OF MINORS IN PARTITION PROCEEDINGS.

Circuit Court of Hamilton County.

WILLIAM C. MURR ET AL v. ANNA MURR, AN INFANT, BY HER GUARDIAN. *

Decided, November, 1907.

Partition—Failure to Guard Interests of Minor—Appraisement Law—Adult Co-Parceners Elect to Take—Land Afterward Sold for Three Times Its Appraised Value—Accounting—Judgment Against Joint Wrong-doers.

1. Where adult co-parceners conceal from an infant co-parcener the true value of the land, and after taking it at its appraised value sell it at a greatly enhanced figure, they will be required to account to the minor for the profits thus derived.
2. In such a case the court is not bound to apportion the judgment among the joint wrong-doers, but may render a general judgment against all the defendants.

Spangenberg & Spangenberg and *John J. Gasser*, for plaintiff in error.

J. T. Harrison, contra.

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

The plaintiff in her original petition did not seek to set aside the proceedings in the partition suit, because the rights of an innocent purchaser had intervened; but she asked that the defendants be required to account to her for the excess of the proceeds of subsequent sale to this purchaser over the amount of the appraisement, at which one of the defendants elected to take the premises.

The ground of the action was fraud on the part of the defendants in concealing from the plaintiff, an infant, the true value of the premises; and after selling the same a few months after the partition proceedings for nearly three times their appraised

* Affirming *Murr, an Infant*, v. *Murr et al*, 5 O. L. R., 125, which see for a statement of the case.

value, dividing the proceeds of sale to the exclusion of plaintiff. While the testimony upon this issue was not, and rarely is, direct and positive, yet the circumstances were quite as convincing, and warranted the court in finding for the plaintiff.

The court is not required to apportion the amount of a judgment among joint wrongdoers, and hence the judgment for the full amount against all the defendants was not erroneous.

Judgment affirmed.

SIDEWALK ASSESSMENTS.

Circuit Court of Hamilton County.

KAHN v. CITY OF CINCINNATI ET AL.

Decided, June 6, 1908.

Sidewalk—Notice to Build Served on Abutting Owner—Walk Constructed by the City—Assessment Levied against Subsequent Purchaser.

Moses Ruskin, for plaintiff.

Fyffe Chambers, for the City.

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

When a resolution to construct a sidewalk in a municipal corporation is duly passed, and notice thereof is duly served upon the owner of an abutting lot, who fails to comply with such notice, and afterwards sells and conveys the lot, the corporation may nevertheless proceed, within a reasonable time, to make such improvement and assess the expense thereof upon such lot in the name of the subsequent purchaser, who must be held to have constructive notice at least.

FATAL INJURY FROM BEING STRUCK BY A RUNAWAY HORSE.

Circuit Court of Hamilton County.

LICHTENSTEIN, ADMINISTRATOR, v. THE HUDEPOHL BREWING CO.

Decided, December 5, 1908.

Pleading—Negligence—Special Instructions—Interrogatories—Defenses—Error—Accidents Which Belong to that Unfortunate Class of Occurrences for Which the Law Affords the Injured Party no Relief—Section 5067.

1. The defense of contributory negligence, if well pleaded in an action for damages for personal injuries, is not inconsistent with a general denial.
2. An interrogatory which raises an issue as to the comparative negligence of the plaintiff and defendant, or an instruction to the jury which imposes on the defendant the duty of proving that it was prudent and cautious, or that omits the statement that the negligence complained of was the direct cause of the injury, is erroneous.

Pogue & Pogue and *R. A. Black*, for plaintiff in error.
Kelley & Hauck, contra.

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

In an action for damages for personal injury upon the ground of negligence the defense of contributory negligence, when well pleaded, is consistent with a general denial. If it be admitted in the answer, as a predicate for the defense of contributory negligence, that the defendant was negligent, such admission will necessarily disprove the general denial; but if the admission is conditional only and for the purpose of setting up contributory negligence as an additional defense, it disproves nothing nor is it inconsistent with the general denial. The rule is stated in *Pavey* v. *Pavey*, 30 O. S., 600, as follows:

"A defendant can be required to elect between which of several defenses he will proceed to trial, only when the facts stated therein are so inconsistent that, if the truth of one defense be admitted, it will necessarily disprove the other."

And again, on page 601 it is said:

"A contrary construction would make the section of the code requiring a verification of pleadings, in all cases where a general denial is pleaded, defeat the section allowing the defendant to plead as many defenses as he may have, although the facts constituting the defense be not inconsistent with the denial. Such a construction of the code would work great injustice to a defendant who, among several defenses, has at least one good defense to the action, and yet, through some accident incident to a trial, he may be defeated by reason of his being confined to one. This would be clearly contrary to the policy and spirit of the code."

We are not unmindful of the fact that Section 5067, Revised Statutes, has since been amended by adding "but the several defenses must be consistent with each other," but if this provision be strictly contrued it will, as pointed out in the above case, defeat the very object of the section and prevent all defenses of new matter when a general denial is interposed.

The word "consistent" as used in the statute refers to the facts constituting the several defenses which are averred to be true, and not to such as are implied by law or supposed by the pleader, and requires only that they should be stated in such form that the answer can be sworn to without falsehood and in good faith. In the answer before us the defendant by its third defense admits negligence conditionally and only for the purpose of stating the defense of contributory negligence, which as thus stated is consistent with a general denial. The second defense contains a denial of all negligence of the defendant and an averment of particular facts showing negligence of plaintiff which, in effect, is the same as the general denial pleaded as a first defense, and could probably have been stricken out as redundant; but we think no prejudice resulted from the refusal to sustain such motion. The admission of evidence tending to excuse the defendant, and objected to by plaintiff, was not prejudicial, inasmuch as the jury in answer to a special interrogatory found it guilty of negligence.

The first special instruction refused by the court excludes the necessary fact that the negligence there described must have been the direct cause of the injury.

The second instruction refused imposes upon the defendant the burden of proving that it was prudent and cautious.

There was no error in the refusal of either. Special interrogatories 7, 8 and 9 were properly submitted to show whether the view of the deceased was obstructed in any manner and thereby excuse him for not seeing the approaching runaway horse and wagon. Interrogatory 12 called for an important fact in the case, and the answer is sustained by the evidence.

The answer to interrogatory 19 is conclusive of the general verdict for defendant if sustained by the evidence, and after reading same we see no reason to doubt the correctness of the finding.

The comparative negligence of the defendant and the deceased was not a material issue in the case, hence interrogatory 22 should not have been submitted to the jury, but we think no prejudice resulted.

Interrogatories 23, 24 and 25 and answers determine material questions of fact, consistent with the general verdict.

Our conclusion is from all the evidence that the accident was one of those unfortunate occurrences for which the law affords plaintiff no remedy, and the judgment will be affirmed.

PROCEEDINGS TO COMPEL PRODUCTION OF BOOKS AND DOCUMENTS.

Circuit Court of Stark County.

THE STARK ROLLING MILL COMPANY v. THE OCEAN ACCIDENTAL & GUARANTY COMPANY.

Decided, October 2, 1908.

Action for Discovery—Proceedings Under the Statutes to Compel Production of Books and Writings—Right of Inspection and Copies—Enforcing Answers to Interrogatories—Truthfulness of Answers—Interpleader—Equity Jurisprudence—Contract for Insurance Against Liability Arising from Injuries to Employes.

When under a given state of facts Section 5293, Revised Statutes, together with Sections 5289, 5290 and 5101, will afford the same re-

lief as was formerly administered in chancery by a bill of discovery under the same facts, the provisions of said sections must be pursued.

Linch & Day, for plaintiff in error.
Shields & Pomerene, for defendant in error.

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

The Ocean Accidental & Guaranty Company brought an action in the nature of a bill of discovery in the court of common pleas against the Stark Rolling Mill Company, in which it in substance alleges that it entered into a contract with the Stark Rolling Mill Company, whereby it agreed to insure the defendant below against liability arising from injury to certain employes of the defendant; that the premium to be paid by the defendant depended upon the amount of wages paid by the defendant to its employes; that the amount of premium, to be paid in advance, was based upon an estimate of the amount of wages to be paid; and that if that estimate was too high, then the plaintiff was to make certain refunder to the defendant, but if the estimate was too low then the defendant was to pay the plaintiff an additional amount; that the provisions of the contract provided that the plaintiff might have an inspection of the books of the defendant for the purpose of determining the amount of wages paid to the defendant's employes; that the plaintiff believed and was informed that the wages paid by the defendant were much higher than had been reported to it by the defendant; that the plaintiff demanded of the defendant an inspection of its books and papers, for the purpose of determining what the wages that had been paid were; that the defendant refused to allow the plaintiff to inspect its books; that the plaintiff believed and was informed that the defendant had paid a larger amount to its employes than it reported to the plaintiff; and that the plaintiff desired to bring an action against the defendant, but could not do so without an inspection of the books and papers of defendant to determine the amount of wages paid, and asked for an order of discovery, and that the defendant be compelled to exhibit its books and papers to the plaintiff.

The defendant filed a demurrer to this petition, on the ground that it did not state facts sufficient to constitute a cause of action, claiming that if the plaintiff wanted an inspection of the books and papers of the defendant, or a discovery of any facts peculiarly within the knowledge of the defendant, it should have resorted to the provisions of Sections 5293, 5289, 5290 and 5101, Revised Statutes.

On a hearing of this demurrer, the court of common pleas overruled the same, and the defendant below prosecuted error to this court asking this court to reverse the judgment of the court of common pleas in overruling such demurrer.

Upon the adoption of the code of civil procedure in 1851, the distinction between forms of action at law and in equity was abolished, but the power to grant equitable relief existed thereafter, as well as before, and equity jurisprudence exists in this state the same as it did before the adoption of the code, excepting where it has been changed or modified by the Legislature.

Before the adoption of the code, if a party was unable to bring his action at law without the discovery of some facts peculiarly within the knowledge of the defendant, he could file his bill of discovery in a court of equity, setting forth the fact that he had a cause of action, but by reason of some information possessed by the defendant, which he himself did not possess, he was unable to file his action at law, and submit certain interrogatories in his bill, which the defendant was required to answer under oath. If the bill was properly brought, the defendant was required to answer these interrogatories under oath, but this was the extent of the relief afforded by a bill of discovery.

A court of equity went no farther than requiring the defendant to answer these interrogatories under oath; and the answers, so made by the defendant, could be used in the action at law.

After the adoption of the code of civil procedure, the Legislature enacted Section 5293, Revised Statutes, which seems to be almost, if not entirely, equivalent to a bill of discovery in equity.

Section 5293, Revised Statutes, undertook to *direct a course of procedure* in all cases where adequate relief could be obtained under it.

In the 62d Ohio State, page 41, we find the first paragraph of the syllabus reading as follows:

"The purpose of Section 5016, Revised Statutes, which permits a defendant before answer, in an action upon contract or for the recovery of personal property, to interpose an affidavit, and ask that opposing claimants interplead, was intended as auxiliary to the practice in chancery respecting interpleader, and to direct the practice in the particular classes of cases named, and was not intended to regulate the entire subject of the interpleader."

Interpleader was recognized in courts of equity, but the Legislature of the state passed Section 5016, Revised Statutes, providing for interpleader, and the Supreme Court in that case held that when the Legislature had passed a law upon the subject of interpleader, that statute directed the practice and should be pursued, when the statute gave adequate relief under the facts of the case.

We think Section 5293, Revised Statutes, falls within the doctrine announced in the 62d Ohio State, 41, and that if relief can be granted under Sections 5293, 5289, 5290 and 5101, Revised Statutes, then their provisions must prevail, and the party seek his relief in accordance therewith.

If Sections 5293, 5289, 5290 and 5101, Revised Statutes, could be ignored when their provisions control or apply to a particular case, then it would be useless for the Legislature to undertake to prescribe a course of procedure.

An analysis of Section 5293, Revised Statutes, will show that its provisions apply to just such a case as alleged in the petition. It reads:

"When a person claiming to have a cause of action is unable without a discovery of the facts from the adverse party to file his petition such person may bring his action for the discovery, setting forth in his petition the necessity for such discovery and the grounds therefor, and such interrogatories relating to the subject-matter of the discovery as may be necessary to procure the discovery sought."

Now applying that section to the case at bar. The plaintiff claims to have a cause of action; it claims that it is unable with-

out a discovery of the facts from defendant to file its petition. Now what should it do?

It should do just exactly what the statute provides: file its petition setting forth the necessity and grounds for the discovery, and attach such interrogatories relating to the subject-matter of the discovery, as may be necessary to procure the information sought.

The plaintiff below did all that is required by this section of the statute, except that it did not attach interrogatories. But in failing to attach such interrogatories it ignored the plain provisions of the statute.

It is said, however, that the answers to the interrogatories might not be truthful, and that it was necessary that the plaintiff might see the books in order to ascertain whether or not the answers were true. A bill of discovery in chancery never gave the plaintiff such a right. It simply compelled the defendant to answer the interrogatories under oath, and that was the extent to which a court of chancery would go. That being true, Section 5293 gives the same relief as did a bill of discovery in chancery.

Pomeroy's Equity Jurisprudence, Section 82, Vol. 1 (new edition), together with the 45th Ohio State, 365, 366, gives a very clear statement as to the relief afforded by a bill of discovery in chancery, and on page 366 of the 45th Ohio State, the court says:

"All the aid which a suit of discovery would give is now given by our code in a case at law itself."

In our judgment, Section 5293, Revised Statutes, is a substitute for the old bill of discovery in chancery, and the provisions thereof should be followed when applicable.

It is claimed, however, by plaintiff below that under its contract with the defendant, it had a right to an inspection of defendant's books, and a court of equity should enforce that contract. In answer to this, we say that parties contracting together can not by virtue of their contract extend the equity power of the court, nor can they enlarge the statute.

Sections 5289, 5290, 5101, Revised Statutes, afford ample means for obtaining an inspection of the books or papers of an

adversary, and should be resorted to rather than to apply to a court of equity.

We think these statutes are as broad as the old chancery practice and provide a method of procedure, and that method must be pursued, and in holding otherwise the court of common pleas erred in overruling the demurrer.

The judgment of the court of common pleas will therefore be reversed, at the costs of defendant in error; and this court proceeding to render the judgment the court of common pleas should have rendered, dismisses the petition of the plaintiff below at its costs.

PROSECUTION OF ERROR WHERE THERE WERE TWO FINAL DECREES.

Circuit Court of Hamilton County.

TEDTMANN v. TEDTMANN ET AL.

Decided, December 5, 1908.

Final Order—Title Held in Trust—Finding as to, and as to Rents and Profits—Error Proceedings.

In an action to declare a trust in land and for recovery of rents and profits, the final decree to which error can be prosecuted so as to bring before the court the question as to whether the defendant held the property in trust or in fee is the decree wherein the controversy as to the title was decided, and not a subsequent decree confirming the report of the referee as to the amount of rents and profits due from the defendant.

E. A. Hafner, for plaintiff in error.
Burch & Johnson, contra.

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

This was an action in the court of common pleas by the heirs of Martin Tedtmann, Sr., against Martin Tedtmann, Jr., wherein it was alleged that Martin Tedtmann, Sr., had purchased certain real estate in the city of Cincinnati and placed the same in the name of his son, Martin Tedtmann, Jr. That Martin Tedt-

mann, Sr., occupied and improved said property until the time of his death, in 1903. That since his death said Martin Tedtmann, Jr., has occupied said property and claims to own the same.

The court was asked to find that said property was held by said Martin Tedtmann, Jr., in trust for himself and his brothers and sisters, and account for rents and profits, and for the sale of the property and for equitable relief. Martin Tedtmann, Jr., denied the claim of plaintiffs and claimed to be the owner in fee simple of the premises. On September 10, 1906, the court rendered judgment in the case, stating its finding of fact and law separately. It found the issues in favor of the plaintiffs. That they were the owners of the premises and that the defendant held the legal title to the premises in trust for the plaintiffs. The court ordered the property sold and appointed a referee to ascertain the amount of the rents and profits for which Martin Tedtmann, Jr., was liable. To this decree Martin Tedtmann, Jr., prosecuted error in this court, the petition being filed May 7, 1907, and the case numbered 4406. On June 3, 1907, this court struck the petition from the files for the reason that the petition was not filed within the time for which error might be prosecuted and therefore the court had no jurisdiction of the subject-matter.

Afterwards the referee made his report. The parties agreed as to the amount of the rents and profits and on this the referee made his report and this report was confirmed by the court on July 23, 1907, and a petition in error was filed in this case in this court November 20, 1907, although the bill of exceptions was not signed until December 21, 1907, being more than four months after the judgment confirming the referee's report.

There is no contention in this case that the report of the referee was wrong in any particular; his finding was conceded to be correct if the judgment of the court rendered September 10, 1906, was correct. And what Martin Tedtmann, Jr., seeks to set aside in this court is the decree of September 10, 1906, wherein it was found that he held the premises in question as a trustee for himself and his brothers and sisters, and he claims

that the final judgment to which he has a right to prosecute error is the judgment of July 23, 1907, confirming the referee's report, and that the decree of the court rendered September 10, 1906, was merely interlocutory and it is brought up by the final decree of July 23, 1907, confirming the referee's report.

We are of the opinion the final decree to which error could have been prosecuted so as to bring before this court the question as to whether Martin Tedtman, Jr., held this property in trust or in fee was the decree of September 10, 1906, wherein the court decided this controversy. Of course he could prosecute error to the judgment confirming the referee's report, but there is no claim that there is any error in the finding of the referee. 49 O. S., 374.

Judgment affirmed.

QUIETING TITLE AGAINST KNOWN HEIRS.

Circuit Court of Licking County.

WILSON ET AL v. WILSON, ADMINISTRATOR.*

Decided, October Term, 1908.

Title—Proceedings to Quiet Title Against Unknown Heirs—Not Effective Against Known Heirs—Summons—Publication—Parties—Notice—Statute of Limitations—Tenants in Common.

1. An action brought to quiet title to land against J. D. W. if living, and if dead then against the unknown heirs of J. D. W., as defendants, in which action service was made by publication, and a decree rendered quieting the title of plaintiff against such defendants does not affect the title in the land of heirs of J. D. W. whose names and places of residence in Ohio are known to the plaintiff in such action, and who are not named as parties, or served with summons therein, and who have no actual notice of such action; and such known heirs are not barred by the proceedings and decree in such action from asserting their interest in such land.

* Reversing *Wilson, Admr.*, v. *Wilson et al*, 6 N. P.—N. S., 489.

2. The statute of limitations does not run in favor of a tenant in common in the occupancy of the premises, against his co-tenant, until some overt act of an unequivocal character, clearly indicating an assertion of ownership of the premises, to the exclusion of the right of the co-tenant.
3. The commencement and pendency of an action to quiet title against J. D. W. if living, and if dead then against his unknown heirs, was not such notice to the known heirs of J. D. W. who were co-tenants of the plaintiff, but had no actual notice of such action, that the plaintiff claimed adversely to their interest in the land, as to make the statute of limitations run against their interest in the land.

Flory & Flory and *R. M. Ochiltree,* for plaintiffs in error, cited the following authorities:

That action to quiet title against unknown heirs of John D. Wilson, did not affect the title of known heirs—Archer v. Brockschmidt, 5 N. P., 349; Uhlein v. Gladieux, 74 O. S., 233; Lamb v. Boyd, 4 C. C., 499; 24 Am. & Eng. Enc. of Law, 718, 719, 724, 734, 736, 737; Young v. Heffner, 36 O. S., 238; Kingsborough v. Tousley, 56 O. S., 450; Green v. R. R. Co., 62 O. S., 67; Spoors v. Coen, 44 O. S., 497, 503; Webster v. Reid, 53 U. S., 437.

That statutes of limitation did not run between co-tenants—Gill v. Fletcher, 74 O. S., 295, 305; Farmer's etc., Bank v. Wallace, 45 O. S., 165; Young v. Heffner, 36 O. S., 232; Hoggs v. Burman, 41 O. S., 99; Freeman on Co-tenancy, Section 230; Wood on Limitations, page 620, Section 266; Wood on Limitations, pages 568, 571, 574, 576; Culver v. Thoads, 87 N. Y., 348; Chambers v. Wilcox, 15 O. Dec., 629.

That the suit to quiet title did not charge co-tenants with any adverse claim of co-tenants—Lessees of Irwin v. Smith, 17 Ohio, 226, 239; Gill v. Fletcher, 74 O. S., 295; Benton v. Shaffer, 47 O. S., 117; Gibler v. Smith, 14 Ohio, 323; Hollinger v. Bates, 43 O. S., 437.

That no cause of action accrued until notice of adverse claim was received by co-tenants and this did not occur until disability of infancy ceased—Lessees of Thompson v. Green, 4 O. S., 218, 224; Walker v. Youngstown, 62 O. S., 249.

From the brief of Kibler & Montgomery:

It is a recognized rule that the statute of limitations may run in favor of one co-tenant against another, where the possession of the one co-tenant is hostile to that of the other—Barr v. Chapman, 30 W. L. B., 265; Schulte v. Beineke et al, 4 N. P., 207; Veazie v. McCuginio, 40 O. S., 365 (affirmed by the circuit court).

The judgment in an action to quiet title is final and conclusive—Wabash Ry. Co. v. Toledo Elevator Co., 7 N. P., 198; Desnoyers v. Dennison, 19 C. C., 320; Swenson v. Cresap, 28 O. S., 668; B. & O. Ry. Co. v. Smith, 54 O. S., 562; Covington, etc., Co. v. Sargent, 27 O. S., 232; Gill v. Fletcher, 74 O. S., 295; Young v. Heffner, 36 O. S., 232.

The judgment of 1884 can not be collaterally attacked—8 Ency. Digest (Michie), p. 162; Bank of Wooster v. Stevens, 1 O. S., 233; Bosewell v. Sharp, 15 O. S., 466; Irvin v. Smith, 17 O. S., 242; Newman v. Cincinnati, 18 O. S., 330; Morgan v. Burnet, 18 O. S., 546; Fowler v. Whiteman, 2 O. S., 270; Kingsborough v. Tousley, 56 O. S., 450.

A judgment must be void and not merely erroneous in order to render it subject to collateral attack—Gaw v. Glassboro, 20 C. C., 416; Moore v. Robinson, 6 O. S., 302; Weyer v. Zane, 3 O., 409.

As to the jurisdiction of the probate court—Doan v. Biteley, 49 O. S., 588; Dalton v. Davis, 18 C. C., 878.

C. C. Forry, for Isaac N. Wilson, administrator of the estates of Cynthia Jane Wilson and Sarah Ann Wilson.

Kibler & Montgomery, for the First Presbyterian Church of Newark.

CRAINE, J. (orally); DONAHUE, J., concurs; TAGGART, J., dissents as to the last syllabus, and to the judgment of the court that the record does not show an adverse holding by the tenants in common for more than twenty-one years, and to the reversal of the judgment.

This action was brought in the probate court by Isaac N. Wilson, as administrator of the estates of Cynthia Jane Wilson and

Sarah Ann Wilson, asking for an order to sell certain real estate (lots 512 and 513 in the city of Newark, Ohio), for the purpose of paying the debts of the decedents. Charles O. Wilson, William Wilson, Pauline Wilson and James William Gillies were made defendants. Charles O. Wilson and William Wilson in their answer allege that they are the owners of a one-sixth interest in lots 512 and 513; that they were co-tenants of the decedents at the time of their death. James W. Gillies files the same kind of an answer, claiming to be the owner in fee simple of an undivided one-sixth, and they pray judgment for their share.

A reply was filed by the administrator to these answers, denying certain matters and setting up as an affirmative defense that these claimed heirs were barred by an adjudication of the court of common pleas; and also claiming a prescriptive right.

The probate court and the common pleas court held that they were barred by the statute of limitations, twenty-one years having run against them. The case is brought to this court to review the judgment of the court of common pleas. A history of the case is somewhat as follows:

John D. Wilson, who was a single man, left this country for California about 1850, and nothing has been heard from him since. The presumption is that he died. Cynthia Jane Wilson and Sarah Ann Wilson were sisters of John D. Wilson, and inherited one-sixth each; James William Gillies inherited one-sixth through his mother, who inherited from John D. Wilson; Charles O. and William Wilson claim to inherit from their father, John O. Wilson; who, in turn, inherited from his father, Joseph Wilson; who, in turn, inherited from John D. Wilson, who went to California.

The principal contention of the parties is, whether or not Charles O. Wilson, William Wilson and James Gillies were barred by the proceedings in the court of common pleas, brought in 1884. In that year Cynthia Jane Wilson and Sarah Ann Wilson brought an action in the common pleas court of this county against John D. Wilson (the man who went to California) if living, and if dead then against the unknown heirs of John D. Wilson. An affidavit was made, which reads:

"Cynthia Jane Wilson, being sworn, says that she is about to commence suit against the unknown heirs of John D. Wilson, deceased, and against the said Wilson if living, the object and prayer of which is to quiet the title of herself and co-plaintiff, Sarah Ann Wilson, to lots 512 and 513 in the city of Newark, Ohio, against any claim or interest therein of the unknown heirs of John D. Wilson, deceased, or of the said John D. Wilson if living, and that the said defendants claim or may claim an interest therein adverse to the interest of the plaintiffs who are the owners of and in possession of said realty."

It is said that this affidavit is not sufficient. We have examined the statutes in force at that time, and we find that the affidavit was drawn strictly in conformity to the statutes that were then in force. It will be noticed, however, from this affidavit that she wants to bring an action against John D. Wilson, if living, to foreclose his rights. If he is not living, then she wants to bring it against his *unknown* heirs. She does not bring the action against the heirs of John D. Wilson but against the unknown heirs of John D. Wilson. I emphasize that because of what may be said hereafter, in view of the fact that the court is not in entire harmony in this case.

Publication was made, and a decree was entered:

"It is therefore ordered, adjudged and decreed that the title and possession of the said Sarah Ann Wilson and Cynthia Jane Wilson to all and singular the premises in the petition described, to-wit: situate in the county of Licking and state of Ohio, and in the city of Newark, and being lots numbers 512 and 513 in said city, be, and the same hereby are quieted as against the defendants, and each and every one of them, and all persons claiming under them."

Who were the defendants? John D. Wilson and the unknown heirs of John D. Wilson. The action was to quiet the title against the unknown heirs of John D. Wilson.

We think, in a case like this, where an attempt is made to quiet title against parties, nobody's title ought to be quieted who is not made a party. Were Charles O. Wilson, William Wilson and James W. Gillies *unknown* heirs of John D. Wilson? The majority of the court, at least, think not. We think

the evidence in this case shows that the plaintiff knew of Charles O. Wilson, William Wilson and James W. Gillies. In 1882 she presented this book (indicating) to Charles O. Wilson and William Wilson. They were residents of this state; they were minors, one being about eleven and the other fifteen years of age. We think that this decree operates no further than its terms import, and a majority of the court think that this decree did not quiet the title against Charles O. Wilson, William Wilson and James William Gillies, because they were not within the class named as *unknown* heirs. There is no place where the evidence shows that they were in that class. They were the *known* heirs, and not the *unknown* heirs, and to preclude them there must be some evidence to show that they fell within the class of unknown heirs.

Another question is raised: that of the statute of limitations; that title was acquired by adverse possession.

Charles O. Wilson, William Wilson and James William Gillies were co-tenants; that is, they were seized of an undivided one-sixth; two of them had the one-sixth jointly; and James S. Gillies had one-sixth to himself. Now, were they barred by the statute of limitations? That is the next question. In the 36th Ohio State, page 232, we find the syllabus reads as follows:

"The statute of limitations does not run in favor of a tenant in common in the occupancy of the premises, against his co-tenant, until some overt act of an unequivocal character, clearly indicating an assertion of ownership of the entire premises, to the exclusion of the right of the co-tenant.

"The legal presumption of death which arises from the absence of one from his home for the period of seven years, and in the meantime is not heard of, is but *prima facie* evidence of the fact, and may be rebutted by counter-proof."

In the 41st Ohio State, page 81, a portion of the syllabus reads as follows:

"When a grantee enters under a deed describing his estate as a tenancy in common with others, his possession will be presumed to be not adverse to the owners of the other undivided interests, until by unmistakable acts or declarations of which his

co-tenants had or ought to have taken notice, he claims the entire ownership."

So that where there are tenants in common and any one or more of the tenants undertake to set the statute of limitations running against the other co-tenants who are not in possession, there must be some overt act, unequivocal in its character—plain and decisive—so as to inform the person that the tenant in possession is claiming it adversely.

In this case, these parties were in possession of the property by reason of being heirs of John D. Wilson; that is, because they owned the two-thirds interest. Now, ordinarily, possession of itself is notice of an adverse claim, but they had a right to that possession. What act did they do that notified these two infants that they were claiming adversely? It is said that there was a deed made and put upon record, but it does not appear that these heirs were informed of that. It is also said that the bringing of the suit to quiet title was notice to them. We are cited to a case in 17 Wallace, I believe. That case we do not think is similar to the one at bar, because in that case the co-tenants had been made parties, and the claim there was that there was a defect in the judgment. We do not think that the act of bringing the suit in this court to quiet title was of such a public nature that it would put these children, who were infants at that time, upon their guard and inform them of the fact that these people were claiming adversely; and the majority of the court feel that, under the evidence in this case, these heirs had no actual or constructive notice of an adverse claim, and that the claim as to adverse possession has not been established. And for that reason the judgment of the common pleas court will be reversed.

REGULARITY OF PROCEEDINGS FOR EXTRADITION.

Circuit Court of Hamilton County.

CRAIG v. HAMANN, SHERIFF.

Decided, December 5, 1908.

Extradition—Presumption as to Regularity—Where no Error in the Proceedings is Disclosed by the Record—Habeas Corpus.

Where it appears, from the papers embodied in a bill of exceptions, that the Governor of the state was authorized to grant a warrant of extradition, and the proceedings are in all other respects regular, but the record fails to disclose what action was taken by the Governor, it will be presumed that a warrant of extradition was granted and that the prisoner is held by virture of such warrant, and refusal of a writ of habeas corpus under such circumstances is not erroneous.

Scott Bonham, for plaintiff in error.
John Russe, contra.

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

This case is here on error to the judgment of the court of common pleas, in which court the application of the plaintiff in error to be discharged from the custody of the sheriff, on habeas corpus, was denied. It does not affirmatively appear from the record in this case that there was error in the judgment of the court of common pleas to the prejudice of said plaintiff in error.

The requisition of the Governor of the State of Indiana on the Governor of Ohio was properly made under the laws of the United States, and the Governor of Ohio properly granted the request of the extradition of said Craig. We find no defect in either the form or substance of the matters required under the statutes relating to extradition. Substantially a crime under the laws of Indiana was charged to have been committed by said Craig, and that he had fled from justice in said state to the state of Ohio, and upon the papers set forth in the bill of exceptions the Governor of Ohio was authorized to grant a warrant of extradition, and we presume this was done, although

the record of the case does not disclose what action was taken by the Governor of Ohio. We presume furthermore that the said Craig was held by virtue of said warrant although the record does not show this. It is sufficient to say that it does not appear from the record that there was error in the judgment of the court of common pleas in refusing to discharge the prisoner on the evidence offered at the trial.

UNFAIR COMPETITION BY AN UNLICENSED PHYSICIAN.

Circuit Court of Erie County.

CHARLES H. MERZ v. H. L. MURCHISON.

Decided, November, 1908.

Physician and Surgeon—Unlicensed Practice and Unfair Competition—Section 4403c a Criminal Statute—Injunction Will not Lie Against an Unlicensed Practitioner—No Property Rights Conferred by a Physician's License.

1. The practice of medicine or surgery will not be enjoined merely because such practice is unskillful and patients may be injured rather than benefited thereby, or because the patients are deceived by false claims of skill.
2. Section 4403c, Revised Statutes, prescribing who may practice medicine, is designed to protect the public, and notwithstanding some incidental benefits result to those having the necessary qualifications to practice, by excluding others not qualified, it is not intended to confer special privileges upon licensed practitioners for the protection of which as a property right they may invoke equitable aid to restrain unlawful competition by unlicensed practitioners.
3. Injunction will not lie to prevent the practice of medicine by one having no legal certificate therefor, where the only ground urged for such relief is, the diminution of profits to one lawfully engaged in such practice by reason of the unlawful competition,

O. E. Harrison and *W. E. Guerin*, for plaintiff.
Williams & Steineman and *John Ray*, contra.

Per Curiam.
Heard on appeal.

The plaintiff, a physician and surgeon of the city of Sandusky, brought this action in the court of common pleas to enjoin alleged unlawful and unfair competition by the defendant. The case is brought to this court by appeal. It presents an important and interesting question not heretofore, so far as we are apprised specifically considered or determined in any court of this state or other jurisdiction. The defendant was engaged in the practice of what he denominates, not medicine or surgery, for which he concedes that he had no license under the medical examination and registration law of Ohio, but the "chiropractic" adjustment of displaced spinal vertebrae, with the result, as claimed, of effecting remarkable and speedy cure of numerous if not all bodily ailments.

The evidence before us discloses that the defendant is under indictment for alleged violation of the statute referred to (R. S., 4103c). With this matter, however, we are not concerned, but the fact that the acts of the defendant may be such as are forbidden by this penal enactment, may have an incidental bearing on the question of our power as a court of equity to prevent them.

There appears to be no serious contention by counsel for plaintiff but that his claim to the equitable interposition of this court is based mainly, if not wholly, upon this statute. Without legal provisions for the examination and licensing of physicians and surgeons, one person would be as free as another to practice these professions without interference from the courts. True, there are in plaintiff's petition averments that the acts of defendant are fraudulent in intent as well as illegal under the statute, but little emphasis has been placed on this assertion in argument or support given to it by evidence. However unfounded may be defendant's claims as to the merits of the "chiropractic" method of removing the cause of disease, and with regard to this we express no opinion, we are not convinced that he knows or believes such claims to be false. But were it otherwise, it is not apparent that the position of the plaintiff from a legal or equitable standpoint would be greatly strengthened. A court will not interfere with the practice of medicine or surgery by one person

on the petition of another, merely because such practice is unskillful and patients may be injured rather than benefited thereby, nor because the patients are deceived by false claims of skill.

The plaintiff relies rather on what he earnestly urges is a property right to practice medicine and surgery conferred on him by his statutory license, and an interference with that property right by the unlawful competition of a person unlicensed.

Probably the statute rather qualifies rights heretofore existing than confers new ones. It is not apparent that the law could stand the test of the constitutional requirement that laws shall be for the equal benefit and protection of the people, if it had no object, purpose or effect other than to confer special privileges upon certain people having certain qualifications to practice medicine, through excluding from such practice all others not so qualified. The constitutionality of the statute is based on the police powers of the Legislature, and whatever benefit is derived from the statute by those engaged in the practice of medicine and surgery is only incidental. The circle of competition may be narrowed by excluding unlicensed competitors, but that is not the purpose of the law. *Palmer & Crawford* v. *Tingle,* 55 O. S., 423, 440; *State* v. *Gardner,* 58 O. S., 599.

The statute, which is designed to protect the public, contains certain penal provisions enforcible in behalf of the public. Can a private individual invoke it in his own behalf, and in a civil proceeding prevent the very acts which the statute makes criminal?

We quote this language from an opinion by Lord Mansfield, 2 Burrows, 803:

"The rule is certain, 'that where a statute creates a new offense, by prohibiting and making unlawful anything that was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued and no other.'"

This rule is followed and applied in *Com'rs* v. *Bank of Findlay,* 32 O. S., 194, 200, 201, and asserted in other phraseology in

State, ex rel Reynolds, v. *the Capital City Dairy Co.,* 62 O. S., 123-126.

We refer also to High on Injunctions, 4th Ed., Sections 20 and 769. In the latter section the author asserts that an injunction will be withheld against the perpetration of an act prohibited by public statute, the only ground urged for the relief being the diminution of the profits of a trade or business pursued by complainant in common with others.

While no reported case precisely like the one under our consideration has been cited to us, the courts of New York and Texas have passed upon conditions and contentions very analogous and have refused the relief here sought. We refer to the cases of *Smith et al* v. *Lockwood & Wood,* 13 Barbour (N. Y.), 209, and *York* v. *Yzaguairre* (Texas), 71 S. W., 563.

The principles enunciated in those cases, so far as applicable to the case before us, we are disposed to adopt. We have found no others so pertinent to our inquiry.

It is the judgment of the court that plaintiff's petition be dismissed.

LARCENY AND ROBBERY DISTINGUISHED.

Circuit Court of Hamilton County.

PRENTICE C. TILLER v. THE STATE OF OHIO.

Decided, December 5, 1908.

Criminal Law—Larceny Converted into Robbery by Pursuit and a Struggle—Violence is Concomitant with the Taking, When.

T, while examining rings in a jewelery store, under the pretense that he desired to purchase, seized the tray containing the rings and ran. He was followed by the clerk, and at the door of the store there was a struggle, with the result that T escaped with the tray. *Held:*

That the pursuit by the clerk and the struggle at the door were concomitant or concurrent with the taking of the rings, and T was properly convicted of robbery as distinguished from larceny.

Raymond Ratliff for plaintiff in error.

C. O. Rose, contra.

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

At the April term of the Court of Common Pleas of Hamilton County, the plaintiff in error was tried upon two counts in the indictment, one charging the offense of robbery and the other grand larceny. The jury returned a verdict finding him not guilty of larceny, but guilty of robbery. A motion for a new trial was interposed, upon the overruling of which judgment was entered for the State, and the prisoner sentenced to the penitentiary.

The sole ground of error urged is that the defendant below, if guilty at all, was guilty of larceny and not of robbery, as the prosecuting witness was not put in fear, and the violence necessary to constitute the crime of robbery was not concomitant with, but subsequent to the taking of the property.

The circumstances of the taking as detailed by the prosecuting witness show that while examining rings in the store of Michie Brothers, the plaintiff in error grabbed the tray containing them from the counter, placed it under his arm and ran to the door. The prosecuting witness immediately pursued him. The plaintiff in error succeeded in getting out of the door and proceeded to close it when the prosecuting witness attempted to prevent this closing, and after this struggle at the door the plaintiff in error escaped with the property.

The question is, does or not the evidence disclose that such violence was used as the statute contemplates and is essential in the crime of robbery?

In *Hanson* v. *The State*, 43 O. S., 376, it was decided that the violence essential to the crime of robbery must be concomitant with the taking of the property. In other words, accompany the taking—be concurrent with it. This, therefore, raises the question of fact whether the violence used was or was not in contemplation of law concomitant with the taking. Was the grabbing of the tray, the pursuit through the store, the struggle to escape at the door a part of the act by which the taking was effected? We think that they were. The taking of the property from the prosecuting witness or from his presence and under his control was not effected until these various acts of violence were completed, for

the reason that plaintiff in error did not succeed in his attempt to possess himself of the property until after all these acts of violence occurred.

In this respect the charge of the court correctly stated the law, and the judgment is affirmed.

ATTORNEYS' FEES UNDER AN ALLEGED CONTRACT.

Circuit Court of Hamilton County.

M. F. GALVIN ET AL v. JULIA B. GAUSSEN.

Decided, December 5, 1908.

Attorneys' Fees—Alleged Contract for Services—Proof Fails to Establish Contract—Accord and Satisfaction—Unprejudicial Errors.

In an action for recovery for services by attorneys under a contract, there can be no recovery where the proof tends to show that no contract was entered into, and that the defendant sent to the plaintiffs a check for a substantial amount, having upon it "in full for all claims or demands for service rendered to date," which check was endorsed and collected by the plaintiffs.

J. D. Creed, for plaintiff in error.
W. T. Porter, contra.

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

From an examination of the evidence and the entire record in this case, we are of opinion that the judgment of the court below should be affirmed.

As we view the case, it was an action to recover for services claimed to have been rendered by the plaintiffs in error and items of cash paid out by them for the defendant in error under a certain contract between the parties. Defendant in error denied this contract and set up payment in full.

The evidence at the trial showed the amount claimed was disputed, and a check was given by the defendant for a less amount than was claimed, the check having upon it "in full for all claims or demands for services rendered to date."

The contentions of both sides were fairly left to the jury and we find no error committed by the court either in its general charge or in giving the special charge asked by the defendant or in refusing charge number three asked by the plaintiffs in error.

The other errors complained of by plaintiffs in error as to the court declining to notice alleged misconduct of attorney for the defendant in error, if there was such misconduct, and refusing to eliminate certain testimony offered in the case relative to the suit involving the constitutionality of the Harrison Avenue Viaduct Act, if errors at all, we do not think were prejudicial.

The question was, what was the contract between the parties, if there was a contract, and, second, was the matter in dispute settled between them and payment made in full?

We think the proof showed that the matters in dispute between the parties had been settled and under the law the payment of the $300 by the defendant to the plaintiffs would discharge the defendant.

Judgment is affirmed.

ACTIONS ON CERTIFICATES OF FRATERNAL ORDERS.

Circuit Court of Hamilton County.

GRAND LODGE OF THE BROTHERHOOD OF RAILROAD TRAINMEN v. DALY.

Decided, December 19, 1908.

Life Insurance—Mutual Benefit Societies—Exemptions—Weight of Evidence—Charge of Court—Error—Sections 3625 and 3631-14.

1. In an action on a policy of life insurance, where the burden of proof is placed on the defendant fraternal order by the issues joined and also by Section 3625, relating to false answers in an application for insurance, the order will not be permitted after trial and verdict to claim the exemptions provided by Section 3631-14.
2. Where the application for insurance is made a part of the contract both by its own terms and by the constitution of the order, it is

reversible error to charge the jury that the contract of insurance is embodied in the constitution and the certificate.

Hoffman, Bode & LeBlond, for plaintiff in error.
Wm. Littleford and *Henry G. Frost,* contra.

The defendant below recovered a judgment against the Grand Lodge for $1,350 on a policy of insurance on the life of the decedent. The principal defense set up was as to the truthfulness of answers made by the decedent at the time of his application for a policy. In the court below the judgment was against the Grand Lodge.

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

Upon the issues joined in this case the burden of proof rested upon the defendant in the original action, and by its answer it also assumed the burden of proving each fact required by Section 3625, Revised Statutes.

After trial and verdict upon issues thus tendered it can not claim exemption under Section 3631-14, Revised Statutes, and inasmuch as this court will not reverse a judgment on the ground that it is against the weight of the evidence unless clearly so, it follows that Section 3625 and not 3631-14, Revised Statutes, is the law of the case. All the facts enumerated in this section were clearly proved with reference to the following answers made by the deceased in his application for a benefit certificate:

1st. That he had not consulted a physician during the last five years.

2d. That he was then in good health.

3d. That he had never been afflicted with syphilis.

4th. That he had no deceased brother or sister.

5th. That he took possibly three drinks of intoxicating liquor a week.

The judgment is therefore manifestly against the weight of the evidence.

The statement of a physician to his patient in that relation that he is afflicted with a certain disease is advice within the meaning of Section 5241, Revised Statutes.

The court erred in charging the jury that the certificate and the constitution and by-laws constitute the contract, when the petition of plaintiff, the constitution and the application itself make the latter a part of the contract.

The special instructions requested by the defendant were based upon the rule stated in the case of *Insurance Co.* v. *Pyle,* 44 O. S., 19, which was abrogated by Section 3625, Revised Statutes. *Life Ins. Co.* v. *Warren,* 59 O. S., 345, at 353.

Many other errors are alleged but we find none that is prejudicial.

Judgment reversed and cause remanded for a new trial.

COMMITMENT TO WORK HOUSE IN ANOTHER COUNTY.

Circuit Court of Ashland County.

WILLIAM YOUNG v. THE STATE OF OHIO.

Decided, November 11, 1908.

Imprisonment—Authority of Constable to Take Prisoner to Work House of Another County—Fines and Costs—Provisions for, in Default of Payment—Habeas Corpus—Section 1536-378.

1. A constable, in a county having no work house, but which has made terms, under Section 1536-378, Revised Statutes, with a city or district of another county having within its limits a work house, can not commit to such work house a prisoner found guilty of violating a state law, unless the sentence so provides, although the writ issued to the constable directs such confinement.
2. It is the duty of a constable holding a writ of execution for the collection of a judgment for a fine and the costs of prosecution, rendered by a magistrate for the violation of a state law, but which judgment makes no provision for imprisonment in case of default in the payment of said fine and costs, to take the body of the offender and commit him to the county jail, in case he fails to pay said fine and costs and there is no property out of which to satisfy said judgment.
3. Where, under such circumstances, a constable has taken possession of the body of the defendant, habeas corpus will not lie against the constable for the release of the defendant, at least until the constable has had a reasonable time in which to convey him to the county jail.

H. E. Bell, for plaintiff in error.

F. N. Patterson, contra.

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

William Young, the plaintiff in error, was arrested, convicted and sentenced by the mayor of Ashland for a violation of Sections 4364-20-*a-b-c,* Revised Statutes. The sentence provided that Young should pay a fine and the costs of prosecution, but imprisonment was not made a part of the punishment, nor did the sentence provide for imprisonment in case the defendant defaulted in the payment of the fine and costs of prosecution. A writ of execution was issued by the mayor and placed in the hands of a constable, directing the constable to collect the amount of said fine and costs of prosecution and, in default thereof, commit the defendant to the Columbus work house. The constable, being unable to find property of the defendant with which to satisfy his writ, took the body of the defendant and was about to commit him to the Columbus work house, when the defendant applied to the court of common pleas for a writ of habeas corpus, claiming that said constable unlawfully deprived him of his liberty. A writ of habeas corpus was issued by the court of common pleas, but upon a final hearing of the case, the court of common pleas dismissed the petition and remanded Young to the custody of the constable. From the judgment of the court of common pleas error has been prosecuted to this court, asking this court to reverse the judgment of the court of common pleas. The contention of plaintiff in error is, that there being no provision for imprisonment mentioned in the sentence, either as a part of the punishment or as a means of collecting the fine and costs, the constable had no right to take the body of Young and commit him to the Columbus work house or any other prison, but that the sentence stood like a judgment in a civil case, and that if Young did not have property sufficient to satisfy the fine and costs, that ended the matter.

Section 1536-378, Revised Statutes, provides:

"That a city or district having within its limits, a work house, may receive as inmates of such work house persons sent-

enced thereto as provided by law, from counties other than the one in which such work house is situated."

It does not appear from the record whether or not the county of Ashland had made any provision for sending inmates to the Columbus work house, but assuming that Ashland county had such arrangements with the authorities of the Columbus work house, we are of the opinion that Young could not be committed to this work house, unless the sentence of the court so provided, as the language of the statute is:

* * * "may receive as inmates of such work house persons sentenced thereto as provided by law."

If Young were in the possession of the work house authorities, we would be inclined to hold that such confinement, under the circumstances, would be illegal and that he be released by habeas corpus, but Young never having been admitted to the Columbus work house, a writ of habeas corpus would not lie, simply because the officer threatened to send him there.

The remaining question is as to whether or not the constable has a right to the custody of Young. Section, 7327, Revised Statutes, reads as follows:

"When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced shall remain confined in the county jail until the fine and costs are paid, or secured to be paid, or the offender is otherwise legally discharged."

This section of the statute provides that the magistrate *may* order the person confined in the county jail, but we apprehend that such order should be made a part of the sentence.

Section 7328, Revised Statutes, we think, is decisive of the duties of the constable under the circumstances and reads as follows:

"When a magistrate or court renders judgment for a fine, an execution may issue for the same, and the costs of prosecution, to be levied on the property, or, in default thereof, upon the body of the defendant; and the officer holding such writ may arrest the offender in any county, and commit him to the jail of the county in which the writ issued, there to remain until

the fine and costs are paid, or secured to be paid, or he is otherwise discharged according to law."

As I have said, in this case there was no provision made in the sentence for any imprisonment, but when the magistrate issued the writ of execution he provided in it that in default of property out of which to satisfy the fine and costs, the constable should commit Young to the Columbus work house. We do not think that under this writ the constable had any right to commit Young to the Columbus work house, but it was his duty to ignore that part of the writ which provides for commitment to the Columbus work house and proceed under Section 7328, Revised Statutes, which provides that in default of property he shall commit the body of the defendant to the county jail. The constable had not committed Young to the county jail, but he certainly had a reasonable time in which to do so.

Section 5729, Revised Statutes, which is a part of the habeas corpus act, provides:

"If it appear that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; etc."

There is no doubt but what the magistrate had a right to render the judgment and likewise had the right to issue the writ of execution for the collection of the judgment and costs, and the fact that he ordered Young to be committed to the Columbus work house in default of the payment of the judgment and costs, would not, in our judgment, render the writ nugatory, except as to the commitment part.

In the 78th O. S., 24, a party was sentenced to pay a fine and the costs of prosecution. Afterwards the mayor issued a mittimus, commanding the person to be committed to the county jail until the fine and costs were paid, without including the words "or secured to be paid," as provided by Section 1536-793 of the Revised Statutes. Habeas corpus was brought and a writ issued. The trial judge gave the state leave to amend the

writ, so as to include the omitted words. This being done, the court remanded the prisoner to the custody of the marshal, and the Supreme Court held there was no error in so doing.

We think the court of common pleas was right in dismissing the petition of the plaintiff in error and in remanding the body of Young to the custody of the constable, and we also think that it is the duty of the constable to commit Young to the county jail in pursuance of Section 7328, Revised Statutes, and being of this opinion we affirm the judgment of the court of common pleas. We would suggest, however, that the constable obtain a new writ of execution from the magistrate, providing for imprisonment in the county jail, in default of the payment of said fine and costs and in default of property of Young out of which to satisfy said writ.

FAILURE OF CONSIDERATION FOR WIFE'S RELEASE OF INTEREST IN LAND.

Circuit Court of Hamilton County.

KATE KLEIN v. ELLIS B. GREGG, GUARDIAN, ET AL.

Decided, December 5, 1908.

Husband and Wife—Release by Wife of Her Interest in Lands—Consideration Wholly Fails—Action to Set Deeds Aside—Pleading—Presumption—Fraudulent Representation—Mistake.

The allegation that the consideration upon which a wife released her rights in her husband's property have wholly failed, and if the deeds are permitted to stand she will receive no part of the consideration which it was intended both by her husband and herself that she should receive, is not ground for setting the deeds aside, in the absence of the allegation that the consideration was wholly inadequate at the time the deeds were executed.

W. A. Hicks, for plaintiff.

E. B. Gregg, contra.

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

The failure of the plan or design of David Klein in executing and delivering the deeds in question to provide a home and support for his wife and children after his death is no legal ground for setting aside such deeds, unless such plan or de-

sign was disclosed to the plaintiff and induced her to part with her interest in the property. The statement that "she would be taken care of and be amply provided for under said deeds" is not a representation of an existing fact, nor of the legal effect of such deeds, but a mere opinion of her future wants as well as those of the children, and the sufficiency of the means provided. Her real complaint is, not that the property conveyed is insufficient of itself to provide a home and support for herself and his children, but that they do not receive what the deeds purport to convey, to-wit, a clear and unincumbered title. One conveyance is made subject expressly to a mortgage of $3,000, and there is no allegation in the second amended petition that he promised or represented to her that he would pay or cause to be paid such mortgage.

The other conveyance contained a covenant of warranty that the property is clear and unincumbered, and plaintiff avers that her husband represented to her at the time the deed was executed that the $2,500 mortgage was satisfied and no longer a lien on said property, whereas in fact it was unsatisfied of record; but she nowhere avers that such representations were relied upon by her. *Insurance Co.* v. *Reed,* 33 O. S., 283.

There is no pretense that the misrepresentation was intentionally made, and if it be treated as a mistake there is no averment that it was mutual.

While the pleading contains the averment that "the consideration upon which she released her rights in said property has wholly failed, and if said deeds are permitted to stand she will receive no part of the consideration upon which such release was founded and intended for her by her husband," yet there is no averment that the consideration was wholly inadequate at the time the deed was executed, September 19th, 1901. The presumption would rather be that it was adequate, else she would have begun her action long ago.

Her right of action depends not upon the failure to receive what her husband intended she should receive, although not expressed in the deed, but upon fraud, mistake or undue influence

There was no intentional misrepresentation of fact, nor undue influence, and the only apparent ground for rescission is mis-

take, which, to be available, must be mutual. If the facts warrant, the plaintiff may amend accordingly.

Demurrer sustained.

CONSTITUTIONALITY OF ACT LIMITING HOURS OF LABOR OF GIRLS IN FACTORIES.

Circuit Court of Cuyahoga County.

J. W. BOLTON v. THE STATE OF OHIO.

Decided, January, 1909.

That provision of the act of February 28, 1908 (99 O. L., 30), which makes it an offense to permit girls under eighteen years of age to work more than eight hours in one day in factories, etc., is constitutional.

Hoyt, Dustin & Kelley, for plaintiff in error.

Charles P. Hine, contra.

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

Error to the Court of Common Pleas.

Plaintiff in error was convicted of employing a girl under eighteen years of age and permitting her to work more than eight hours in one day in the factory of which he was superintendent, contrary to the provisions of the act of February 28, 1908 (99 O. L., 30).

In this court it is claimed that the provision of the law referred to, under which plaintiff in error was convicted, is unconstitutional.

We find nothing upon which to base this claim. The state has plenary power to legislate regarding minors, as wards of the state; they have only such right to contract as the state awards them.

That the provision of the law referred to is a reasonable exercise of the police power of the state is apparent, if it be viewed in its bearing upon the health of immature girls who are to be the future mothers of our citizens. The judgment of the Legislature in this matter is not to be set aside by the courts.

Judgment affirmed.

PROSECUTION FOR SUFFERING A GAME OF CHANCE ON THE PREMISES.

Circuit Court of Hamilton County.

HARRY ENDERES v. STATE OF OHIO.

Decided, November 14, 1908.

Criminal Law—Failure to Lay the True Venue—In Prosecution for Suffering Game of Chance on the Premises—Section 6933.

A conviction for suffering a game of chance on the premises must be reversed, where the affidavit merely charges that the offense was committed within four miles of the city of Cincinnati and county of Hamilton, but there is no averment and no proof that the offense occurred "within" the county of Hamilton and state of Ohio.

M. C. Lykins, for plaintiff in error.
John M. Thomas, for the state.

The plaintiff in error was tried in the police court of the city of Cincinnati, Hamilton county, Ohio, on the charge of suffering a game of chance on the premises. The alleged offense was committed on the Island Queen, an Ohio river steamer, lying at "Coney Island," a pleasure resort on the Ohio side of the river, near Cincinnati. The affidavit was as follows:

"H. T. Harrison, being first duly cautioned and sworn, deposes and saith that one Harry Enderes, on or about the 29th day of August, 1906, within four miles of the corporate limits of the city and county aforesaid, did unlawfully suffer a certain game of chance, the name of which is to the affiant unknown, to be played for gain, to-wit, for money, to-wit, for the sum of five cents, by means of a certain gaming device and machine, to-wit, a 'nickel slot machine,' by one Louis Wien, in a certain erection, to-wit, an apartment upon the main deck of the steamer Island Queen, the said apartment being then and there in the care of him, the said Harry Enderes."

Enderes was found guilty in the police court, and the court of common pleas affirmed the judgment. Error was thereupon prosecuted to the circuit court, where the judgment was reversed in the subjoined memorandum opinion:

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

It is not charged in the affidavit that the offense was committed at the city of Cincinnati and county of Hamilton, but "within four miles of the corporate limits of the city and county aforesaid." Under this averment it may have been in the state of Kentucky. It is admitted in the record that Coney Island is within four miles of the city of Cincinnati, but there is no proof that it is within the county of Hamilton and state of Ohio.

Judgment reversed.

EFFECT ON DESCENT OF PROPERTY OF FAILURE OF WIFE TO TAKE UNDER THE WILL.

Circuit Court of Knox County.

ARMSTRONG ET AL v. ARMSTRONG ET AL.

Decided, 1907.

Wills—Devise of Property to Widow in Fee—Other Property Devised to Her for Life with Power to Sell—Effect of Failure of Widow to Take—Intention to Create a Life Estate Prevails over Inference Arising from Power to Sell—Widow can not Elect Whether She will Take as Heir at Law or as Devisee—But Must Take Either as Widow or Devisee—Distribution of Residue—Dower—Sections 4159 and 5964.

1. Where a husband possessed of real estate acquired by purchase dies testate but without issue, property devised to his widow in fee, with no devise over in the event that she elected not to take or failed to take under the will, does not become intestate property *as to her* within the meaning of Section 4159, and she can not take as heir at law the property thus devised to her in lieu of dower and distributive share.
2. With reference to the fee of property devised to a widow for life with a power to sell which has not been exercised, the husband will be held to have died intestate.
3. In such a case the widow becomes the owner in fee of the intestate property devised to her for life, but has only a dower interest in the property devised to her in fee.

DONAHUE, J.; TAGGART, J., concurs; MCCARTY, J., not sitting.

This cause comes into this court by appeal and is submitted on demurrer to the petition. It appears by the petition, the material allegations of which are admitted by this demurrer to be true, that the defendant, Rebecca Armstrong, is the widow of John Armstrong, who died testate seized of the real estate described in the petition, all of which was acquired by purchase, leaving no children. By the terms of the will the husband devised to his widow a certain part of this real estate, but the will contains no devise over of this real estate in case the widow elected not to take under the will. It appears that the widow did elect not to take, or rather, failed to elect to take, under the provisions of the will, and now claims that the real estate devised to her in the will, by reason of her failure to take under that will, becomes intestate property and that she is entitled to take the entirety thereof as heir at law, under the provisions of Section 4159, Revised Statutes of Ohio.

We think that Section 5964 of the Revised Statutes is decisive of the question presented by this petition and the demurrer thereto. That section provides that, upon failure of the widow to elect to take under the will, she shall retain the dower and such other of the personal estate of the deceased consort as the widow would be entitled to receive in case the deceased consort died intestate, leaving no children. That is to say, that in such case where the widow fails to elect to take the provisions made for her by will, that by operation of Section 5964, Revised Statutes, the property devised to her does not become intestate property *as to her* within the meaning of Section 4159, Revised Statutes, but that her interest therein is the same as if the husband died intestate leaving children. In other words, we do not believe that it is the policy of the law to permit the widow to make her election to take as *heir* at law or *devisee;* she must elect to take either as *widow* or *devisee,* and she can not defeat her husband's will by claiming dower in all his real estate and her rights as widow in all his personal property, whether the same be devised or not, and then claim

that she takes as heir the property devised to her by her husband in lieu of her dower and distributive share.

In the case of *Wilson, Ex'r,* v. *Hall et al,* Vol. 6 C. C. Rep., page 570, which was affirmed without report in the 53 Ohio State, page 679, almost an identical question was presented, the only difference being that it was the husband who elected not to take, or failed to elect to take under the will within the year, and it was there held that such property would descend subject to his rights as widower, under Section 4176, to the children, and there being no children in that case, that except for the provisions of Section 5964, the entire estate would pass to and divest in the widower, but, in accordance with the provisions of Section 5964, Revised Statutes, notwithstanding the testatrix left no children, the widower was entitled only to take the same interest that he would have taken in intestate property had the testatrix died leaving children, and that the residue thereof would pass to the brothers and sisters of the intestate of the whole blood or their legal representatives, and distribution was ordered in that case in accordance with this finding, and the same affirmed by the Supreme Court.

The next question presented by this demurrer is, whether or not John Armstrong died intestate as to any of the real estate described in the petition. The determination of this question requires the construction of item three of his will, which reads as follows:

"I give and bequeath to my beloved wife Rebecca Armstrong, the farm I now own situated in Porter township, Delaware county, Ohio, known as the Ramsey farm, to be hers to do as she may wish with." "I also give and bequeath to her so long as she may live the balance of my real estate and personal property with full power to sell and dispose of the same as she may wish; also to make and execute deeds for any or all of that part of my real estate that lies within the corporate limits of the village of Centerburg, Knox county, Ohio."

It is apparent that the Ramsey farm was devised to Rebecca Armstrong in fee and therefore John Armstrong did not die intestate as to any part of that real estate. But the question

arises upon the further provision of this item which devised his other real estate and personal property to her "so long as she may live with the right to sell and dispose of the same," etc., and it is claimed that this devise, coupled with the power to sell, is a devise of the real estate in fee simple, but with this contention we can not agree. We think that under the provision of this will Rebecca Armstrong took only a life estate in the balance of the real estate, except the Ramsey farm, and the farm devised in a former item of the will to a church society; that he died intestate as to the fee in all his other land.

In the case of *Home* v. *Lippart*, 70 O. S., page 261, at the bottom of page 282, the Supreme Court say:

"The rule is that when an estate is devised with absolute power of disposal, a devise over of what may remain is void, but that *where a life estate only* is given in express words to the first taker, with an express power in a certain event, or for a certain purpose, to dispose of the property, the life estate is not by such power enlarged to a fee or absolute right and the devise over is good."

In this will we are construing there is no devise over, but the principle announced in that case is applicable to the case at bar, and applying the same here it would appear that Rebecca Armstrong takes only a life estate in this property, and from the reading of the entire will it is apparent that that was the intention of the testator.

Underhill on the Law of Wills, Vol. 2, Section 686, page 938, says:

"A devise of land not expressly by terms of limitation, inheritance, or succession creating a fee may be raised to a fee simple if the testator gives the devisee an absolute and unrestricted power to dispose of the land. It is not meant to say that this is the case where an estate is expressly given for the life of the devisee."

Again, in the same connection, the following language is used:

"But if the land be devised to a person expressly for life only, an estate for life only passes. The intention to create an

estate for life shown by the express language which is employed will prevail over the inferences which may be created by the gift of the power; and if the devisee dies without exercising the power, the reversion of the fee will descend to the heirs of the testator or it will go to the devisee of the testator as a contingent remainder or executory devise if he has devised it over. In either event no estate in the land will pass under the power until it has been executed."

In this case she has not exercised the power, and having failed to take under the will she can not now, and never can, exercise that power. Therefore John Armstrong died intestate as to the fee in all these lands. And the widow, notwithstanding she has failed to take under the will, may take this land as heir at law under the provision of Section 4159, Revised Statutes.

In the land that was specifically devised to her in fee simple, to-wit, the Ramsey farm, she is entitled to take only dower therein, and this plaintiff as next of kin takes under the statute of descent and distribution.

Entertaining this view the demurrer will be overruled and the defendant, Rebecca Armstrong, is given leave to answer the plaintiffs' petition, setting up her rights and interest in these lands of which John Armstrong died intestate, as well as her dower interest in the Ramsey farm, or, if counsel desire it, the petition may be amended so as to present a separate cause of action as to the different parcels of land, and a decree may be entered finding that she is the owner of the intestate property and that she has only a dower interest in the property that was devised to her by the will of John Armstrong.

Motion for new trial will be overruled; exceptions noted.

PROCEEDINGS IN ATTACHMENT.

Circuit Court of Hamilton County.

EDWARDS MANUFACTURING COMPANY v. ASHLAND SHEET MILL COMPANY.

Decided, January 25, 1908.

Attachment—Error to Overruling of Motion to Discharge—Averments of the Affidavit—Exceptions Under Section 5521—Compliance with Section 5563b.

1. The filing of a petition in error within the required time together with an undertaking for retention of the attached property is a sufficient compliance with Section 5563*b*.
2. The averment of the affidavit that the defendant is a non-resident, when aided by an allegation of the petition that the defendant is a corporation under the laws of Kentucky, is equivalent to a statement that it is a non-resident corporation; but the affidavit must affirmatively show that the defendant is not within the exceptions contained in subdivision 1 of Section 5521.

Albert D. Shockley, for plaintiff in error.

Maxwell & Ramsey and *Joseph L. Lackner*, for defendant in error.

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

Where a motion to discharge an attachment is sustained, and the plaintiff, within thirty days thereafter, or sooner if so ordered by the court, files a petition in error and an undertaking for the retention of the attached property, it is a sufficient compliance with the provisions of Section 5563*b*, Revised Statutes.

An affidavit for attachment which contains the statement that "the defendant is a non-resident of said state of Ohio," when aided by the averment in the petition, which is sworn to positively, "that the defendant is a corporation duly organized under the laws of Kentucky," is equivalent to a statement that the defendant is a foreign corporation.

An affidavit for attachment upon the ground that the defendant is a foreign corporation must affirmatively show that such

corporation is not within the exceptions contained in Subdivision 1, Section 5521, Revised Statutes, and it is not aided by an averment in the petition, though sworn to positively, that the defendant is "doing business at Ashland, Kentucky," as such statement does not exclude the fact that it may also be doing business in this state and owning or using a part of its capital or plant in this state.

Judgment affirmed.

REAL ESTATE AGENT'S COMMISSION.

Circuit Court of Hamilton County.

JOHN PFANZ v. MAGDALENA HUMBERG ET AL.

Decided, February 29, 1908.

Where the contract with a real estate agent specifically states that he is to be paid for his services "when the property is sold," it is not error in an action by the agent against the owner for recovery of his commission to direct a verdict for the defendant, where the testimony has disclosed that the prospective purchaser refused to take the property because of defect in the title.

Renner & Renner and *Eugene Heim*, for plaintiff in error.

A. L. Herrlinger and *A. T. Fulford*, contra.

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

The contract of agency sued upon in this case distinctly sets out that the agreement entered into between the parties was that defendants in error were to pay Pfanz for his "services when the property was sold."

This being so, the agent was not entitled to compensation until either a sale was had, or at least an enforceable contract made, signed by the sellers and purchaser, that would enable the sellers to compel the purchaser to take the property if he refused to do so.

Neither of these elements were present. A deed was offered by the defendants in error for the property in question to the

purchaser, Ohlinger, who declined to accept it, for the reason of an alleged defect in title.

The defendants were never in a position to enforce their rights against him; therefore, under the contract, no sale having been made, or there being no means of enforcing one, the plaintiff in error under the terms of his contract was not entitled to compensation.

There was no error in the trial court granting the motion of defendants at the close of plaintiff's testimony to arrest the evidence from the jury and direct a verdict for the defendants.

Judgment affirmed.

MAKING IDIOTS PARTIES BY ANSWER.

Circuit Court of Hamilton County.

ROSA SEGAL v. THE EAGLE BUILDING CO.

Decided, May 21, 1907.

In an action by an administrator to sell real estate to pay debts, heirs who are idiots are made parties to the record by the filing of an answer and cross-petition by their guardian, wherein the allegations of the petition are admitted, service of summons waived, and the court is asked to grant the prayer of the petition.

Phares, Gusweiler & Phares, for plaintiff in error.

Bates & Meyer, contra.

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

As appears from the findings of fact the only question involved is whether, in a proceeding to sell real estate by an administrator to pay debts of decedent, heirs, who are idiots, are parties to the record, when not made parties to the petition but their legal guardian filed an answer in which she as such guardian expressly waived the issuing and service of summons upon her wards—admitted the allegations of the petition to be true and ask that the prayer of the petition be granted? We think they are such parties and bound by the sale made. *Ewing* v. *Hollister*, 7 O. (pt. 2), 138; Section 6143, Revised Statutes.

Judgment reversed and judgment for plaintiff in error.

STATE AND FEDERAL AUTOMATIC COUPLER ACTS.

Circuit Court of Jackson County.

THE DETROIT, TOLEDO & IRONTON RAILWAY COMPANY v. THE STATE OF OHIO. *

Decided, January, 1909.

Automatic Couplers—State Law Relating to, not Superseded by the Federal Act—Commerce Clause of the Constitution—Rights Retained by the States—Regulation of Commerce and of the Instruments of Commerce Distinguished—Unit of the State Act—98 O. L., 75.

1. The state law, requiring that all locomotives and cars used in moving intrastate traffic shall be equipped with automatic couplers, is not in conflict with the federal act making the same requirement as to locomotives and cars engaged in moving interstate traffic, but rather the state law is supplementary to the federal law and in harmony with it.
2. The car is made the unit by the statute, and each car must be complained of separately in seeking to enforce the penalty under the statute.

Alex. C. Smith and *John Robbins*, for plaintiff in error.

O. E. Harrison, of counsel to Attorney-General, and *E. E. Eubanks*, Prosecuting Attorney, for defendants in error.

The following authorities were cited on behalf of the State: 65 O. S., 70; 135 Fed., 122; 149 Fed., 107; 150 Fed., 229; 154 Fed., 897; 116 Fed., 873; 161 U. S., 677; 95 U. S., 155; 169 U. S., 311; 179 U. S., 287; 169 U. S., 613; 175 U. S., 211; 102 U. S., 541; 154 U. S., 204; 129 Fed., 522; 11 Mich., 43; 103 Mo., 550; 1 Black., 603; 5 Wheat., 1; 5 How., 410; 9 How., 560; 8 Grat., 933; 5 Leigh, 707; 10 Amer. Neg. Rep., 166; 133 Ind., 69; 177 U. S., 584; 141 U. S., 147; 173 U. S., 285; 135 U. S., 100; 140 U. S., 545.

WALTERS, J.; CHERRINGTON, J., and JONES, J., concur.

The State of Ohio brought this action in the court of common pleas of this county, against the railroad company, defendant below.

*Affirming *State* v. *D., T. & I. Railway*, 7 N. P.—N. S., 541.

It was alleged in the petition that defendant was a corporation organized under the laws of the state of Michigan; that its road extended from Detroit, in the state of Michigan, to Ironton, in the state of Ohio; that it was engaged in the business of carrying freight and passengers as a common carrier, and that on the 17th day of January, 1907, in violation of the statute of Ohio, it carried a car, No. 4661, doing state business and engaged in state traffic and belonging to said railroad company, which was not equipped with an automatic coupler, a device which when used renders it unnecessary for an employe, when desiring to couple or uncouple the cars, to go between the ends of the same to do so. The statutory penalty of one hundred dollars was demanded.

The railroad company in its answer, admitted its incorporation; that it was engaged in the business of a common carrier, and alleged that as such it owned locomotives, engines, cars, equipment and rolling stock, all of which, together with its employes, were commonly engaged in interstate traffic and business.

It further alleged that the Congress of the United States was empowered, under the commerce clause of the Constitution, to regulate interstate traffic, which included automatic couplers upon cars commonly used in interstate commerce, and that the Congress had exercised its power so given, and passed an act which was in operation at the date mentioned in the petition, and that the act of the General Assembly of Ohio passed before that time had thereby become superseded and was void. The second defense contained a further allegation that this particular car in question was in a train composed of ten other cars, which were all loaded with freight and were then being transported from points within the state of Michigan, to places outside of said state.

A demurrer for insufficiency was interposed to each of these defenses and sustained by the court. The exact point presented for decision is:

Whether the federal law regulates or controls a car operated by a railroad which is, commonly, and was engaged in interstate traffic, over a track commonly so used by employes commonly so engaged, in a train actually at the time so used and

engaged, but which particular car at the time happens to be loaded with intra-state traffic, as distinguished from interstate traffic, and whether said car is so regulated and controlled by the federal law as to thereby withdraw it from the operation of state legislation?

Article 2 of the articles of confederation provides:

"That every state retains its sovereignty and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled."

Article 10 of the amendments to the Constitution of the United States provides:

"The powers not delegated to the United States by the Consituation nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Article I of Section 8 of the Federal Constitution grants to the Congress, among other things, the power, "to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Under the power thus granted, the Congress passed an act entitled, "an act to promote the safety of employes and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with drive wheel brakes and for other purposes."

Section 2 is as follows:

"That on and after the 1st day of January, 1908, it shall be unlawful for any such common carrier to haul, or permit to be hauled, or used, on its line any car, used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The General Assembly of the State of Ohio, 1906 (98 O. L., 75), enacted a law upon the same subject. Section 2 of this act, which the state claims in this case was violated, is as follows:

"That it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any locomotive,

car tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars."

In so far as these two acts refer to cars, and require automatic couplers thereon, the language used in each is identical.

The word "such" in Section 2 of the Ohio law, refers to the kind of a common carrier described in Section 1 of that act, which is as follows:

"Any common carrier engaged in moving state traffic by railroad between points within this state."

Placing this definition of a kind of carrier meant by the word "such" in Section 2, it would read as follows:

"That is shall be unlawful for any common carrier engaged in moving state traffic by railroad between points within this state * * * to haul * * * any car * * * used in moving state traffic," etc.

The car must be "engaged in moving state traffic between points within this state."

The Supreme Court of the United States has held that there are three general classifications of legislative acts, federal and state, under the commerce clause of the Constitution, in one of which classes each enactment must fall. The three classes are:

First. Where the federal Congress has exclusive jurisdiction.

Second. Where the state has exclusive jurisdiction.

Third. Where the state has jurisdiction to act until the federal Congress passes an act upon the same subject.

The object to be attained by the Ohio law would indicate that it fell within the second class. The safety, life and health of the employes, passengers and citizens of the state, lie at the bottom of the regulation. These objects are clearly within the police power of the state, and unless such a law conflicts with a regulation of a federal law upon the same subject, over which the Congress has delegated power to act and has acted, the state law is valid.

The states have a right to enact a law forbidding the consolidation of parallel and competing lines engaged in interstate commerce. *L. & N. R. R. Co.* v. *Ky.*, 161 U. S., 677.

The state can regulate the speed of interstate trains within city limits; it can establish a rule of evidence ordaining the character of proof by which a carrier may show its liability to be limited. 169 U. S., 311. It can enforce track connections between two railroads. 179 U. S., 287.

In all the cases upon the subject there is an important distinction and difference between regulation of commerce among the states and a regulation of the instruments of commerce. The one is confided to the Congress, the other, the regulation of the instruments of such commerce, is within the jurisdiction of the states under their police power. All police regulations of interstate traffic interfere indirectly more or less with commerce between the states, in the fact that they impose a burden upon the instruments of such commerce, by adding something to the costs of transportation in the way of expense in conforming to such regulations.

In *L. & N. R. R.* v. *Kentucky*, 161 U. S., 702, Justice Brown says:

"It has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. * * * In the division of authority with respect to interstate railways, Congress reserves to itself the superior right to control this commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

The state of Ohio, having the right to legislate and regulate thereby for the safety and lives of its people under its police powers, and having done so, and employed language in the act that confines its operations to a "common carrier engaged in moving traffic, by railroad, between points within this state," it could not conflict with the federal law upon the same subject

and regulating the same instrumentality, when engaged in moving interstate traffic among the several states, because to the state is reserved the exclusive right to regulate its own internal commerce.

The Ohio law, instead of being in conflict with the federal law, as to cars, is rather a harmonious supplement thereto, compelling the roads to have the safety device on all cars engaged in moving traffic between points within this state, a subject without the jurisdiction of the Congress, and the Ohio and federal law, each acting and operating within its own proper and constitutional sphere, bring about the intended result by requiring such safety device to be placed on all cars by all roads, whether such cars are being engaged in moving interstate or intra-state traffic.

Otherwise, without the force and effect of the Ohio law, all cars loaded with freight moving from point to point within the state of Ohio would be absolutely immune from the operation of the federal law, and all such safety couplers could be omitted.

The national pure food and drug act has been supplemented by acts passed by the various states, containing similar provisions, applicable to the manufacture, sale and transportation of impure foods and drugs within the statutes, without which the national act would lose much of its value.

The claim is made that by reason of peculiar situation of this car No. 4661, being as the answer alleges nested in a train consisting of ten other cars, and all the other ten containing freight which was being transported from one state to a point in another; that the equipment consisting of a locomotive, cars, track and train crew, all then being engaged in interstate transportation and commerce, it must be held that this particular car partook of the same characteristics as the other ten cars.

The Ohio, as well as the federal act, designates a "car," and not a train of cars, as being subject to the penalty prescribed in the acts. The device is attached to each car, and each as such must be complained of separately in a petition asking for the penalty. The car is thus made the unit by the statute.

Each car shall be provided with the coupler and any road

hauling a car not so provided, is doing an unlawful act, prohibited and penalized.

The demurrer was properly sustained, and the judgment below is affirmed.

MOVABLE PARTITION NOT PART OF THE FREEHOLD.

Circuit Court of Hamilton County.

THE COMMERCIAL TRIBUNE BUILDING COMPANY v. RAPID ELECTROTYPE COMPANY.

Decided, January 25, 1908.

Landlord and Tenant—Partition of Room Held by Lease—Fixtures.

The movable partition involved in this case can not be regarded as a permanent addition to the freehold.

Mallon & Vordenberg, for appellant.
Johnson & Levy, for appellee.

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

The defendant, as lessee of the third floor of a building belonging to the plaintiff, constructed a partition across the same, for the purpose of subletting a part thereof, the upper part being of glass and the lower part being of wood fitting into the groove of a cleat which was nailed to the floor. At the edges and at the top it was wedged but not otherwise fastened to the walls or the ceiling, and could easily be removed without doing any substantial injury to the building.

Held: The nature of the article affixed, the relation of landlord and tenant, the structure and mode of annexation, and the purpose or use for subletting a portion of the floor space, show no intention to make the partition a permanent accession to the freehold. *Teaff* v. *Hewitt,* 1 O. S., 511; *Brown* v. *Wallis,* 115 Mass., 156.

Injunction dissolved and petition dismissed.

EVIDENCE ESTABLISHING GIFT BY WIFE TO HUSBAND.

Circuit Court of Hamilton County.

ELLA A. MILLER, EXECUTRIX, v. WM. C. MCLEAN, ADMINISTRATOR.*

Decided, January 9, 1909.

Husband and Wife—Separate Estate of Wife—Gifts Inter Vivos—Proof Necessary to Establish—Assent of Wife to Possession and Use of Her Property by Husband—Written Instrument not Necessary to Complete a Gift—Declarations of Deceased Persons—Presumption.

1. While the evidence of a gift *inter vivos* must, under the Ohio law, be clear and convincing, there is no rule requiring that it be direct and positive.
2. If there be any weakness in testimony as to declarations by a deceased wife of her assent to the use by her husband for his benefit of her property then in his possession, it lies in the source and not in the substance of the declarations.
3. Where a wife has full knowledge that her husband is using her property as his own, investing part of it in real estate, taking title in his own name, selling part and reinvesting the proceeds without in any way recognizing her as a creditor or beneficiary, her assent thereto during more than thirty years of harmonious and affectionate married life is clearly corroborative of declarations that a gift was intended.
4. Evidence that the husband had possession of a check and notes, transferrable by delivery and given in payment for property of his wife, does not sustain the burden of proof required in an action for money had and received, in the absence of testimony that he realized the cash or its equivalent by using the check and notes.

Healy, Ferris & McAvoy, for plaintiff in error.
Wm. C. McLean and *Edward Barton*, contra.

For the facts in this case see the opinion of the court below, 5 N. P.—N. S., 57.

* Reversing *McLean, Administrator*, v. *Miller, Executrix*, 5 N. P.—N. S., 57.

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

It is settled law in this state that a written assignment is unnecessary to complete a gift *inter vivos* of a note or other evidence of indebtedness (*Polly* v. *Hicks*, 58 O. S., 218). And while the evidence must be clear and convincing, there is no rule of law requiring it all to be direct and positive.

The admissions of Mrs. Mills, if made, are direct evidence of the facts stated, which considered together show her assent to a reduction into possession by her husband of the proceeds of sale of her real estate. The claim of counsel for defendant in error that the declarations of deceased persons are of little, if any, value, is not as a general rule sound. In the case of *Larimore* v. *Wills Admr.*, 29 O. S., 13, it was held to be reversible error to exclude declarations of the payee of a promissory note that she intended to give it to the defendant, Judge White saying at page 17:

"Where the subject of the alleged gift has been delivered, the intention with which the delivery was made becomes material, and this intention may be proved by the declarations of the alleged donor, whether made at the time of the delivery or not."

In the case under consideration the declarations relate not to an intention to thereafter make a gift, but to her assent to the use by her husband for his benefit of property then in his possession. If there be any weakness in the testimony, it lies in the source and not the substance of the declarations. The trial judge makes, in his written opinion, no complaint of the witnesses who testified to the declarations, but disagrees with us on their effect; and surely the fact that one of the witnesses was a nurse or servant in the household should not alone discredit her.

While it is true that no presumption of a gift arises from the possession by the husband of his wife's property, whether with or without her consent, yet such possession with her consent continued for a period of thirty years without demanding or receiving any account, although the marriage relation was always harmonious and affectionate, is clearly corroborative of the declaration that a gift was made. Mrs. Mills was not, of course,

bound to speak at the risk of making trouble in the family; but it was natural that she should and did speak in harmony with her conduct with reference to the property. When therefore, with full knowledge that her husband was using her property as his own, investing part of it in real estate and taking title in his own name, selling part, and reinvesting the proceeds, without in any way recognizing her as a creditor or beneficiary, she makes any declaration upon the subject, the most natural one would be that it was all done with her consent.

Her will executed before her marriage to Mr. Mills and before the purchase of the property in dispute, and which contains no specific bequest, except of her gold watch, is no more inconsistent with her admissions concerning property in the possession of her husband than her election to take under his will is inconsistent with her right to such property, and for the reason that neither refers, in terms, to that property.

Without her declarations the evidence is insufficient to show that her husband received for her use all the money in question. The stub of a bank check can rise no higher as evidence than the check itself, which is only to be regarded as payment, if cashed, unless accepted in absolute discharge of the debt. 2 Daniel on Neg. Inst., Section 1623.

The stub of June 6th, 1870, shows by a liberal construction only that a check for $6,875, payable to Fanny C. Mendenhall, or bearer, was delivered to Samuel Mills as "first payment, house and lot, Sixth street;" and no effort was made to prove that the check itself was cashed by him or any other person, although a check of the bank on which it was drawn was examined as a witness.

So also the check dated May 29th, 1872, for $5,135.58, and the corresponding stub show that it was payable to Fanny C. Mendenhall or bearer, and applied to the payment of "note to S. Mills;" but the note for the purchase money of the Sixth street property due on that day bears no evidence by indorsement or otherwise that S. Mills had anything to do with it; and on the day the last note was due, Mrs. Mills joins her husband in the execution of a receipt of satisfaction in full of the mortgage, and authorizes its cancellation of record.

It does not appear from the evidence when, if ever, in what manner, or to whom, the first payment of $2,500 for the George street property was made, except by the deed in which both husband and wife acknowledged receipt of the entire purchase money of $6,000.

The purchases of real estate by Samuel Mills in 1885 and 1886 were too remote to prove the receipt by him of money arising from transactions occurring twelve or fifteen years before; nor do they enlarge the declaration that he had money of his wife's to invest in a particular piece of property and for a particular purpose, so as to include all the money he invested during that period in other property.

Counsel insist, however, that the trial court was entitled to accept the declarations of Mrs. Mills to the extent of showing possession and to reject them as evidence of title; but he himself, in his original brief, cites cases to show the indefinite and uncertain sense in which the verb "to give" may be used in connection with personal property. Why then reject qualifying words which make the meaning definite and certain, and add others that restrict the sense to "delivery of possession" only.

In the case of *Liesemer* v. *Burg*, 63 N. W. Rep., 999, cited by counsel for defendant in error, the defense of payment is a distinct admission of the purpose for which the money was received, to-wit, for the use of plaintiff; hence it was properly held that he might avail himself of the admission and contradict other portions of the testimony.

The plaintiff's cause of action is money had and received for the use of his testator, and the burden of proof is not sustained by showing merely that Samuel Mills had possession of a check and notes given in payment of his wife's property, although transferable by delivery. It must be further shown that he realized the cash or its equivalent by using the check and notes.

In either view of the evidence, therefore, it is not sufficient to sustain the judgment, and the application for a rehearing will be denied.

PREJUDICIAL REMARKS BY COUNSEL TO JURY.

Circuit Court of Hamilton County.

DAYTON FOLDING BOX CO. v. DANIEL RUEHLMAN.

Decided, January 30, 1909.

Negligence—Master and Servant—Defective Machinery—Master's Liability After Ineffectual Efforts to Repair—Injury to Operative—Unprofessional Remarks to Jury—Duty of Trial Judge.

1. Where the evidence clearly shows that the machine at which the plaintiff was employed was not working properly, and that an effort was made to fix it, and the plaintiff was then told it was all right, a judgment in his favor for injuries thereafter received and due to a defect in the machine will not be set aside if supported by sufficient evidence.
2. Where counsel make statements of fact during the trial of a cause and within hearing of the jury, which are prejudicial and incompetent or not at issue, it is the duty of the judge to interpose and correct the wrong without waiting to be reminded of it by opposing counsel; and in default of so doing, or if the wrong be one that could not be nullified and therefore required that the jury be discharged and the cause continued, and it does not manifestly appear to the reviewing court that no prejudice in the minds of the jury resulted from the statements, the judgment must be reversed.

Galvin & Galvin, for plaintiff in error.
Victor Heintz, contra.

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

This case is in this court on error to a judgment rendered in the Superior Court of Cincinnati, wherein a judgment was recovered by Ruehlman in an action for personal injuries.

It is urged that the judgment is not sustained by sufficient evidence. We think it is sustained by sufficient evidence. The evidence clearly shows that the machine which produced the injury had not worked properly; that the defendant was informed of the fact by Ruehlman; that the defendant attempted to fix the machine, and informed plaintiff that it was all right—although the weight of the evidence is probably to the effect that the machine was not fixed at the exact time claimed by the

plaintiff. It might have been fixed a few days before but this is not material. From the evidence the jury had a right to believe and find that the injury was caused by the defective machine.

During the progress of the trial the following occurred:

"MR. GALVIN: If Dr. Van Meter is here, plaintiff can subpoena him and call him if he desires.

"MR. HEINTZ: But he is the physician of the defendant.

"MR. GALVIN: He is not the physician of the defendant, but is a regular practicing physician of this city and belongs to no one.

"MR. HEINTZ: Well, then, he is the physician of the insurance company which you represent and which is defending this suit.

"MR. GALVIN: I object to that statement from counsel for plaintiff, and I move the court that this case be now withdrawn from consideration by the jury, because of the misconduct of counsel and the improper remarks of counsel for the plaintiff in the statement made in the presence of the jury that there is an insurance company back of the defense of this action, and because said statement is outside of the record, foreign to the question we are trying and made for no other purpose than to prejudice the jury. I insist upon my motion that the case be withdrawn from the consideration of the jury and the cause continued."

This motion was overruled; to which counsel for defendant excepted.

It is the duty of a judge in the trial of a cause before him to see that the cause is tried in accordance with the established principles of the law. The cause is to be tried upon the issues made in the pleadings, and the evidence which is competent to support these issues, the arguments of counsel upon these issues, and the evidence and the charge of the court pertinent to the issues and the evidence. This duty is ever present with the judge during the trial, and where evidence is sought to be introduced which is not only incompetent but which is calculated to prejudice the jury, or when counsel make statements of fact which are not in issue, which are calculated to prejudice the minds of the jury, it is the duty of the judge to immediately interpose and correct the wrong without waiting to be reminded of it by counsel. There may be cases where the judge by proper ad-

monitions to the jury may nullify this wrong, but there are cases where this can not be done, and in these cases the only safe way is to discharge the jury and continue the case. 69 O. S., 438; 69 O. S., 55; 215 Penna., 219, 226; 95 N. Y. Sup., 861.

In this case the court did not interfere of its own motion and admonish the jury, but when counsel objected to remarks of counsel the objection was overruled, and the remarks therefore went to the jury with the court's approval.

The remarks made by counsel are clearly improper and manifestly calculated to prejudice the jury, and it does not manifestly appear from the evidence that what was said did not influence the jury in arriving at its verdict, and while we hold that the verdict is not manifestly against the evidence, we also hold that it does not clearly appear that the jury was not influenced in arriving at its verdict by this improper statement of counsel made in its presence.

Judgment reversed.

PROSECUTION FOR ASSAULT WITH INTENT TO MAIM.

Circuit Court of Ashtabula County.

JOHN O'BRIEN v. THE STATE OF OHIO.

Decided, September Term, 1908.

Criminal Law—Assault with Malicious Intent to Maim or Disfigure—Evidence Necessary to Convict—Maim and Mayhem—Intention Inferred from Circumstances—Section 6819.

Where an assault is committed by a blow upon the head with a blunt instrument, under circumstances evincing an intent to permanently disable the person assaulted in respect to the use of some member of the body necessary in defense of his person or to annoy his adversary, the party committing the assault may be convicted of an assault with intent to maim.

Boyd, Marvin & Lawyer, for plaintiff in error.
Clyde L. Taylor, Prosecuting Attorney, contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

Error to Ashtabula Common Pleas Court.

John O'Brien was convicted, under Section 6819 of the Revised Statutes, of the crime of assaulting George Ryle with a dangerous weapon with the malicious intent to maim and disfigure. The indictment contained three counts: the first of assault with intent to kill, and the second and third of assault with intent to maim and disfigure; the last two counts being substantially the same. The jury returned a verdict of not guilty on the first and third counts and guilty on the second count. He was sentenced by the court to the penitentiary and the case is now before us on error.

The circumstances as detailed in the evidence are briefly these:

A construction firm was putting up some structural steel work at Ashtabula Harbor, and the work was being done with non-union labor, which was objectionable to union men; and the union at Cleveland sent several men to the harbor to look after the interests of the union men, and to see if the non-union men could not be induced to quit working. These special agents of the union were assisted by a number of other men at the harbor so that there were quite a number of men, union and non-union, on each side.

As ordinarily in cases of this character the controversy became quite hot and much bad blood was aroused. About six o'clock in the morning, when the assault took place, Ryle was going to work and passed diagonally across the corner of two streets when four men came in the opposite direction; coming from behind a small building, and met Ryle about half way across the intersection of the streets. Each of the four, or at least some of them, had a piece of gas pipe about eighteen inches long and one inch in diameter, covered with heavy brown paper. They were closely huddled together, and one of them struck Ryle over the side of the head with his weapon, making a serious and dangerous wound, but not of sufficient force to fracture the skull. The blow felled Ryle to his knees when he pulled his revolver and shot one of his assailants dead; the other three immediately fleeing in different directions. There is no evidence of any threats being made by O'Brien, or by either of the other three.

Two questions of error are made before us, and are strenuously relied upon by counsel for plaintiff in error. First, that the evidence does not sufficiently show that O'Brien was one of the parties that committed the assault. Second, that the evidence wholly fails to show that the assault was made with the malicious intent to maim or disfigure. We have examined the evidence and we think the jury did right in finding that O'Brien was one of the parties that committed the assault. The judgment, therefore, can not be reversed upon that ground.

The second ground of error presents a question of much more difficulty, and that is, whether the malicious striking of a person upon the head with a blunt instrument, of the character and under the circumstances shown in the evidence, is sufficient to show a malicious intent to maim or disfigure. It must be conceded that whatever may be the holding in the different states—and the decisions are directly contrary—in our own state, in order to convict of an assault with the malicious intent to maim or disfigure, the act must be done with intent to permanently injure one of the members of the body specifically set forth in Section 6819 of the Revised Statutes, and to maim the assault must be made with the malicious intent to injure a member that may be used in the defense of the person, or to annoy an adversary.

State v. *Johnston*, 58th O. S., 417; the first section of the syllabus in that case is as follows:

"1. Maim and mayhem are, at common law, equivalent words, and mean the same thing; therefore, a count in an indictment charging the defendant with maliciously biting the ear of another with intent to maim, can not be supported as to the particular intent charged, as the biting of an ear does not in law constitute a maiming."

On page 423 in the opinion it is said:

"There is no question, we think, but that maim as a noun, and mayhem are equivalent words, or that maim is but a newer form of the word mayhem—the difference being in the orthography and not in the sense. Webster's Unabridged Dictionary: 'Maim,' as a noun, is there defined the same as mayhem: 'The privation of the use of a limb or member of the body by

which one is rendered unable to defend himself or to annoy his adversary.' This is the definition of mayhem at common law (1 East, P. C., 393; 1 Whar. Criminal Law, Section 581). Hence the verb 'to maim' is accurately defined in Anderson's Law Dictionary, as follows: 'To commit mayhem.' "

Again, on page 425, it is said:

"If the member be not one of use to the person in defending himself, an injury to it can not be said to have been done with intent to maim."

In this case it is not claimed by the State that there was any intent to disfigure on the part of O'Brien; neither could there be, as there is nothing tending to show such intent by the injury or by any circumstance in the case.

The question then arises, is the evidence sufficient to show, under the law as laid down in *State* v. *Johnson*, *supra*, an intent to maim; that is, such privation of the use of a limb or other member of the body by which one would be rendered less able to defend himself or to annoy his adversary. The injury in this case produced no such effect, so that no implication of fact or law arises that the accused intended that which his act in fact produced, and a specific intent must therefore be shown from the manner of inflicting the blow, the part of the body struck and the circumstances under which the injury was inflicted.

Intent is a mental state, and therefore very difficult of proof. The only manner in which it can be proven is by the circumstances of each particular case, and if the circumstances are of such character as to satisfy the triers of the facts beyond a reasonable doubt, not only that the act was done by the defendant, but that it was done with the felonious intent charged in the indictment, that is sufficient.

The rule is well stated by Elliott on Evidence, Section 2841:

"[*Intent—Inferred from Circumstances.*] While it is incumbent upon the state to prove the intent, yet the law, recognizing the difficulty of proving mental states, does not require proof of such intent by direct evidence, but it may be established by proof of such facts and circumstances from which the intent may naturally or reasonably be inferred. One court very

aptly stated the rule thus: 'But it is generally true that the State is not expected and can not be required to make proof of felonious intent, as a fact, by direct and positive evidence; for as a general rule, men who do or commit acts do not proclaim in public places the intent with which such acts are done. If the State were required to make direct and positive proof of the felonious intent which characterizes the act done as a public offense, the result would be that many persons, charged and guilty of public crimes, would go acquit unwhipt of justice.' Therefore all that the State is required to do in such cases is to introduce such evidence on the trial of the cause as will satisfy the triers of the facts, whether court or jury, beyond a reasonable doubt, not only that the act was done by the defendant, but that it was done with the felonious intent charged in the indictment."

The jurors and the trial judge were so satisfied in this case. Were they in error in being so satisfied? We think not. Here was a contention between two conflicting parties of large numbers. The question between the factions was which should do the work of construction, union labor or non-union labor. There could be no reasonable object in killing Ryle; it would not accomplish their purpose, and at the same time upon apprehension be attended with severe penalty.

The main object, no doubt, was to disable Ryle and not kill him. This is shown by the weapon used and the manner of its use. It was wrapped with heavy paper so as to blunt the force of the blow. Why use an eighteen-inch piece of gas pipe so protected, if the main intent was to kill? Why not have used a revolver or other gun at a safe distance, at some secluded point; why go four together attracting attention leading necessarily to detection, apprehension and conviction? But it is said, they did not maim Ryle. True, but what would have happened had he not shot one of the number down? They were there to disable him; teach him a lesson, and had it not been for his revolver, no doubt numbers of blows would have fallen upon his arms, limbs and other members of his body. Who can say, under such circumstances, the assault was not made for the purpose of maiming?

The case of *Ridenour* v. *The State*, 38 O. S., 272, is a case quite similar to the one we are considering. Ridenour was convicted

of shooting with intent to maim. He shot Montgomery in the trunk of the body near the navel; a nerve was destroyed by the bullet in its course and paralyzed his right leg. In the second paragraph of the syllabus it is held:

"2. Where one shot another in the trunk of the body, and the result was to produce paralysis of a leg, causing a permanent disabling of that member, a verdict of guilty with intent to maim is supported by sufficient evidence. The accused might fairly be presumed to have intended the actual and natural result of his unlawful act."

True, in that case an actual maiming took place and raised a presumption against Ridenour, but we think not stronger than the presumption raised by the circumstances in this case.

On page 274 in the opinion it is said:

"It further appeared, however, that a nerve was destroyed by the bullet in its course, and that although the patient has recovered, his right leg is disabled by paralysis, from which it is said he will never, in all probability, recover. From this it seems that the result of the shooting was actually to maim. Can it be said that the verdict finding that the accused intended the result of his criminal act was not warranted? We think not. The law presumes all persons to contemplate the natural and probable results of their actions; and we can not say that the natural and probable result of such an injury as this is not to cause the loss of the use of some important member of the body."

Mark the closing sentence:

"The law presumes all persons to contemplate the natural and probable results of their actions; and we can not say that the natural and probable result of such an injury as this is not to cause the loss of the use of some important member of the body."

So a blow upon the head made under the circumstances shown in this case may be presumed to have been made with intent to cause the loss of the use of some important member of the body. Indeed, it is well settled by medical authority that a violent blow upon the head not fracturing the skull frequently does cause the paralysis of an arm or leg. American Text Book of Surgery; Principles and Practice of Surgery, by De Costa.

The judgment of the court of common pleas is affirmed.

DAMAGES TO PROPERTY FROM A SEWER.

Circuit Court of Hamilton County.

CITY OF CINCINNATI v. PHILIP ROETTINGER.

Decided, January 9, 1909.

Municipal Corporations—Sewers—Damages to Property from—Ownership of Sewer—Notice of Defect—Errors at Trial Immaterial, When.

Where a cause of action is stated against a municipality, and the uncontradicted evidence shows liability for whatever damages resulted, and also that the plaintiff suffered greater damages than were allowed him by the jury, errors of law in the charge to the jury or in the admission or rejection of evidence become immaterial.

Geoffrey Goldsmith, for the city.

Ellis G. Kinkead and *H. Kenneth Rogers,* contra.

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

Defendant in error brought an action against the plaintiff in error for damages to his real estate caused by sewage matter escaping from a sewer in Gilbert avenue and flowing under the foundations of his houses abutting on that street. The petition states a good cause of action. The answer of the city was in effect a general denial.

The plaintiff introduced his evidence, which substantially sustained the allegations of his petition. The damage to the property was shown to be at least $1,500; one witness placed it at $2,000. It was further proved that repairs were made to the buildings caused by sewage matter to the extent of $951. The city offered no evidence. The jury returned a verdict for the plaintiff in the sum of $1,179, including interest to May 4, 1908. The petition was filed April 20, 1904, claiming interest from January 1, 1903, so that the verdict carried with it at the least over four year's interest, and the amount of damage allowed by the jury was not over $900.

The jury made special findings of fact as follows:

"Did the city have reasonable notice of the defect, if any, in the sewer pipe before the injuries or any of them complained of. Answer. Yes."

"Did the city have reasonable notice of the defect, if any, in the culvert before the injuries complained of, or any of them. Answer. Yes."

"Did the city after notice, if any was given, remedy the defect, if any, in the sewer in a reasonable time. Answer. No."

"Did the city after notice, if any was given, remedy the defect, if any, in the culvert in a reasonable time. Answer. No."

"Was the break, if any, in the sewer pipe, the proximate cause of the damage. Answer. Yes."

"Was the break, if any, in the culvert, the proximate cause of the damage. Answer. Yes."

It is urged in argument that the evidence does not show that the city was the owner of the sewer in question, but this contention comes too late. The city in its answer did not set up any defense of that kind. The evidence shows that the sewer was in the public street of the city, and when complaint was made to the city that sewage was leaking from the sewer into plaintiff's property, the city did not disclaim ownership of the sewer, but finally after repeated notices of the defect, repaired the sewer. There really can be no question but that the sewer was the property of the city.

Quite a number of errors alleged to have been committed by the court in the trial of the case were presented to the court on behalf of the city with great learning and ability, but with the view we take of the record these do not seem prejudicial, if erroneous, and need not therefore be considered in detail.

The plaintiff having stated a cause of action and the uncontradicted evidence showing that the city was liable for whatever damages resulted, and the uncontradicted evidence showing that he sustained more damage than the jury allowed, any errors of law if committed by the court in its charge or in the admission or rejection of evidence must be immaterial and of no prejudice to the city.

Judgment affirmed.

JUDGMENTS AGAINST MUNICIPALITIES FOR PROPERTY TAKEN.

Circuit Court of Hamilton County.

STATE, EX REL EDWARD M. BALLARD, SOLICITOR, v. CHARLES L. HARRISON ET AL, SINKING FUND TRUSTEES.

Decided, July 18, 1908.

Municipal Corporations—Sinking Fund Trustees—Mandamus—Recovery of Damages for Property Taken—The Proceeding in the Nature of Condemnation.

Mandamus will not lie to compel sinking fund trustees to pay a judgment against a municipality for land taken, the value whereof was fixed by the court in a proceeding filed by the property owner subsequent to the taking of possession by the municipality.

Edward M. Ballard and *Fyffe Chambers*, for relator.
Thornton M. Hinkle and *Alfred G. Allen*, for defendants.

This was an application for mandamus to compel the sinking fund trustees to pay a judgment against the city. The relator alleged that the city had taken possession of lands of Oliver without having appropriated the same by law or made compensation therefor; that Oliver brought suit against the city for two thousand dollars as damages for the trespass committed; that the city answered admitting that it took possession of the land as alleged, is willing to pay the value thereof upon receipt of a deed therefor, and asking the court to fix the value. The court entered a decree finding the value and ordering it to be paid to the plaintiff, Oliver, upon delivery of a deed to the city. The solicitor thereupon certified the judgment to the sinking fund trustees. They declined to pay it on the ground that they were not authorized to levy taxes to provide for judgments against the city "in condemnation of property cases," nor to pay such judgments.

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

The judgment entered against the city in favor of Oliver et al

was not in the nature of damages, but in its nature was one for condemnation. The sinking fund trustees are not permitted to pay judgments in condemnation. The writ should be refused.

COMPENSATION—EVIDENCE—BILL OF EXCEPTIONS.

Circuit Court of Hamilton County.

RAPHAEL M. PEDRETTI v. CHARLES A. PEDRETTI ET AL.

Decided, December 28, 1907.

Error does not lie to the overruling of a motion for the allowance of compensation for services rendered, where the motion was heard on evidence and no bill of exceptions is offered containing the evidence.

Galvin & Bauer, for plaintiff in error.
H. R. Probasco, contra.

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

This is an action in this court to reverse the judgment of the court of common pleas, wherein that court refused to grant the motion of Galvin & Bauer, attorneys in the case for Raphael Pedretti, for compensation for services rendered the plaintiff and receiver and referee. The judgment entry recites that this motion was heard on testimony and was argued by counsel and the court being fully advised overrules said motion. The plaintiff excepted to the overruling of the motion, but no bill of exceptions was taken containing the evidence. Therefore this court can not say whether the court decided the question correctly or not. A consideration of the evidence alone could show this. In the absence of this evidence, we must assume that the court decided the matter correctly. The judgment is therefore affirmed.

BLINDNESS RESULTING FROM USE OF WOOD ALCOHOL IN VARNISH.

Circuit Court of Hamilton County.

THE HERANCOURT BREWING CO. v. JOSEPH FRANK. *

Decided, January 30, 1909.

Negligence—Master and Servant—Fumes of Wood Alcohol Cause a Brewery Employe to Lose his Eyesight—Safe Place to Work—Assumed Risk—Pleading—Charge of Court—Bill of Exceptions—Weight of Evidence—Expert Witnesses.

1. Under the rule that a master can be held liable only for acts negligently done or omitted and so alleged, it is necessary to aver that the appliance used was negligently selected, or that there was a failure to warn the servant of the danger connected with its use.
2. A charge which authorizes the jury to return a verdict for the plaintiff, in the event they find that certain facts are true, is erroneous when the essential fact constituting the negligence is omitted.
3. The fact that a witness is a dealer in brewers' supplies and technical machinery does not qualify him to testify as an expert as to whether or not Columbian spirits are poisonous, if applied as a compound of shellac in an enclosed area.
4. Questions requiring an argumentative answer, or which appeal to the prejudice of the jury by introducing irrevelant facts, are not only erroneous, but should draw from the court a caution against any further attempt to influence the jury in that manner.
5. Where exhibits are found to be missing from a bill of exceptions at the time it is offered for signature, the time for signing should be extended under the statute, rather than go to the upper court with an incomplete bill, or attempt to make it complete by subsequently attaching the exhibits without the consent or knowledge of the trial judge.

Robertson & Buchwalter and *Roettinger & Gorman*, for plaintiff in error.

Stricker & Johnson, contra.

* For the facts in this case and opinions previously rendered, see 5 N. P. —N. S., 281; 5 O. L. R., 559, and 5 O. L. R., 577.

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

The negligence of the defendant brewing company is charged in the second amended petition as follows:

"That defendant negligently, carelessly and in total disregard of its duty to plaintiff, failed and omitted to supply or offer to supply the plaintiff with such mask or head-protector or any other appliance or means to avoid the harmful and dangerous consequences connected with the use of said varnish and that had the plaintiff been supplied with such mask, helmet or head-protector, he would have escaped all the injuries herein complained of."

Also as follows:

"That he is permanently and incurably blind, all of which was directly caused by, and is due to, the use of said varnish or shellac as aforesaid."

The other allegations show what duty devolved upon the defendant, and lay the foundation for the specific charge of negligence. There is no allegation that the varnish used was negligently selected from among others in the market, and so far as the pleading discloses was the only material suitable for coating the inside of beer casks; nor is there any averment that the defendant negligently failed to warn plaintiff of the danger. The defendant can be held liable only for acts negligently done or omitted and so charged. *Railroad Co.* v. *Kistler,* 66 O. S., 326; *Railroad Co.* v. *Lockwood,* 72 O. S., 586.

The duty of a master to provide a "safe place" in which to work is not involved under the pleadings or the evidence; and the claim of counsel may be aptly answered in the language of the Supreme Court in the case of *Coal & Mining Co.* v. *Adm'r of Clay,* 51 O. S., 542, at 558:

"Here the place was not furnished as in any sense a permanent place of work, but was a place in which surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employes within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform."

The first special instruction to the jury given at the request of plaintiff is in substance, if you find from the evidence that plaintiff had no knowledge of the danger, that the defendant knew or ought to have known the dangers, yet failed to warn the plaintiff thereof, and in consequence thereof plaintiff sustained the injuries complained of, your verdict must be for plaintiff.

These facts were all necessary to be found by the jury as leading up to the essential fact constituting the negligence charged, to-wit, the failure to supply the plaintiff with a mask or other means to avoid the danger of using the varnish, but did not alone amount to negligence as charged. It was error to give this charge; but it will no doubt be claimed that it was not prejudicial, because the jury found in answer to an interrogatory that the failure to provide masks and properly ventilate the casks caused plaintiff's blindness. They do not, however, find that such failure was due to negligence of the defendant. Another interrogatory requiring a statement of the *negligent* acts of the defendant causing plaintiff's blindness was submitted to the court, but refused. Why, does not appear. We think it was a proper question to be submitted to the jury; but the error seems not to be urged in the petition in error either specifically or generally.

Special instruction No. 5 given at the request of the plaintiff is not accurate in stating the duty of defendant, to-wit, "the defendant knew or in the exercise of ordinary care *ought* to have known of such dangers."

What a master ought to know is the measure of his duty in the premises, but that duty is ascertained by what he *would* know by the exercise of ordinary care.

The witness, J. A. J. Mager, was neither a chemist nor a physician, and had no experience in varnishing beer-casks, but was in the business of brewers' supplies and technical machinery. It seems to us therefore that he was not qualified as an expert to answer such questions as the following:

"State, if you know, whether or not Columbian spirits is poisonous, if used or applied as a compound to shellac in an enclosed area such as a brewer's beer vat?"

Besides it was a precise issue of fact to be determined by the jury from the evidence. *Fowler* v. *Delaplain*, 79 O. S., —.

William Forn, a brewmaster, was asked by counsel for plaintiff in his examination in chief the following question:

"What would you say as to the necessity of heating the casks until they are so hot on the inside you can feel the heat on the outside with your bare hand? Is it necessary the casks be heated to such a degree before the operator applies the varnish? There being, if you please, no ventilation in the cask save a manhole at the bottom one to two feet in diameter and a bung-hole at the top two inches in diameter, and the varnisher not being supplied with a mask but a moistened sponge worn around the mouth and nose?"

It is hardly necessary to ask what relation the bung-hole, the man-hole, the absence of a mask, and the presence of a sponge over the mouth and nose of the varnisher have to the necessity of heating the cask; but it *is* pertinent to inquire why encumber the record with such questions until the bill of exceptions reaches the enormous bulk of ten hundred and thirty-six type-written pages, and why appeal to the passion and prejudice of the jury by an irrelevant question put to a witness? The court should not only have sustained the objection to the question, but cautioned counsel against any further attempt to influence the jury in that manner.

The same witness was asked the following:

"Why do you use pure grain shellac varnish and not Columbian spirits varnish?"

His motive or reason for doing the act was not in issue, nor relevant to any fact in issue, and the question called for an argumentative answer, which was given as follows:

"Because I know the dangers of wood alcohol and Columbian spirits; regardless of the fact that we can make a cheaper varnish, we do not employ Columbian spirits or wood alcohol."

We have not weighed the evidence to ascertain whether the verdict is sustained by sufficient evidence, because the trial judge has certified that the bill of exceptions does not contain

all the evidence, in that two exhibits are wanting. At the time the bill was signed it was discovered that these exhibits were not attached and the judge so certifies. They were soon after found in the custody of the clerk of the court, and attached to the bill without the consent of the judge and after the time for signing the bill had expired. While it is not the duty of the trial judge to prepare a bill of exceptions, yet under the circumstances the better course would have been to extend the time under the statute for allowing and signing the bill, so that counsel, who were without blame, could search for the missing exhibits. With the record incomplete, and a want of power to weigh the evidence, we are constrained to hold that the errors in giving special instruction No. 1, and in admitting incompetent and irrevelant testimony were prejudicial, for which the judgment is reversed and the cause remanded for a new trial.

IMMUNITY FROM STATUTE OF LIMITATIONS NOT TRANSFERABLE.

Circuit Court of Hamilton County.

CHARLES H. WILTSIE v. JOHN B. MCCLYMON ET AL.

Decided, February 6, 1909.

Taxation—Lien for Money Paid at Delinquent Tax Sale—Subject to Statute of Limitations—Defenses—Section 2880.

1. The plea of the statute of limitations is a good defense against an action to subject lands to satisfaction of a lien for money paid for said lands at a tax sale which proved invalid.
2. The six year statute of limitations applies in such a case.

Wm. F. Chambers, for plaintiff.

John J. Acomb and *Harmon, Colston, Goldsmith & Hoadly,* contra.

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

This is an action to subject lands to the payment of certain sums of money paid to the state on the sale of said lands at delinquent tax sale.

The petition alleges that plaintiff bought the land at delinquent tax sale in February, 1898; that said sale was invalid by reason of certain irregularities; that he paid the taxes of December, 1898, and the June tax of 1899; and he asks judgment for the amounts paid at the respective dates with interest, and asks for a foreclosure of his lien on the land.

Defendants filed an answer setting up a general denial and also a plea of the statute of limitations pleading the bar of six years. This action was brought January 21, 1907.

We are of the opinion that the plea of the statute of limitations is a good defense to this action.

It is conceded that the statute of limitations does not run against the state for taxes, and it is insisted that this exemption is transferred to the purchaser at tax sales by virtue of Section 2880, Revised Statutes, wherein it is provided that if the tax sale is proven to be invalid, the purchaser shall be entitled to receive from the properties the amount of the taxes and the land shall be bound for the payment of the same.

The right of the purchaser to maintain this action and have a lien on the land is conferred by the statute, and is not inherent in him, and in transferring this right to the purchaser the state does not confer with it the right of the sovereign not to be bound by any statute of limitations, and whatever right the purchaser gets is governed by the statute of limitations.

The provision of the statute applicable to this case is the six year limitation. This action was not brought until after six years had elapsed after the cause of action accrued.

The two propositions in the syllabus in the case of *Hartman* v. *Hunter*, 56 O. S., 157, are decisions of the two propositions involved in the determination of the questions here raised.

Petition dismissed.

APPROPRIATION OF ABANDONED CEMETERY.

Circuit Court of Montgomery County.

PANSING v. VILLAGE OF MIAMISBURG.*

Decided, July 6, 1907.

Eminent Domain—Appropriation of Abandoned Cemetery by Village—Rights of Persons Who have made Interments upon Payment of a Fee—Harmonious Purposes of the Appropriation—Method of Procedure—Certificate of Clerk—Necessity for the Appropriation—Designation of Parties Defendant.

1. A cemetery wherein interments were made upon payment of a fee without the granting of any title to the ground, and in which no interments have been made for forty years, may be appropriated by a village for use for parks and public buildings.
2. The Burns law, requiring that before any expenditure is authorized the clerk or auditor shall certify that funds sufficient to meet the proposed expenditure is in the treasury and unappropriated, can not be made to apply to an appropriation proceeding in advance of any knowledge as to what the property will cost.
3. In such a proceeding it is not necessary to declare the interest to be acquired, and in the absence of a declaration a fee simple will be presumed; nor can the necessity of the appropriation be questioned, except for collusion or fraud.
4. Where the property is owned by a religious society the trustees of the society should be individually named as such in the caption of the application to assess compensation.

Gottschall & Turner and Mahlon Gebhart argued for the plaintiff in error, Pansing, that the probate court had no jurisdiction to determine the questions raised, and cited Revised Statutes, Sections 1536-108 and 1536-111; P., C., C. & St. L. Ry. Co. v. Greenville, 69 O. S., 487, and Grant v. Hyde Park, 67 O. S., 166.

That the relatives and even friends of deceased persons buried in the cemetery are the real parties in interest, and have a standing in a court of equity to restrain the village from entering on

* Affirmed by the Supreme Court without report, 79 Ohio State, ——.

the land: Davidson v. Reed, 111 Ill., 167; Boyce v. Kalbaugh, 47 Md., 334; Sabin v. Harkness, 4 N. H., 415; Wormley v. Wormley, 207 Ill., 411.

That if the statute is not strictly followed the probate court acquires no jurisdiction and its proceedings are void: Harbeck v. Toledo, 11 O. S., 219; Harbeck v. Connelly, 11 O. S., 227; Platt v. Penn. Co., 43 O. S., 228; Giesy v. Ry. Co., 4 O. S., 308.

That no certificate was filed by the clerk as required by Section 1536-205: Rhoades v. Toledo, 6 C. C., 9; Ryan v. Hoffman, 26 O. S., 109.

That the resolution, ordinance and application do not state the purpose of the appropriation: Grant v. Hyde Park, 67 O. S., 166; Section 1536-103 and 105; Taylor v. Taylor, 55 O. S., 61; Railway v. Bohm, 34 O. S., 114; Randolph on Eminent Domain, Section 56, bot. p. 53; Lewis on Eminent Domain, Section 308.

That the resolution, ordinance and application do not state the estate or interest sought to be appropriated: 98 O. L., 164; Giesy v. Railway, 4 O. S., 308; Dodson v. Cincinnati, 34 O. S., 276; Railway v. Bohm, 34 O. S., 114.

That council made no finding or declaration that the appropriation of this real estate was necessary for the public use: 4 O. S., 308, *supra*; 34 O. S., 276; State v. Curtis, 86 Wis., 140.

That the property was devoted to public uses and can not be condemned; as to what constitutes a public cemetery: Lay v. State, 12 Ind. App., 362; as to dedication, which arises out of the conduct of the owner and the acts of those who rely thereon by permitting others to bury there: Davidson v. Reed, 111 Ill., 167; Hunter v. Trustees Sandy Hill, 6 Hill (N. Y.), 407-13; Boyce v. Kalbaugh, 47 Md., 334; Beatty v. Kurtz et al, 2 Peters (U. S.), 566; Wormley v. Wormley, 207 Ill., 411; Rosewood Cemetery v. Bandy, 93 Ind., 246; Kitchen v. Wilkinson, 26 Pa. Super. Ct., 75; 6 Cyc., 714; 13 Cyc., 446.

As to abandonment, mere disuse, especially where it results from the filling up of a cemetery, never constitutes abandonment: Commonwealth v. Wellington, 7 Allen (Mass.), 299. See, also, Stockton v. Newark, 42 N. J. Eq., 531; Kansas City v. Sacarrit, 169 Mo., 471; Dangerfield v. Williams, 26 App. D. C., 508; 6 Cyc., 715.

That a public cemetery can not be condemned in Ohio: Iron Co. v. City of Ironton, 19 O. S., 299; Hatch v. C. & I. Ry., 18 O. S., 119; Little Miami v. Dayton, 23 O. S., 510-518; Hickok v. Hine, 23 O. S., 523; R. R. v. Belle Center, 48 O. S., 273; St. Ry. Co. v. St. Ry. Co., 50 O. S., 603-616.

As to the law in other states: Evergreen Cemetery v. New Haven, 43 Conn., 234; Memphis State Line Ry. Co. v. Forest Hill Cemetery Co., 116 Tenn., 400; Lewis on Eminent Domain, second edition, 654; 6 Peters, 438; Hunter v. Trustees Sandy Hill, 407; 2 Peters, 566; 116 Tenn., 422.

J. C. Myers, Village Solicitor, and Rowe, Shuey, Matthews & James, cited for the defendant in error: Sloan v. Railway, 7 C. C., 84; Spangler v. Cleveland, 43 O. S., 526; Kellog v. Ely, 15 Ohio, 64; Railway v. Fostoria, 7 C. C., 293; Colby v. Toledo, 22 C. C., 736; Railway v. Belle Center, 48 O. S., 290; Richards v. Skiff, 8 O. S., 586; T. & O. C. Ry. v. Beard, 20 C. C., 681; Heckman v. Adams, 50 O. S., 305; Moore v. Moore, 46 O. S., 89; Toledo v. Preston, 50 O. S., 36; Thoms v. Greenwood, 7 Am. L. Rec., 320; Hallock v. Columbus, 1 N. P.—N. S., 205; Swing v. Rose, 75 O. S., 355; Fire Ins. Co. v. Furniture Co., 108 Mich., 176; Stove Co. v. Mehling, 21 C. C., 60; Reynolds v. Stansbury, 20 O. S., 345; Sheldon v. Newton, 3 O. S., 494; Ex parte Bushnell, 8 O. S., 599; Railway v. Traction Co., 1 N. P.—N. S., 296; Railway v. Ironton, 19 O. S., 299; Krumberg v. Cincinnati, 29 O. S., 69; Caldwell v. Carthage, 49 O. S., 334; Strauss v. Cincinnati, 24 W. L. B., 422; R. R. v. O'Meara, 2 W. L. B., 142; Coster v. Water Co., 18 N. J. Eq., 54; Water Co. v. Burkhardt, 41 Ind., 364; People v. Smith, 21 N. Y., 595; Sample v. Carroll, 132 Ind., 496; R. R. Co. v. Kipp, 46 N. Y., 546; Ward v. Turnpike Co., 6 O. S., 15; Commonwealth v. Connellsville, 201 Pa., 154; Laird v. Pittsburg, 54 Atlantic, 324; Wellsville v. O'Conner, 1 C. C.—N. S., 253; Ryan v. Orbison, 7 O. C. C., 30; Put-in-Bay v. Well, 18 C. C., 780; Klopfer v. Sunderland, 1 Iddings, 143; Grant v. Hyde Park, 67 O. S., 166; Section 1536-111, Revised Statutes; Ellis' Forms, Ellis' Code, 88 and 89; Order of Procedure, Ellis' Code, 87; C., H. & D. R. R. v. sundry persons, 7 W. L. J., 265; Mills on Eminent Domain, Section 20; In re

Application to Acquire St. John's Cemetery, 133 N. Y., 329; In re Deansville Cemetery Assn., 66 N. Y., 569; Randolph on Eminent Domain, Section 97; Richards v. Sutherland, 32 Barb., 42; Babb v. Cincinnati, 36 W. L. B., 206; Matter of Street Opening, 133 N. Y., 336; R. R. Co. v. Ironton, 19 O. S., 299; C., H. & D. v. Spring Grove, 1 Ohio Dec. (Reprint), 316 (7 W. L. J., 251); State v. Jersey City, 58 N. J. L., 262; In re Railway Co., 99 N. Y., 12; Ry. Co. v. Mining Co., 161 Mo., 288; C., H. & D. v. Spring Grove, 1 Ohio Dec. (Reprint), 316 (7 W. L. J., page 251); Sections 1464 to 1475-1; Sections 1536-478 to 1536-518; Sections 3571 to 3586-5; Mannix v. Purcell, 46 O. S., 102; tery Association, 66 N. Y., 569; Mannix v. Purcell, 46 O. S., 102; Elliott on Evidence, Sections 1335 and 1336; Sections 420 to 433; Potter v. Norwood, 21 C. C., 461.

An old cemetery containing about .39 of an acre lies near the center of the town of Miamisburg. The title to the land is in the German Reformed and Lutheran churches. Prior to about 1860 it was used as a public burying ground, although the church controlled it, and might charge a fee for burying unless they saw fit to remit such charge. There have been practically no burials in it for possibly forty years.

The village council decided to appropriate this land for the purpose of erecting public buildings. Being more ground than would be required for the buildings proper, the appropriation resolution and subsequent proceedings used the following language, "for parks and public building purposes," etc., it being intended that the ground around the buildings should be kept as incidental to the buildings, although not to be built upon. Plaintiff claimed that this language made the proceedings involve more than one subject, and therefore illegal under the statute. The resolution did not specify the estate to be taken and the plaintiff urged this as an error, but defendant claimed that under the present statute, which provides that an estate in fee shall be taken unless some other estate is asked, the village was entitled to the fee.

No certificate of the clerk of the corporation was filed showing the money in the treasury for the appropriation. Plaintiff in-

sisted that this also was an error. Plaintiff also claimed that the village had no right to appropriate the land, because it was already used for public purposes and was in fact public property.

The circuit court found all of plaintiff's objections not well founded, and that the village had the right to appropriate the land. This judgment of the circuit court was affirmed by the Supreme Court.

DUSTIN, J.; WILSON, J., and SULLIVAN, J., concur.

We think the Village of Miamisburg has the power to appropriate the cemetery in question for public purposes. It has not been in "use" for forty years. The right of eminent domain is sovereign, and all private and corporate realty is subject to it, except that where the right has already been exercised, and the property continues in the use for which it was conveyed or appropriated, it can not again be taken for a different or inconsistent purpose. *Cemetery of Spring Grove* v. *Cin. Ry.*, 7 W. L. J., 251.

In this case it appearing that interments were made on payment of a fee, no title to the ground being granted to individuals, the only rights acquired by the survivors were to have the bodies of their dead remain long enough for thorough decomposition, and removed to another burying ground, when the property should be used for secular purposes. *Windt* v. *German Reformed Church*, 4 Sand. Chan. Rep., 502.

It did not render the ordinance invalid to state several harmonious purposes for which the property was to be used. Indeed it was the only practicable way. Should several ordinances be passed and several actions brought to condemn different parts of the same tract? That would complicate the situation, require an unnecessary multiplicity of suits and largely increased costs for no good reason.

The necessity for the appropriation can not be questioned except for fraud and collusion.

The Burns law does not apply and could not be made to apply in advance of any knowledge as to what the premises would cost.

Nor was it necessary to declare the estate or interest to be acquired; for a fee simple is presumed unless a lesser estate is mentioned.

But we think the trustees of the churches should have been individually named as such. To generally designate parties to a suit as "trustees" of a church without giving their names leaves the identification of the parties wholly to the determination of the officer serving the process; and there is no means of testing the correctness of the service by comparison with the petition.

Opportunity will be afforded, however, to correct the condemnation proceedings in that respect, so as to bring the proper parties into court.

The case therefore will be continued for that purpose.

RECOVERY FOR WRONGFUL DEATH OF A MARKET WOMAN.

Circuit Court of Hamilton County.

CINCINNATI TRACTION CO. v. FRED KETTLER, ADMINISTRATOR OF LOUISA RECHMANN.

Decided, December 19, 1908.

Bill of Exceptions—Failure to Attach Letters of Administration—Negligence Where Electric Car Struck Market Wagon—Improper Manner of Introducing Evidence—Damages for Wrongful Death.

1. Failure to attach letters of administration to a bill of exceptions does not render the bill incomplete, where the administrator testified as to his appointment and to his acting as administrator, and no objection was taken thereto.
2. Statements by counsel without objection, as to facts contained in a pamphlet not offered in evidence, is not the proper way to introduce evidence, but in this case was not prejudicial.
3. For the wrongful death of a widow fifty-seven years of age, engaged in market gardening, whose income with the aid of two sons and one daughter amounted to only $500 a year, a judgment of $2,000 is liberal compensation to the children for their loss.

Joseph Wilby, for plaintiff in error.

Hoffman, Bode & LeBlond, contra.

A Colerain avenue car, descending a grade in Cincinnati came up behind a truck wagon which was being driven by the decedent. The wagon was shoved along for 100 feet or more, when the intestate was thrown off and killed. Her administrator recovered a judgment below for $3,000.

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

We think the bill of exceptions contains all the evidence offered by the parties on the trial of the case. It is true that the letters of administration were offered in evidence and are not attached, but the witness testified that he was appointed administrator by the probate court and was there acting as such, and no exception was taken to the competency of this evidence, and it is further shown that the letters introduced added nothing to what had been shown, and that in fact the letters of administration showed the appointment of Kettler by the probate court.

As to the omission to attach the almanac to the bill, it does not appear to have been introduced, but without objection counsel was permitted to state what it contained as to a particular matter. This was not a proper way to introduce evidence, but it was done and is not prejudicial.

The jury had a right to conclude from the evidence that Mrs. Rechmann was driving her wagon on the morning in question on the track of the company in the street of the city; that the car of the company approached the wagon from the rear; that the wagon was in plain view of the motorman when he was more than two hundred feet away; that he did not sound his gong, nor slacken his speed until the car struck the wagon and killed Mrs. Rechmann, and that there was nothing to show that he could not have sounded his gong or stopped his car so as to have avoided the injury; that the collision was caused by the company, to which Mrs. Rechmann did not contribute.

The verdict was for $3,000. Mrs. Rechmann was 57 years old at the time of the killing. She was a market gardener and stood in Sixth street market. She had raised a family and her husband had died some three years before. The estate inven-

toried some $6,500. It was in evidence that with the help of two sons and one daughter she had made about $500 per year, the sons doing the garden work, the daughter the household work and she managing the garden and marketing the product. It seems to us that the judgment is excessive; her earning power was not great; it must soon cease altogether, and instead of supporting her children they would before long have to support her. We think $2,000 would be a most liberal estimate to be placed on the pecuniary loss to the children, and a remittitur should be made to this extent.

JURISDICTION OF POLICE JUSTICES.

Circuit Court of Hamilton County.

IN THE MATTER OF HABEAS CORPUS FOR CHARLES DERRICK.

Decided, January 25, 1909.

Sunday law—Prosecution for Violating—Police Justices—Appointed Under Section 1536-884a—Constitutional Law—Villages.

1. A police justice of a village, appointed by virtue of authority conferred by Section 1536-884*a*, has under the present statutes of Ohio the same jurisdiction as is conferred upon mayors of such corporations.
2. The statute bestowing this jurisdiction the court believes to be unconstitutional, but inasmuch as the question of its constitutionality can not be raised in a collateral proceeding, the police justice in this case is treated as a *de facto* officer whose acts are valid as between the public and third persons.

Amos Foster, Henry G. Frost and *Albert H. Morrill,* for the writ.

Edwards Ritchie and *Jas. E. Robinson,* contra.

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

The agreed statement of facts sets out that on May 29, 1908, Edward Woodruff, the police justice of the village of Wyoming (appointed under Section 1536-884*a*, old Section 1831), caused

the arrest of the said Derrick for an alleged violation of the Sunday common labor law, which is claimed to have occurred at the defendant's place of business in the city of Cincinnati, at least a distance of ten miles from the boundary of the village of Wyoming; whereupon this application is made to the court for the release of said Derrick.

In support of this application it is urged—

First. That the right of the police justice to try the defendant, Derrick, does not exist, because the offense for which he was arrested was not committed in the village of Wyoming, in which the police justice was appointed, but was committed in the city of Cincinnati, ten miles distant from the boundary line of said village, for the reason that said police justice has jurisdiction only over violations of ordinances of his own village.

Second. That the Legislature having repealed Section 1536-884*a* without repealing Section 1536-885, this left the latter section without any full force and effect and that the result of the repeal of the main statute was to repeal the following statute with which it was connected; and when again the Legislature re-enacted Section 1536-884*a* without specifically re-enacting Section 1536-885, this brought upon the statute books only the one Section 1536-884*a*, the latter section not having been expressly re-enacted.

Third. That Section 1536-884*a* is unconstitutional for the reason that it contravenes Article IV, Sections 10 and 15 of the Constitution.

We are of the opinion and agree with counsel for the applicant that the right of the police justice to try the defendant does not exist under Section 1536-884*a*, unless Section 1536-885 is in force, as the offense was not committed against an ordinance of the village of Wyoming and the jurisdiction of the justice could not be extended to the limits of the county. The words, "in all such cases," contained in said law must refer to the words, "violation of ordinances." We think this view is sustained by a proper construction of the case of *Morgan* v. *Tighe*, 12 Ct. Ct., 719.

This being so, is Section 1536-885 in full force and effect, thus making the jurisdiction of the police justice in such matters the

same as the mayor of a village and consequently co-extensive with the county as provided in Section 1536-876?

An examination discloses that the old Sections 1831 and 1832 were passed as one (69 O. L., 192), and later in the revision of statutes were separated and classified as two distinct sections as Nos. 1831 and 1832. That the first was repealed (96 O. L., 105) and subsequently re-enacted (98 O. L., 159), thus leaving upon the statute book Section 1832. It is clear that having repealed Section 1831, Section 1832 was of no force or effect, as the office to which it related did not exist, but afterwards when Section 1831 was re-enacted, Section 1832 still being in existence, it was not necessary to re-enact the latter as the force and effect of the statute was at once restored and its application to Section 1831 was again available.

While it is true that a statute containing a clause repealing all other laws within its purview operates to repeal all other legislation relating to the same subject, yet we think that where the act repeals expressly a particular act or statute, this shows the intention of the Legislature to allow the remaining acts or statutes to stand although the same might be inoperative.

The claim that the law is unconstitutional we believe is well taken, but we are of the opinion that this question can not be raised in a collateral proceeding such as this.

It would seem that the police justice is an officer *de facto* at least and the acts of such an officer performed before the unconstitutionality of the law has been judicially determined are valid as respects the public and third persons as the acts of an officer *de facto*. *State* v. *Gardner*, 54 O. S., 24; *Ex Parte Strang*, 21 O. S., 610.

The discharge of the defendant is denied.

THE MERIT SYSTEM IN THE POLICE DEPARTMENT.

Circuit Court of Jackson County.

STATE OF OHIO, EX REL JOHN HERRICK ET AL, v. HENRY C. SEARCY, AS MAYOR OF THE CITY OF PORTSMOUTH, OHIO.

Decided, January, 1909.

Municipal Corporations—Merit System of the Code—As Applied to the Police Department—Sections 129, 152, 167, 186 *and* 213.

1. Seniority of employment in the classified service of municipalities entitles incumbents in office thereunder to no preference over others subsequently acquiring positions in such service by virtue of examinations under the merit system, except as provided by Section 165 of the municipal code of 1902 (Revised Statutes, 1536-701) in cases of promotion from one rank to another. Hence, in reducing the number of patrolmen of a city, pursuant to ordinance of its council, the board of public safety may reclassify its police force regardless of the length of service of its members.
2. Section 227 of the municipal code of 1902 (Revised Statutes, 1536-1005), authorizing municipal councils to fix the number of employes in the department of public safety, gives councils authority to reduce the number of its patrolmen.
3. Sections 167 and 213 (Revised Statutes, 1536-703, 1536-912), providing that no removals in the civil service list shall be made except for cause, and continuing in office certain municipal employes, are provisional in their scope and were intended to give incumbents their status under the new code, but they give no higher status or greater right to position than those subsequently placed in employment by examination under the merit system.

Milner, Miller & Searl, for relators.
Horace L. Small, City Solicitor, contra.

Prior to November, 1908, the police force of the city of Portsmouth consisted of a chief and twenty patrolmen, including a turnkey. At that time the city council, by an ordinance repealing a former ordinance, reduced the force of patrolmen from twenty to eleven. Pursuant to the ordinance, the board of public safety again classified its force of police, naming the eleven

men who were to constitute the reorganized force of patrolmen from the incumbents and sent their names to the mayor, who notified the nine patrolmen who were not retained on the force that they had been dropped from the pay roll. The eight relators appearing as plaintiffs were among the nine discharged or dropped. Five of the eight were patrolmen when the municipal code took effect, and these five, as well as the three other relators, in point of seniority of service, had been on the force longer than some of the patrolmen retained by the board of public safety in its reorganization of the police force.

JONES, J.; WALTERS, J., and CHERRINGTON, J., concur.

The relators seek, by mandamus, to be restored to their rank and place upon the police force. Inasmuch as five of the relators were incumbents on the force when the new code went into operation and because they, as well as the other three relators, in length of time of service, had continuously served longer than some others who were retained by the board after the reduction of the force by the city council, it is urged on their behalf:

1st. That the five incumbents when the code took effect are entitled to preference over other patrolmen later placed on the force of the department.

2d. That in any event, because of continuous seniority of service on the force, these eight relators were entitled to preference over those of lesser rank in that regard, and that the implied intendment of the merit system found in the code is that such seniority of service must be maintained in making removals, when the entire force has been reduced by the city council.

By Section 227 of the code (Revised Statutes, 1536-1005), the city council had authority to determine, by ordinance or resolution, the number of employes in the department of public safety. This the city council did, and fixed the number of patrolmen at eleven, and repealed its former ordinance. It is conceded that the council had this authority. In the drafting of the municipal code while the Legislature had in view the application of the merit system to possible increases of the force and to individual removals therefrom for specific causes, it did not make any pro-

vision whatever for a material reduction of the force of employes by the action of the city council.

In arriving at a proper conclusion, upon an examination of the various provisions of the code, we think that the general power of appointment and removal of the employes of the police department has been conferred upon the board of public safety by Section 129 of the code (Revised Statutes, 1536-636). Section 158 (Revised Statutes, 1536-694), is not helpful of the question, as that section is provisional and is intended to provide for the operation of the new code by the certification of the names of old incumbents to the mayor. It did not contemplate that, upon the selection of every new board of public safety, a reorganization of the police department should follow *ex necessitate*. This seems to be the view in *State* v. *Wyman*, 71 O. S., 1, 11.

Section 129, *supra*, provides that the directors of public safety, "subject to the limitations herein prescribed," shall have the *exclusive* power of appointment and the *sole* power of removal of the employes in its department. This power so conferred by this section is explicit, general and broad in its scope; the board's power is limited only by such limitations elsewhere found in the act. An examination of the code will show that this limitation is confined to individual removals made for cause and upon hearing. The patrolman is suspended for a specified cause as provided in Section 152 (Revised Statutes, 1536-688), and under Sections 167 and 168 (Revised Statutes, 1536-703, 1536-722), upon the patrolman's removal, the mayor's act is certified or appealed, as the case may be, to the board of public safety. This seems to be the only limitation of the broad power of removal conferred on the board by Section 129; such cases are limited to individual removals for cause. Otherwise the board's "sole" power of removal is not curtailed. We can not otherwise give effect to the act of council in reducing the police force.

It is urged that five of these relators have an especial right to be retained because they were on the force when the new code took effect. The municipal code stipulates that the merit system shall be maintained, and by the provisions of Section 167 and 213

of the code (Revised Statutes, 1536-703, 1536-912), it is provided that no removals shall be made except under the provisions of the act. These sections were provisional, and were intended to give incumbents their status under the new code; the sections did not give them a higher status or a greater right to position than those subsequently placed on the force by examination under the merit system. They are not entitled to preference under any provision of the code. If this action of the board were being taken at the first organization of the force, following the adoption of the code, and not at a later reorganization, the board could have selected any of the old incumbents it desired, without regard to seniority, under Section 158. See opinion of Summers, J., in *State, ex rel,* v. *Hall,* 2 C. C.—N. S., 237.

However, it is impossible to apply seniority as a *sine qua non,* even if we attempt to enforce the merit system found in the code. And this, for the reason seniority of service is referred to in the code in Section 165 (Revised Statutes, 1536-701), in cases of promotion only. Again, in the scheme of merit adopted by the code, in so far as patrolmen are concerned, they obtained position by an examination upon qualifications in which seniority was not even an element. Once on the force, all of the patrolmen were on an equality. Those retained were all merit men. The older incumbents had no greater right or priority than those subjected to physical and other examination who got on the force later.

It is insisted that the action of the city authorities, if upheld, would tend to destroy the entire purpose of the merit system. It is undeniable that the police force might be radically changed and new members placed thereon; but after all that may or can be done, the merit idea is not destroyed, for in any event, as in this case, the patrolmen retained must be merit men—men who passed the requisite examinations.

It is not the province of this court to cast a new merit system, or to lick one into shape to meet new conditions. We leave that to another branch of the government. The merit system devised, was to meet the contingency of increases in the force and

of individual removals for cause. Farther it does not apply. To meet the contingency that has arisen in this case, where a material reduction has been made in the police force, as is now suggested by counsel for relators by the application of the element of seniority of service, would be to enlarge judicially the scope of the act where the Legislature had failed. The language of the learned judge, in commenting on the merit system in the case of *State* v. *Baldwin*, 77 O. S., 552, can well be quoted here:

"But the wisdom of it, or effectiveness of it, is not a matter for our consideration. We have only to determine what the Legislature in its wisdom has prescribed."

It might have been well had the relators made the members of the board of public safety parties to this suit, since the acts of removal were made by that board, but since no question of parties was made by counsel, we also have concluded to ignore it, and we decide the controversy upon its merits.

While issue has been joined by the petition and its amendments and the mayor's answer, the material facts are admitted by those pleadings.

The demurrer to the answer will be overruled, mandamus refused, and petition dismissed with costs.

JURISDICTION TO PUNISH A RECEIVER.

Hamilton County Circuit Court.

EICHERT ET AL v. EICHERT ET AL.

Decided, December 29, 1908.

Contempt—Receiver Appointed by Nisi Prius Court—Disobeys Order of Appellate Court—Jurisdiction to Punish.

A receiver can not suspend an order of the court of common pleas by appeal, and then defy the order of the appellate court on the ground that only the court which appointed him can enforce the order; but in such a case the appellate court has jurisdiction to adjudge the receiver in contempt and to punish him therefor.

Fred Hertenstein, for the charges.

Patrick Gaynor, for the receiver.

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

Heard on motion to adjudge the receiver appointed in this case to be in contempt for failure to pay over moneys in accordance with the order of court.

The jurisdiction of this court over the person of the receiver and the subject-matter on appeal from the order of the common pleas court is conclusively determined by the Supreme Court in affirming the order of this court; but it is claimed that, although the receiver willfully disobeys the order of this court, he can be punished for contempt only by the court appointing him. He himself invoked the jurisdiction of this court by appealing from the order made by the common pleas court, which was thereby suspended; and this court having made a like order against the receiver may enforce obedience with all the power and to the same extent it could if he were appointed by it. He can not by appeal suspend the order of the common pleas court and then defy the order of this court upon the ground that only the court appointing him can enforce the order.

As said in the case of *State* v. *Johnson*, 13 Fla., 33, at 50:

"He is amenable to the court having authority for the time being in the due course of law."

There is no excuse for his resistance of the order of the court to pay over the money found in his hands as receiver. If the money has been appropriated to his own use, and he is therefore unable to pay as directed the offense is thereby aggravated. Section 6640, Revised Statutes.

We regret to conclude that the receiver is without lawful excuse for his disregard of duty, of the authority of this court, and of the law of the case, wherefore he is adjudged to be in contempt.

ACTION AGAINST COUNTY COMMISSIONERS FOR NEGLIGENCE.

Circuit Court of Sandusky County.

MARIA M. YUNKER, ADMINISTRATRIX, v. THE BOARD OF COUNTY COMMISSIONERS OF SANDUSKY COUNTY.

Decided, December, 1907.

Roads—"Repair" of—Plank Removed from Bridge by Traction Company—Liability of County Commissioners for Resulting Injury to Pedestrian—Negligence—Section 845.

Leave was given to a traction company by the county commissioners to lay tracks on and over a bridge and along a pike, which was formerly a state road but by act of the Legislature had been given to the county to keep open and in repair as a public road. While laying its tracks the traction company removed the plank from the bridge and left an uncovered space into which the decedent fell. ***Held:***

That an action will not lie in such a case against the county commissioners for damages, under the provisions of Section 845, Revised Statutes.

Love & Culbert, for plaintiff.
Hunt & Garn, contra.

HAYNES, J.; PARKER, J., and WILDMAN, J., concur.

The petition in this case was filed on the 15th of March, 1902, by the plaintiff, Maria Yunker, as administratrix of the estate of David Yunker, deceased, and sets forth, among other things, that the defendants, the county commissioners of this county, had charge of the highways and bridges within the county, and especially the bridge over the Sandusky river in the city of Fremont, on the Maumee & Western Reserve turnpike.

For cause of action the plaintiff sets forth that the commissioners granted a franchise and right-of-way along the Western Reserve turnpike and said bridge thereon over the Sandusky river in the city of Fremont, Ohio, to the Toledo, Fremont &

Norwalk Railroad, for the purpose of constructing and operating thereon, and over said highway, and over and upon the bridge aforesaid an electric railway. That while said company was engaged in the construction of its electric line, it went upon said bridge for the purpose of repairing and strengthening it, and that the defendants negligently and carelessly allowed said company to take up and remove from said bridge a large part of the floor thereof; and said defendants, on or about the 18th day of March, in violation of their duty, carelessly and negligently failed to require said company to repair the same, or cause the same to be replaced, on the 18th day of March aforesaid.

The petition then sets forth the location of the bridge over the river and the height above the waters, and that the defendants further carelessly and negligently failed to keep the bridge in proper repair, by permitting the floor thereof to be torn up and left open and unguarded and unprotected, and without causing the open space to be covered, protected and guarded, where said floor was so removed as aforesaid, in a sufficient manner to caution and advise the traveling public, and especially foot passengers, that the floor of said bridge had been thus removed; and that it was impossible to travel over said part of said bridge, or to cross from one side thereof to the other, where the floor had been thus carelessly and negligently removed, as was the custom of pedestrians to do. She then avers that the deceased party had fallen through said bridge, without any fault on his part, etc.

It is a matter of public history that this Maumee & Western Reserve road was built first under grant from the government, and a certain amount of the road was built, and is was afterwards completed by the state of Ohio, and it was a state road, owned and controlled by the state of Ohio down to a certain period, some years ago—I think it was in the '80's—when, by an act of the Legislature of the state, the commissioners of this county and the commissioners of Wood county were authorized to take over that part of the road in their respective counties and keep the same open and in repair as a public road, the ob-

ject, perhaps, being to do away with it as a toll road, as it had been during the time it was under state control.

The plaintiff relies upon this fact, that the commissioners have control of this road, and are bound to keep it in repair, and keep it open as a public road, for the use of the public and safe for the public, and upon that account it is argued that the commissioners are liable.

I will not stop to read that act. There is nothing in the act that throws any light on this question, and so far as the liability of the commissioners is concerned, the plaintiff, if she recovers, must recover by virtue of the act of the Legislature, Section 845 of the Revised Statutes.

At that time, on April 13th, 1894, Section 845 was amended so that there was inserted in it—

"And any such board of county commissioners shall be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners in keeping any such road or bridge in proper repair."

In the progress of the case, a demurrer was interposed to plaintiff's petition. That demurrer was overruled, and the defendants given leave to answer, and they filed an answer, and to that answer a demurrer was interposed. The case had been pending two or three years, and had run along, and finally the matter was submitted, and I suppose an entry was made by the court. At any rate the judge passing upon the demurrer to the answer, held that the demurrer searched the record and that the plaintiff's petition did not state a cause of action, and thereupon the petition was dismissed, and judgment rendered against the plaintiff, and error was prosecuted here to reverse the action of the court.

Now it is argued on behalf of the defendants that this road was not out of repair at all. No repairs were being made to it; but in pursuance of the power vested in the county commissioners they had granted the electric road the right to pass along this street, and the right to pass across the bridge, and in order to have the bridge sufficiently strong to sustain the cars passing over it, it became necessary to strengthen the bridge, rather than

repair it, and they claim that is one reason why there is no liability on the part of the defendants.

But we have passed that by, and have considered this statute, and its application to this case, and this class of cases. In the case of *Board of County Commissioners* v. *Storage Co.*, 75 Ohio St., 244, decision by Judge Shauck, and it refers largely to the construction of the statute in question, the syllabus of the case is:

"Consistently with the rule that statutes in derogation of the common law should not be extended beyond the plain meaning of their terms, the amendment of Section 845, Revised Statutes, providing that county commissioners shall be liable for negligence 'in keeping any such road or bridge in proper repair' can not be interpreted as creating a liability for negligence in the operation of a free ferry."

There was a ferry across the Muskingum river, which was claimed to have been built and operated as part of a public road—public highway—and some person was crossing with his team, and as he approached the shore on one side his horses went through and were drowned. He sued the county commissioners, claiming that a proper construction of the statute would make that part of the highway. Judge Shauck says:

"The view urged by counsel for the plaintiff is that we should regard the phrase of the amendment 'any such road or bridge' as including a free ferry which the commissioners might see fit to establish and maintain. Since ferries are not mentioned in either the amendment or the amended section, it is obvious that the suggested interpretation would extend the section beyond the natural meaning of its terms. If, in contemplation of the Legislature, bridges and ferries are synonyms, it would scarcely have regarded a special section as necessary to authorize the establishment and maintenance of the latter. We need not consider the suggestion that ferries, as well as bridges, are within the reason of the amendment for interpretation requires that the meaning of the Legislature be ascertained from what it has enacted. We can not assume that the provision authorizing the establishment of free ferries was absent from the minds of the members of the Legislature when they enacted the amendment, because it was in a different section of the statute, nor are we permitted to indulge in conjecture respecting their action if

the provision had been in their minds. Nor is it a case in which a statute should be construed liberally for the purpose of accomplishing a clearly indicated purpose and to prevent the failure of the statute. If the suggested interpretation is rejected the statute will still operate, and its operation will be as broad as the appropriately indicated purposes of the Legislature. The argument does not really tend to show that the Legislature has provided for a liability of the commissioners, because of their negligence in operating ferries, but rather it is a legislative argument that ferries, as well as bridges, might have been included. To adjudge a liability on that view would be to legislate rather than to adjudicate. These and other like considerations have led to the formulation of the elementary and oft-repeated rule that statutes in derogation of the common law should not by interpretation be extended beyond their terms. Propriety will be observed, and certainty of interpretation will be promoted, if we assumed that the Legislature acts in view of all legislation relating to the subjects in hand and with a comprehension of the established rules by which their intention will be ascertained."

Thereupon the Supreme Court reversed the circuit court and affirmed the common pleas judge, who found in favor of the commissioners.

The Supreme Court had this statute before them again during this same session, in the case of *Ebert* v. *Commissioners of Pickaway County,* 75 Ohio St., 474. The syllabus reads:

"Consistently with the rule that statutes in derogation of the common law should not be extended beyond the natural meaning of their terms, the amendment of April 13th, 1894, of Section 845 of the Revised Statutes that 'any such board of county commissioners shall be liable in its official capacity for any damages received by reason of its negligence or carelessness in keeping any such road or bridge in proper repair' can not be interpreted as creating a liability for injuries sustained by one whose horse takes fright at stones which commissioners had collected by the road side for the purpose of repairing a road or bridge, there being no defect in either road or bridge contributing to the injury." (Judge Haynes read the opinion of Judge Shauck in full.)

Now the statute reads:

"The county commissioners shall be capable of suing and being sued, pleading and being impleaded in any court of judica-

ture, and of bringing, maintaining and defending all suits either in law or in equity, involving an injury to any public state or county road, bridge or ditch, drain or water-course established by such board in their county, and for the prevention of injury to the same, and any such board of county commissioners shall be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners in keeping any such road or bridge in proper repair," etc.

We think that under these decisions, without discussing the matter at any great length, that a proper construction of that statute is, that county commissioners should only be liable for the damages incurred by reason of negligence in not keeping in repair any bridge established by them.

The statement of facts that I have made shows the character of this bridge; by whom it was built, and by whom it is occupied; and the petition of the plaintiff wholly fails to state, in any manner or form, that this bridge was established by the county commissioners; it does not do so because as a matter of fact this is not the case.

For this reason, and upon these decisions, we hold that the court of common pleas did not err in sustaining the demurrer to the petition, and dismissing the case. Having decided this point, we do not care to discuss further the others that were raised in the case.

PREFERENTIAL CLAIMS.

Circuit Court of Hamilton County.

ELIAS BACH & SONS ET AL v. SMITH-PATTISON MANUFACTURING COMPANY.

Decided, February 6, 1909.

Debtor and Creditor—Loans Entitled to Preference—Assignment of Accounts as Security—Corporations—Insolvency—Distribution.

A corporation in need of money entered in good faith into an arrangement with parties who were not creditors and were willing to extend it assistance, whereby a loan was made, and certain accounts were transferred as security, and as these were paid other accounts were substituted. The corporation at a later date went into the hands of a receiver, and upon distribution of the fund arising from a sale of its assets it was *held:*

That the contract was valid and the parties making the loan should be preferred over the general creditors.

Moulinier, Bettman & Hunt, for plaintiffs.
Healy, Ferris & McAvoy, contra.

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

This cause is in this court on error to the judgment of the superior court. That court gave judgment on the rights of parties to a fund which was in the hands of the court through a receiver which it had appointed to take charge of the Smith-Pattison Co. The amount involved is quite large and the trial below occupied a very considerable time, and in this court the case was fully argued orally, and very full and able briefs containing almost a hundred pages, with a great number of authorities cited, have been submitted and considered. In deciding the case we will not attempt to comment on the authorities cited, nor to review at length the evidence, but simply state our conclusions as to the law and the evidence.

The court below found in favor of the claims of E. M. Pattison and John G. Robinson, and in doing so the general creditors of

the insolvent firm of Smith-Pattison Co. claim error was committed. The Smith-Pattison Co. was a firm of $125,000 capital, of which nearly $100,000 had been paid in. The firm was located in Cincinnati, and was engaged in the manufacture and sale of cigars. The evidence tends to show that they expended some $60,000 in advertising and introducing their brands of cigars.

In October, 1907, when the panic was at its worst, the company was hard pressed for funds, and the bank at which it was doing business denied it further credit, and demanded payment of loans already made, and refused to honor checks on funds to its credit in the bank. In order to save the firm from immediate ruin it became necessary to raise $20,000 from other sources than the bank. This it did by borrowing $15,000 from E. M. Pattison and $5,000 from John G. Robinson. To secure this money the company assigned to Pattison and Robinson certain choses in action, to-wit, certain book accounts. The notes given by the company for these loans were payable on demand. It was provided in the agreement that if the note was not paid and while the debt existed, that when certain of the accounts were paid instead of paying the different sums over to Pattison and Robinson, other good accounts which the company had might be substituted from time to time, and this was done. The object of Pattison and Robinson in lending this money to the firm was to aid the firm in its financial difficulty as well as to secure themselves for the loan. Pattison's son was a member of the firm and Robinson himself was a large stockholder as well as an officer of the firm. They were not seeking an investment for their funds nor were they seeking to take advantage of the firm or its creditors, but on the other hand were trying to help both. There can be no question as to the good faith of any of the parties to this transaction, and justice requires that it should be carried out unless it is contrary to well settled principles of the law. The questions that have frequently arisen where an insolvent concern seeks to prefer one creditor over another have no relation to this transaction.

Pattison and Robinson were not creditors of this company. They did not seek to get control of this company or any of its

property. The company sought Pattison's and Robinson's money, which it, the company, sorely needed, and to secure repayment to them gave the security referred to. The general creditors were benefited by this and not injured, and it would be manifestly unjust that the general creditors should now take away the money of Pattison and Robinson which was loaned to the company for their benefit. We think the contract made by the parties was a valid contract and in enforcing it the court below was right.

Later in the same year, to-wit, December 28, the company was pressed for funds to carry on its business, and it sought the same parties for help, and this was given, $5,000 being loaned on that day and $4,000 on January 14, 1908. The amount agreed to be loaned the company by Pattison and Robinson was $9,000. The same remarks, *supra,* in regard to the relations of the parties applies equally here. Pattison and Robinson sought no advantage of the company, but the company needed Pattison's and Robinson's money, and all Pattison and Robinson asked was a return of the money and security from the company that it should be returned. This, of course, the company represented to Pattison and Robinson it was anxious and willing to do. In substance the agreement was that it would pledge to Pattison and Robinson any chattel property that it had and which Pattison and Robinson should take.

The company did not act promptly in putting its property in pledge, but in accordance with its agreement it did carry it out by placing certain cigars in the possession, as we hold, of Pattison and Robinson. The pledge as made fulfilled every requirement of the law, and the court decided rightly in giving effect to the contract of the parties. It would have been a great injustice to have held otherwise.

Judgment affirmed.

PROSECUTION FOR KEEPING OPEN ON SUNDAY.

Circuit Court of Hamilton County.

LUTKEHAUS v. VILLAGE OF MT. HEALTHY.

Decided, December 19, 1908.

Criminal Law—Sunday Closing—Failure of Proof as to the Exception Provided in the Statute.

A conviction of keeping a place where intoxicating liquors were sold open on Sunday will not be set aside because of failure to prove that the place was not a regular drug store, when the testimony offered was to the effect that the place was a saloon in which intoxicating liquors were sold on other days of the week.

Cogan & Williams, for plaintiff in error.
Owen N. Kinney, contra.

The plaintiff in error was convicted below of keeping his saloon open on Sunday.

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

In the trial of this case before the mayor no evidence was offered by the plaintiff in error in defense, and we can not say that he was not proven guilty beyond a reasonable doubt, unless, as claimed by plaintiff in error, no evidence was offered upon the exception in the affidavit that the room claimed to have been open on Sunday was not a regular drug store.

In the absence of evidence to the contrary, we think the testimony offered by the state tended to prove the exception, as there was direct evidence that the place that was open was a saloon, and plaintiff in error sold intoxicating liquors therein; thereby showing it to be a place where on other days of the week intoxicating liquors are usually sold and thus tending to prove that the place was not a regular drug store.

We can not consider the validity of the ordinance, inasmuch as it does not appear upon the record. *Nelson* v. *Berea,* 21 Ct. Ct., 781.

Judgment affirmed.

PROSECUTION OF BANK OFFICER FOR EMBEZZLEMENT.

Circuit Court of Stark County.

IN RE APPLICATION OF CORWIN D. BACHTEL FOR A WRIT OF HABEAS CORPUS.*

Decided, 1907.

Constitutional Law—Section 3821-85, Relating to Embezzlement, etc., by Bank Officials—Habeas Corpus—Lies Against the Jurisdiction of a Court, but not Against the Regularity of Its Order of Commitment—Criminal Law—Error—Free Banking Act of March 21, 1851—Classification.

1. While errors of the trial court can not be properly brought before a reviewing court by habeas corpus, a petitioner for a writ of habeas corpus who attacks the jurisdiction of the trial court will be heard.
2. Section 3821-85, providing a penalty for embezzlement, etc., by bank officers, employes and agents, is not unconstitutional because not of uniform operation.
3. But if it be true that one of the provisions of this act is unconstitutional, it follows that the corresponding section of the original free banking act, passed before the adoption of the present Constitution, is unrepealed and still a valid and constitutional act under the provisions of which an offender may be prosecuted.

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

The petitioner, Corwin D. Bachtel, in his petition in habeas corpus presented to the judges of this court claims that he is unlawfully restrained of his liberty by the sheriff of Stark county, Ohio, and prays an order discharging him from such imprisonment. It appears by the sheriff's return that the petitioner was indicted by a grand jury of Stark county for a violation of Section 3821-85 of the Revised Statutes of Ohio, and in default of bail was committed to the jail of said county until trial could be had upon said indictment.

* Affirmed by the Supreme Court of Ohio without report; leave to file a petition in error in the United States Supreme Court refused.

The petitioner claims that the indictment is invalid and that the Court of Common Pleas of Stark County has no jurisdiction thereof, for the reason that the section, under favor of which the state is attempting to prosecute the petitioner, is unconstitutional and void, because it is in violation of Sections 1 and 2 of Article I of the Bill of Rights, and of Section 26, Article II of the Constitution of Ohio, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It is contended by the state that this court ought not to entertain this petition in habeas corpus at this time, for the reason that it appears by the return of the sheriff that the prisoner is in the custody of the Common Pleas Court of Stark County in which court said criminal prosecution is pending; that he has already filed a demurrer to said indictment, raising the constitutionality of said sections, upon which demurrer that court has held adversely to his claim, and that he ought to be required to follow in the regular course and prosecute error to this court, when it would appear, if it should ever appear, that the holding of the common pleas court upon this demurrer was prejudicial to the rights of the petitioner. With this contention in the abstract we are in accord. We think this is the better practice, and one that ought to be insisted upon by all reviewing courts, for it is not the purpose of habeas corpus to bring before a reviewing court errors of the trial court. There is another plain and adequate remedy at law provided for that purpose. But when a petitioner files his petition in habeas corpus, averring that he is unlawfully restrained of his liberty and attacks the jurisdiction of the court issuing the warrant or order for his commitment, we think it is the policy of our law that the question of jurisdiction should be heard, although all questions of mere error or irregularity will not be heard upon such petition, but solely and alone the question of jurisdiction of the court issuing the writ or order of commitment.

In determining the question raised, then, upon this petition in habeas corpus, to-wit, the constitutionality of the act under which prosecution is brought, it is necessary to determine whether the language of the law itself raises any doubt as to its constitu-

tionality. The three objections urged to the constitutionality of this act are kindred in their nature, and many of the reasons urged by the petitioner why it is in violation of Section 26 of Article II of the Constitution of Ohio are practically the same reasons urged by him as to why it is in violation of Sections 1 and 2 of Article I of the Bill of Rights, and also Section 1 of the Fourteenth Amendment to the Constitution of the United States. In fact the questions raised here by counsel for the petitioner are comprised in the contention that the law is not of uniform operation throughout the state, and for that reason violates all of these constitutional provisions.

Turning first to the law itself we find this comprehensive language used: "Every president, director, cashier, teller, clerk or agent of any banking company," etc. It is insisted by petitioner that this language does not include many other individuals similarly situated in their business relations to the public, because the words "any banking company" can only refer to banks organized under what is known as the free banking act of this state, passed in 1851, and that such officers of all other banks are not amenable to this law, notwithstanding their occupation and duties are identical with the occupation and duties of the officers of such banks, and that by reason thereof the law is not uniform in its operation. The presumption, of course, is that this law is constitutional, and it must clearly appear that it is not before a court is authorized to declare it unconstitutional.

In the case of *Slingluff et al* v. *Weaver et al,* 66 Ohio St., page 621, the Supreme Court say:

"But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

If that doctrine is to be applied to the question here presented it is an end to this contention, for taking this section alone, without reference to its position in the chapter in which it is found and without reference to its history, it clearly appears that it comprises all banking companies in the state of Ohio, and, therefore, the objections urged by the petitioner do not obtain.

But upon the theory that each section of the law must be construed *in pari materia* with other sections applying to the same subject-matter, then it might fairly be said, in contemplation of the whole chapter, that there is a doubt appearing as to whether it includes all banking companies, or simply the banking companies organized under the free banking act, and, therefore, it may become necessary to investigate the history of this legislation for the purpose of determining to what character of banks the act does apply.

Coming, then, to these considerations, we find that on the 24th day of April, 1879, there was in force and effect what was then known as the free banking act, passed March 21, 1851, Section 30 of which was substantially in the language of Section 3821-85 of the Revised Statutes of Ohio, except as to the omission in the later act of various provisions of that section relating to putting in circulation notes and circulating bills of such banks provided for in this act; and upon said date the Legislature of Ohio passed an act entitled "An act further to amend the act entitled an act to authorize free banking, passed March 21, 1851 (49 Ohio Laws, 41), and the acts amendatory and supplementary thereto." And Section 6 of this amendatory act is an amendment of Section 30 of the original act and such amendment is now Section 3821-85 of the Revised Statutes of Ohio. Counsel, however, insist that these sections relating to the free banking act never became a part of the Revised Statutes of Ohio, and we use that term for convenience at this time, and for the further purpose of designating where they can be found conveniently, and not intending to determine whether they are a part of the Revised Statutes or not. They are at least part and parcel of the statute law of Ohio and as such we are now dealing with them.

To determine whether the phrase in the amended Section 30, "any banking company," applies to all banking companies of the state, or only banking companies organized under the free banking act, it is necessary to refer only to the title to this act, which distinctly avers that it is an act further to amend the act entitled an act to authorize free banking, passed March 21, 1851 (49 Ohio Laws, 41), and the acts amendatory and supplementary thereto; so that the conclusion necessarily follows that the Legislature at this time had not in contemplation any other kind or character of a banking institution except those contemplated in the act of March 21, 1851, and that nothing contained in this amendatory act was intended by the Legislature, or by any fair construction thereof, could be held to include any other banking company, except the ones provided for in the original act, including those in existence or any that might come into existence under the provisions thereof during the time that said act might remain the law of Ohio.

It appearing then that Section 6 of this amendatory act, which is now found under the sectional numbering 3821-85, must be held to include only banking companies organized under the provisions of the original act which this act amended, or sought to amend, the next question arises as to whether or not the classification therein attempted is imperfect, false or unnatural, and that such classification is resorted to by the Legislature for the purpose of giving a special law the appearance of a general law, to evade these constitutional limitations of the power of the Legislature.

The Supreme Court has repeatedly held that the Legislature has the power to classify, and that the legislative authority of this state is vested in the General Assembly in the broadest terms, by Section 1 of Article I of the Constitution, subject only to the limitations elsewhere found in the Constitution. It is, therefore, not within the province of any court to declare void, and annul, a statute by reason of a supposed violation of the principles of justice and common reason, if it be within the bounds of constitutional power. The courts have nothing whatever to do with the policy, the justice, or the wisdom of a statute so long

as it can not be said that it contravenes some constitutional provision.

Again our Supreme Court has said in the case of *Railway Company* v. *Horstman*, 72 Ohio St., 93, at page 107:

"We do not accept without qualification the postulate of the court below, that 'classification can not be made arbitrarily by the General Assembly by seizing upon any incident or characteristic that may suit its purpose.' And again at the bottom of the same page, 'where a false and unnatural classification has been resorted to that courts will interfere.'"

As a premise to the petitioner's contention here we are asked to take judicial notice of the fact that there are only a very few such banks in Ohio that come within the contemplation of this section, but it is very doubtful to us whether this contention is correct or not. Certain it is not of universal knowledge, for it is doubtful if one man in a hundred or even in a thousand of the population of Ohio has such knowledge. But though it may not be of common knowledge, yet if it is a matter that may be of common knowledge by reason of authorized statistics within the reach of every man who cares to investigate, then it is a matter of which courts will take judicial notice. That does not so clearly appear in this case; yet conceding all that counsel claim for it in that behalf, what is the result? That there are some such banks existing is admitted. That there may be tomorrow, next year or the year after a great many more is also within the contemplation of this statute, and was necessarily and properly within the contemplation of the Legislature at the time it passed this act and, therefore, having conferred privileges in this very banking act it had a right to impose penalties and restrictions and to classify them as a distinct and separate organization, distinguished from other banks and differing from other banks in their relation to the state and to the public at large. The first inquiry is whether or not there is such a class existing in Ohio. The number within that class is to our minds of little or no importance. If there is such a class, that is sufficient for the purposes of this case. If there are banks organized under this particular act, if other banks may be organized

under it, if the privilege of organizing banks thereunder is and has been open to the people of the state, and there is an entire chapter of our laws devoted to the rights, liabilities and obligations of this character of bank and penal statutes in reference to misconduct of officers thereof, how can it be said that such a bank and such officers are not a distinct and separate class of banking institutions? There are undoubtedly a great many reasons that may be urged why all banking companies in Ohio should be included within the provisions of this section. In fact, to our minds, there is no valid objection thereto and every argument that presents itself to our consideration is in favor thereof, but we are not the Legislature, and as has been said by the Supreme Court in the 52d Ohio St., at page 99, "that if the Legislature has erred in not including what has been excepted from the operation of the law, it is simply an error of judgment in the exercise of its authority and can not be reviewed by the courts." So that the remedy must be sought in the Legislature itself. In order that a law of a general nature shall have uniform operation throughout the state, it must apply, first, territorially to the entire state; second, to all individuals coming within the class designated by the Legislature. And the power to make this classification is not only expressly but of necessity lodged in the General Assembly of the state, for there are few laws upon our statute books that necessarily affect every individual, but rather the great majority of our laws applies to individuals of a certain class.

On page 99 of the 52d Ohio St., in the case of *State* v. *Nelson*, Judge Burket, who announced the opinion in that case, says:

"Very few statutes apply equally to every person in the state. Some apply only to males, some to females, some to minors, some to persons of unsound mind, some to office holders and some to criminals. As pointed out by Minshall, J., in *Alder* v. *Whitbeck*, 44 Ohio St., 539, such classes are arbitrarily formed by the General Assembly, and 'if the Legislature has erred in not including what has been expected from the operation of the law, it is simply an error of judgment in the exercise of its authority, and can not be reviewed by the courts.'"

Again, on page 100, quoting 70 N. Y., page 351, Judge Burket says:

"And does the validity of a law which is required to be general, and which is general in its terms, depend upon the number of subjects upon which it can operate, or upon the size of a class to which it applies? These questions must be answered in the negative."

We are of the opinion, from the reading of these authorities, that the Legislature has a right to make such classification, and it is only when it appears that the classification attempted by the Legislature is false and unnatural that courts ought to interfere, and if there is doubt in this behalf it must be resolved in favor of the constitutionality of the act. We are, therefore, of the opinion that the act in question does not violate any of the provisions contended for by the petitioner.

But even if we are mistaken about that, if this Section 6 of the amendatory act of April 24, 1879, is unconstitutional, it does not necessarily follow that the petitioner is entitled to a discharge. The original act of March 21, 1851, was passed before the adoption of the Constitution of 1851, and, therefore, at the time of the adoption of such Constitution was a valid and subsisting law of the state of Ohio, and it remained the law of Ohio and is still the law of Ohio, unless it has been repealed by a valid act of the Legislature. This original Section 30 prohibited the acts complained of in this indictment, and but for Section 6 of the amendatory act an indictment could be returned and prosecuted under the original act for the commission of acts therein charged. So that if the contention of the petitioner that this Section 6 of this amendatory act is unconstitutional, then it follows as a corollary that original Section 30 is still in force, having never been repealed by a valid act of the Legislature. We think the question is no longer an open one in Ohio, that where the Legislature have enacted an unconstitutional amendment and in the same act repealed the original constitutional law, that the repealing clause must fall with the attempted amendment, and to all intents and purposes the law

remains the same as if no such amendment had been attempted by the Legislature.

In the case of *State of Ohio, ex rel The Attorney-General,* v. *Hall,* 67 Ohio St., page 303, the Supreme Court in the second paragraph of the syllabus declares, "The repealing section of said act is also void," and on page 306 the court say, and this opinion is rendered by the court: "The amending act of April 30, 1902, including its repealing section, is wholly void, and Section 1240, Revised Statutes, stands as though such amendment had not been attempted." This is but following a long line of decisions in Ohio upon this subject.

In the 66 Ohio St., pages 482 and 483, Judge Shauck announcing the opinion of the court, in the case of *State, ex rel Knisely et al,* v. *Jones et al,* says:

"Applying to the case a doctrine with which the lawyers of the state are quite familiar, the repealing section of the present act is inoperative, unless its provisions for reorganization of the board are valid. The system provided by the former legislation being still in full operation, it should continue, unless by a valid act a system to succeed it has been provided."

In 60 Ohio St., at page 273, *State, ex rel Wilmot et al,* v. *Buckley et al,* the court say:

"The said section being inoperative, the repealing section contained in the same act is also inoperative, and this leaves said Section 2926*b,* as amended April 28, 1890, in force."

In the 48 Ohio St., page 211, the case of *The State, ex rel,* v. *Smith et al,* at page 219, in the opinion of the court we find the following language:

"We see no other valid objection to the law. And as the act itself is invalid, the repealing clause must also be held inoperative, as we can not suppose that the Legislature would have repealed the act creating the board of city improvements, without providing any substitute therefor."

Counsel for petitioner make the contention that, under this doctrine announced in the 48 Ohio State, there would be no reason for reinstating an act, when the old law in all material

respects is just like the new one; that there would be neither sense nor justice in reinstating old Section 30 with its archaic provisions as to paper money after the power to issue it had been taken away. There is, no doubt, much logic in this reasoning, but it does not apply to the principle involved here. The question is not as to the reasons and purposes for reinstating such law, but the principle underlying this question is that the invalid act did not affect the valid one that it attempted to repeal, and the court is not now reinstating this act, but would be simply finding that there was no valid act that effected its repeal and that it remains the law of Ohio, because it has not been repealed by any valid enactment of the repealing power of the state. So that we are not concerned as to the reasons why it should or should not be reinstated, for we are not reinstating it, but merely determining that no law of the state is repealed by an unconstitutional enactment of the Legislature of Ohio purporting to repeal the same. For this reason, even though all the other contentions of counsel for petitioner be correct, the common pleas court has jurisdiction of the cause, and there is a valid constitutional law under which this prosecution is proceeding, and the petitioner is not unlawfully deprived of his liberty, and must be remanded to the custody of the sheriff, and such order is accordingly made at the costs of the petitioner and his exceptions are here noted.

APPOINTMENT OF MEMBERS OF THE OHIO RAILROAD COMMISSION.

Circuit Court of Franklin County.

THE STATE OF OHIO, EX REL JOHN SULLIVAN, v. JAMES C. MORRIS.

Decided, February 23, 1909.

Railroad Commission—Appointment of Members of—Authority to Appoint Vested in an Incoming Rather than an Outgoing Governor—"Recess" Appointments Valid only when the General Assembly has Adjourned Sine Die—Section 244-11.

1. The Legislature, in providing that members of the Ohio Railroad Commission shall be appointed in January for terms of office beginning February 1, intended that in years when a new Governor takes his seat on the second Monday in January, the rule that an outgoing official can not appoint for a term to begin after his own has expired shall be operative.
2. The adjournment of the Legislature referred to in this act is the *sine die* adjournment of the session whether regular or extraordinary, and not a mere recess for a specified period; and a "recess appointment" has no validity unless made after final adjournment of the session.

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

This is an action in quo warranto brought to determine whether John Sullivan or James C. Morris, or either of them, has been legally appointed to the office of Railroad Commissioner of Ohio.

January 4, 1909, Andrew L. Harris, then Governor of Ohio, pursuant to "An act to regulate railroads, * * * create a board of railroad commissioners," etc., passed April 2, 1906 (98 Ohio Laws, page 342), appointed James C. Morris as one of the commissioners provided for by said act, for the term of six years beginning February 1, 1909. The Ohio Senate being then in session, on the same day confirmed said appointment. January 29, 1909, said Morris took and subscribed his oath of office, as provided for in the statute.

The term of Andrew L. Harris as Governor expired at noon, January 11, 1909, and Judson Harmon reigned in his stead.

On the 21st day of January, 1909, Governor Harmon assumed to appoint the relator to the same office, and for the same term as Governor Harris had appointed Morris, and sent his name to the Senate for confirmation. Without acting upon the said appointment of Governor Harmon, the Senate pursuant to a joint resolution adopted by it and the House of Representatives adjourned January 22d until February 15th.

On the 1st day of February, Governor Harmon, assuming to act under the power granted by the same law, to appoint a railroad commissioner during an adjournment of the Senate without action upon his previous selection, again appointed the relator, who forthwith took and subscribed his oath of office.

The question is, which of these two appointments, if either, is valid?

The first section of the act in question reads as follows:

"A railroad commission is hereby created to be composed of three commissioners. Within sixty days after the passage of this act the Governor shall, by and with the advice and consent of the Senate, appoint such commissioners, but no commissioner so appointed shall be qualified to act until so confirmed, unless appointed during the adjournment of said Senate. The term of one such appointee shall terminate on the first Monday in February, 1909; the term of the second such appointee shall terminate on the first Monday in February, 1911; and the term of the third such appointee shall terminate on the first Monday in February, 1913. In January, 1909, and bienially thereafter, there shall be appointed and confirmed, in the same manner, one commissioner for the term of six years from the first Monday in February of such year. Each commissioner so appointed shall hold his office until his successor is appointed and qualified. Any vacancy shall be filled by appointment by the Governor for the unexpired term, subject to confirmation of the Senate, but any such appointment shall be in full force until acted upon by the Senate."

It is conceded to be the general rule, that an outgoing official can not appoint for a term to begin after the expiration of his own.

But there is a recognized exception to this rule, which is stated in *State, ex rel,* v. *Ermston,* 14 C. C. Rep., 614 (affirmed in 65 O. S., 665), as follows:

"But when the statute expressly provides that the appointment shall be made on a certain day, or as soon thereafter as practicable, the appointment may be made, notwithstanding that the term of such appointee would commence after the expiration of the term of the appointing officer."

It is claimed that the appointment of Morris is valid, because within the above exception, since the law in question provides that the appointment for the term to begin February 1, 1909, shall be made in *January,* 1909.

It must be presumed that the Legislature contemplated that the term of one Governor would expire January 11, 1909, and the term of his successor begin on the same day; and that a literal construction of the statute would allow either Governor to make the appointment in that month.

But it is also to be presumed that the Legislature did not intend to leave the matter open to doubt, or to a race and contest between the two Governors as to which one should make the appointment.

In our view the only way to harmonize these presumptions with the apparent uncertainty of the appointing power arising from a literal construction of the statute, is to hold that the Legislature intended (not having otherwise provided) that the general rule above noted should govern.

The familiar principle that the common law prevails, except when abrogated by statute, needs no citation.

We conclude, therefore, that the appointment of Morris by the moribund Governor, was invalid.

The next question is, was the appointment of Sullivan, February 1st, legal.

It is based upon the right of the Governor to appoint during an adjournment of the Senate without action by that body upon his appointment.

The so-called resolution of adjournment is as follows:

"Be It Resolved, By the General Assembly of the State of Ohio, that the House and Senate recess from January 22d, 1909, to convene on February 15th, 1909, at 1:30 P. M.; that during said recess the committees of the House and Senate respectively shall consider such matters as may properly be before them, or may pertain to their duties, and that the extraordinary session of the 78th General Assembly adjourn *sine die* on March 12th, 1909, at 4:00 P. M."

The Senate journal of January 22d states that:

"On motion of Mr. Mather, the Senate *adjourned* until 1:30 P. M., February 15th, 1909, in accordance with Senate Joint Resolution No. 7."

It will be observed that the joint resolution uses the word "*recess,*" and provides for the *ad interim* work of committees, and for the adjournment *sine die* on the 12th of March; and the Senate journal, referring to the same action as the joint resolution, uses the word "adjourned."

It is claimed on behalf of the relator that the words "adjourn" and "recess" are synonymous and used interchangeably in legislative records. Authorities seem to sustain that view, but we think the adjournment referred to in the act in question is a *sine die* adjournment of the session, whether regular or extraordinary.

If a recess for three weeks is such an adjournment as the law contemplates, why would not an adjournment for a week or even a day do as well? An adjournment from Friday to Monday would allow a lively Governor to do a lot of things on Saturday without "the advice and consent of the Senate," and perhaps greatly to the latter's embarrassment. It is inconceivable that the Senate when it passed the bill providing for a railroad commission contemplated any such possible treatment. In providing for its own "advice and consent" in the matter of appointments, it undoubtedly meant to give itself reasonable time in which to consider the same. For the consideration of Governor Harmon's appointment it had had only one day prior to the recess. Committees were instructed to proceed with the consideration of matters before them. So that nothing but legislative action was

in abeyance. All matters were carried over to be acted upon or not, at a later date, before final adjournment.

We think it was the legislative intent in passing the act in question to give the Senate the entire session, if necessary, in which to consider appointments, as well as all other matters before it. If it should adjourn the session without action, then the Governor may appoint.

Entertaining these views, we, therefore, hold that the appointment of the relator by Governor Harmon February 1st was invalid, the Senate not having rejected his appointment of January 21st, and not having adjourned the session *sine die.*

The defendant, Mr. Morris, of course, holds over as a Railroad Commissioner, but neither he nor Mr. Sullivan has been legally appointed to the office for the term beginning February 1st, 1909.

Decree accordingly.

INJURY FROM STEPPING INTO AN UNGUARDED STAIRWAY.

Circuit Court of Hamilton County.

SLICER v. THE KOCH & BRAUNSTEIN CO.

Decided, January 23, 1909.

Negligence—Pleading—Presumption—Findings by the Jury—Customer in a Store Falls Down an Unguarded Stairway.

The averment that a customer of a store, having no knowledge of the existence of an open stairway, stepped backwards into the entrance of said stairway and was violently precipitated to the basement below, raises a presumption that she was herself negligent, and where in such a case a general verdict in favor of the proprietors of the store is consistent with special findings by the jury, it will not be disturbed.

Jas. R. Jordan and *Walter M. Locke,* for plaintiff in error.

Kelley & Hauck and *W. G. Roberts,* contra.

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

The negligence charged in the petition consists in maintaining an open stairway in defendant's storeroom without any guard-gate or light, and placing a table so as to guide customers into the stairway. The manner in which the plaintiff was injured is averred as folows:

"When directly in front of the entrance to said stairway she, finding the articles she desired to purchase, turned to notify the clerk of her desire to purchase, when, without any carelessness or negligence on her part, having no knowledge of the existence of said stairway, and by reason of the carelessness and negligence of said defendant as aforesaid, she stepped backwards into the entrance to said stairway and was suddenly and violently precipitated down the stairs into said basement."

Aside from the question whether this averment charges that the negligence of defendant caused plaintiff to be precipitated down the stairs, it raises a presumption that she herself was not, as averred, free from fault, which presumption is, by the jury in special findings returned with the general verdict, conclusively found as a fact, and that the same was the cause of her injury. The errors alleged in giving certain special instructions and refusing others are not therefore material or prejudicial.

We think the plat was sufficiently verified, and properly received as evidence.

The testimony of the architect as an expert was incompetent; but in view of the special findings was not prejudicial.

No other evidence is embodied in the bill of exceptions, and the general verdict being consistent with the special findings the judgment will be affirmed.

ACTION FOR RECOVERY OF A STOCK DIVIDEND.

Circuit Court of Hamilton County.

GEORGE H. STEARNS v. JOHN H. HIBBEN DRY GOODS COMPANY.

Decided, December 19, 1908.

Dividends—Nature of Obligation Incurred by Declaration of—Stock Dividend Distributed to Holders of First Issue of Stock—Was a Trust Created—Concealment and Fraud—Demand—Application of the Statute of Limitations—Decisions by Appellate Courts.

1. Where an appellate court is abolished by the Legislature, and its jurisdiction transferred to the circuit court, a decision by such appellate court in a case afterward coming to the circuit court will be followed by that court, unless clearly erroneous.
2. Where it appears that no misrepresentation was made by the board of directors upon which a stockholder relied to his prejudice, nor any concealment by them of facts not recorded in the minutes, an action by the stockholder for recovery on the ground of fraud and concealment will not lie.
3. If a trust was created by the resolution of the board of directors adopted in this case, it terminated on or before June 30th, 1899, and an action thereon is barred by the six year statute of limitation.
4. Although a demand by a stockholder for his *pro rata* share of a stock dividend is necessary before the beginning of an action by him for the recovery of such dividend, failure to make such demand does not suspend the operation of the statute of limitations.

Peck, Shaffer & Peck, for plaintiff in error.
Walter A. DeCamp, contra.

The Hibben Dry Goods Company having determined to increase its capital stock from $100,000 to $200,000, it was further decided that a stock dividend of $25 per share should be distributed to the holders of the old stock who had borne the burden of founding the business. This was done and thereafter the new stock was sold. The plaintiff was a purchaser of a block of the new stock, and subsequently learning of the distribution of a stock dividend, he filed an action in the Superior Court of

Cincinnati for recovery of his *pro rata* share thereof. His petition was as follows:

"Plaintiff says that the defendant, the John H. Hibben Dry Goods Company, is a corporation created and existing under the laws of Ohio for the purpose of buying and selling dry goods, notions and furnishings, and is engaged in said business in the city of Cincinnati. That by the terms of its articles of incorporation said company has an authorized capital stock of $350,000 common stock, and $150,000 preferred stock. That all of the preferred stock has been issued and is outstanding, but that of the authorized common stock only $282,000 has been issued, and said company has $68,000 of such common stock still unissued.

"Plaintiff further says that prior to the first day of July, 1897, he subscribed for 100 shares of the common stock of said company, and paid therefor to said company the sum of $10,000, and in consideration thereof said company issued to him its certificate of stock dated July 1, 1897, showing that plaintiff was the owner of 100 shares of the capital common stock of said company; and plaintiff then became, and ever since has been, the owner and holder of said 100 shares.

"Plaintiff further says that on the 6th day of October, 1897, he likewise subscribed and paid $5,000 for fifty additional shares of the common capital stock of said company, and received a certificate of that date showing likewise that he was the owner of said fifty additional shares; and plaintiff has ever since been, and now is, the owner and holder of said fifty shares of capital stock.

"By reason of his ownership of said 150 shares of common stock of the said defendant company plaintiff became, and ever since has been, entitled to share *pro rata* with all the other holders of common stock in any dividend or distribution of proceeds or assets made by the company.

"But plaintiff says that notwithstanding the premises, the directors of said company, on or about the 10th day of January, 1898, finding that the company had on hand a surplus arising from the earnings of the company, without the knowledge or consent of the plaintiff, who is not, and never was, a member of the board of directors of said company, adopted a resolution directing the sum of $26,900 of said surplus be 'divided among the stockholders holding stock prior to the last issue of stock to the $200,000 limit,' which included the plaintiff, all of whose stock was issued to him 'prior to the last issue of stock to the $200,000 limit,' and further ordering that 'said amount, while

belonging to said stockholders, and bearing six per cent. interest, yet remain in said corporation or company as working capital, until such amount is voted free to the holders of said amount by the board of directors.'

"And thereafter said directors on the 30th day of June, 1899, without the knowledge or consent of plaintiff, received from a committee a report that said amount of $26,900, amounting to $25 per share *pro rata* to each stockholder of record January 1, 1898, with six per cent. interest to June 30th, 1899, had been distributed to said stockholders, which said report was fraudulent and untrue, in that plaintiff was a stockholder of record to the extent of 150 shares prior to January 1, 1898, but no part of said $26,900 was distributed to him.

"Plaintiff further says that as matter of fact no money other than the interest on the $26,900 mentioned in said orders was distributed to any of the stockholders, but that a stock dividend of twenty-five per cent. of the common stock was by said directors made, and the certificate thereof issued to nearly all holders of the common stock at that time, each of such persons receiving a number of shares equal to twenty-five per cent. of the shares previously held by him, and said defendant has regularly paid dividends upon the stock so issued to the holders thereof.

"Plaintiff further says that instead of distributing said stock dividend of twenty-five per cent. equally to all the common stockholders of said company, the defendant, by its said board of directors, wrongfully and fraudulently excluded this plaintiff from any participation in the same, and issued to plaintiff no shares of stock by way of dividend, and never paid him any dividends other than the regular cash dividends upon the original stock purchased by him as aforesaid, nor permitted him to share in the distribution of said surplus in any manner whatever.

"Plaintiff further says that he had no knowledge of the proceedings of said directors as to said twenty-five per cent. stock dividend, or of the issue of the certificates of said stock, or the payment of any dividend thereon, or of the fraudulent distribution of said surplus or any information whatever concerning the same, until the month of September in the year 1902, since which time plaintiff has frequently requested the president and directors of said company to correct the wrong so done him, and has demanded that they shall issue to him as they did to the other stockholders the twenty-five per cent. additional stock on the 150 shares so as aforesaid held by him, and to pay the dividends upon such stock as have been paid to other holders of the

same since the making of said stock dividend, with interest upon such dividends since the time they became due and payable, but plaintiff says that the defendant has refused, and still refuses, to take any steps or do anything towards issuing to him any additional stock as and for said dividend, or to make any payment of said dividend, or in any way compensate him for the same.

"Plaintiff further says that the defendant has on hand an ample surplus of earnings, and lawful power, by reason of the fact hereinbefore stated, to issue to the plaintiff a twenty-five per cent. stock dividend upon the 150 shares of stock held by him.

"Plaintiff further says that the defendant threatens to, and will, unless restrained by this court, sell and issue all the remaining unissued common stock of said company, which it is authorized to issue by virtue of its charter, and thereby deprive itself of power to issue to plaintiff the 37½ shares to which he is entitled.

"Wherefore, plaintiff prays that the defendant be restrained and enjoined by the order of this court from issuing any further or common stock until after it shall have issued to plaintiff the 37½ shares aforesaid, or from taking any steps to deprive itself of the lawful power to issue the same; and further that the defendant be required by mandatory order of this court to issue and deliver to plaintiff its certificate for 37½ shares of common stock of the defendant company, and to pay to plaintiff the dividends or the interest on the same of the same amount as the dividends and interest paid the other common stockholders since the first day of January, 1898, with interest upon such dividends from the date when they were declared. Plaintiff further prays that if, for any reason, it is found impracticable to order the issue of stock as aforesaid, that the court order an account to be taken to ascertain the value of the said shares of stock to which plaintiff is entitled as aforesaid, and the amount of the dividends paid since the first day of January, 1898, with interest on each of said dividends from the time when due and payable, and that the court order and decree the payment of the aggregate shares, dividends and interest to the plaintiff by the defendant and for such other and further relief as the nature of the case and equity may require."

The defendant interposed a demurrer to the petition, claiming that the action was barred by the statute of limitations. This demurrer was overruled in 1906, and after trial the plaintiff was given a decree,

The case was then taken on error to the general term of the superior court, where the cause was argued in October, 1907, and the judgment below reversed in November, 1907, in an opinion delivered by Judge Ferris, Judges Hoffheimer and Woodmansee concurring, and it was held that the cause of action stated in the petition was barred by the statute of limitations, and that the trial court should have sustained the demurrer to the petition on that ground. The general term also found other errors in the record, and remanded the cause to special term for further proceedings.

When the cause again came on to be heard in the superior court in special term, that court, in obedience to the judgment of the general term, sustained the demurrer to the petition, and the plaintiff not desiring to plead further, judgment was entered for the defendant.

The plaintiff below then prosecuted error to the circuit court (which has recently been authorized to review special term decisions), and alleged that the special term committed error when it sustained the demurrer in obedience to the opinion of the general term.

Peck, Shaffer & Peck argued in the circuit court for the plaintiff in error that a dividend when declared by a company immediately raises an obligation on the part of the company to pay each stockholder his *pro rata* share upon demand, and, upon demand and refusal to pay, an action can be maintained, but an action can not be maintained until after demand has been made. *Larwell* v. *Burke*, 19 O. C. C., 449, 513, 526 and 532; *Fuller* v. *Railway Company*, 8 N. P., 605; *State* v. *B. & O. Railroad*, 6 Gill, 364; *Bank* v. *Gray*, 84 Ky., 566; *Hager* v. *Bank*, 63 Maine, 509; *Cadogan* v. *Jackson Iron Company*, 76 Mich., 498; *Bedford* v. *Ashville*, 14 Lea, 525; *Scott* v. *Central Railroad Company*, 52 Barber, 45.

When a cause of action does not arise until a demand is made upon a claim, it necessarily follows that the statute of limitations does not begin to run until after the demand is made. *State* v. *Newman's Executor*, 2 O. S., 567; *King* v. *Nichols*, 16

O. S., 80; *Keithler* v. *Foster*, 22 O. S., 27; *Townsend* v. *Eichelberger*, 51 O. S., 215.

When a dividend is made by any corporation, the ordinary practice and duty of the company is to give notice to the stockholders, but no notice was given to the plaintiff of any of these proceedings or this distribution, and, therefore, the action is not barred by the statute of limitations, but is an action for relief on the ground of fraud in the misappropriation and distribution of a fund held in trust for the corporation. *Bank* v. *McIntyre*, 40 O. S., 538; *Carlisle* v. *Foster*, 10 O. S., 198.

Notice of the making of dividends, or in fact of any of the proceedings of the directors, is not to be inferred from the fact that the party is a stockholder. *King* v. *Railroad Co.*, 29 N. J. Law, 92.

The omission to disclose what it has become a particular duty to do, is fraudulent concealment. *Kelly* v. *Nealy*, 76 Maine, 71; *Massachusetts Bank* v. *Perry*, 144 Mass., 313; *Atlas National Bank* v. *Harris*, 118 Mass., 147; *St. Romer* v. *Levee Press*, 20 La. An., 381; *Philadelphia Railroad Company* v. *Cowell*, 28 Penn. State, 329.

The statute of limitations applies "in the case of a continuing and subsisting trust." The trust in the action at bar continues and subsists until it is discharged by due performance, as do other trusts. Where the directors of a company set aside a fund to be subsequently distributed, it constitutes a trust fund in the hands of the company. *Re Le Blanc*, 14 Hun. (affirmed in *Re Le Blanc*, 75 N. Y., 598); *LeRoay* v. *Insurance Co.*, 2 Edwards Chancery, 657; *Hunt* v. *O'Shea*, 69 N. H., 600; *Hagan* v. *Union Bank*, 63 Maine, 509.

Mr. Walter A. DeCamp argued for the defendant in error, that the action is barred by the six year statute of limitation (R. S., 4981). It being upon a contract not in writing, and the relation of stockholder to a corporation, with respect to a dividend, being that of debtor and creditor. After the dividend has been declared the company owes the stockholder his *pro rata* share as a debt, and if it is not paid, the stockholder

has a right of action in *assumpsit* for its recovery, and such a right is barred within six years, under Section 4981. Citing, *Clark & Marshall on Corporations,* Sections 517c and 522; *Jackson* v. *Plank Road Co.,* 31 N. J. L., 277; *2 Keener's Cases,* 1418; *Ellis* v. *Bridge Co.,* 19 Mass., 243; *Chaffee* v. *Railroad,* 55 Vt., 110; *Railroad* v. *Jackson,* 77 Penn. St., 321; *Cook on Stockholders,* Section 542; *Thompson on Corporations,* Section 2173; *Cook on Stockholders,* Sections 527-9; *Re Severn Ry. Co.,* 74 Law T. (N. S.), 219; *Turnpike Co.* v. *Wicliffe,* 100 Ky., 531; *Hunt* v. *O'Shea,* 69 N. H., 600; *Kane* v. *Bloodgood,* 7 Johns Ch., 90; *Bills* v. *Mining Co.,* 106 Cal., 9.

The fact that a plaintiff was not aware that he had a right to bring suit does not extend the time. *State* v. *Standard Oil Co.,* 49 O. S., 188; *Howk* v. *Minnick,* 19 O. S., 462; *Williams* v. *Coal Co.,* 37 O. S., 533.

The mere reference to fraudulent transactions in the petition, does not, of necessity, give character to an action as one grounded upon fraud. *Mass* v. *Miller,* 58 O. S., 483; *Mosher* v. *Butler,* 31 O. S., 188; *Evans* v. *Alberts,* 6 O. Dec. (Reprint), 820.

In Ohio, equitable as well as legal causes of action, are barred by the same statute of limitations. *Carpenter* v. *Canal Co.,* 35 O. S., 307; *Loffland* v. *Buch,* 26 O. S., 559; *Zieverink et al* v. *Kemper, Rec.,* 50 O. S., 208; *Combs* v. *Watson,* 32 O. S., 228; *Longworth* v. *Hunt et al,* 11 O. S., 194; *Yearly* v. *Long,* 40 O. S., 34.

Mr. DeCamp also urged that the exact point involved in this case was decided adversely to this plaintiff in error by the decision of the general term rendered in 1907 by unanimous court. This second writ of error in the same case is brought before this court because the Legislature abolished the general term in the spring of 1908, and conferred upon this court the power to review the special term decision. If this present petition in error raising a point already decided by the general term had come before the general term the second time, the judgment below would undoubtedly have been affirmed; and while this court, of course, is not bound by a decision of the general term, nor bound by the decisions of other circuit courts in

the state, yet for the sake of harmony in the decisions this court might well take into consideration the fact that the former appellate court which reviewed special term decisions had pronounced its judgment upon this point of law. In other words, this case coming by successive appeals to different tribunals, each of which was authorized to review the special term decision, the point which was adjudged in the first apppeal should receive the same construction on the second appeal for the sake of consistency and harmony of decision, if for no other reason.

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

The ruling of the Superior Court in General Term upon a demurrer should, when the case is transferred to this court, be followed unless clearly erroneous.

The petition discloses no misrepresentation by the board of directors upon which the plaintiff relied to his prejudice, nor the concealment by them of any fact not recorded in the minutes, which, on demand, were open to inspection by the plaintiff as a stockholder.

Whatever be the nature of the trust created by the resolution of the board of directors on January 10th, 1898, it terminated on or before June 30th, 1899, more than six years before the commencement of the action.

Although a demand was necessary before beginning the action, the failure to make demand did not suspend the operation of the statute of limitations. *Hawk* v. *Minnick*, 19 O. S., 462; *Douglass* v. *Corry*, 46 O. S., 349; *Townsend* v. *Eichelberger*, 51 O. S., 213.

Judgment affirmed.

PRESUMPTION AS TO RESCISSION OF CONTRACT FOR SALE OF LAND.

Circuit Court of Harrison County.

WILLIAM S. ROGERS AND BERTHA ROGERS v. WILBER E. SIMPSON.

Decided, November Term, 1908.

Contract—For Sale of Land—Failure of Performance by Both Parties —Rescission by Mutual Consent Presumed—Right of Vendee to Recover Money Paid.

Under a contract for the sale of land where a vendor is unable to make a deed at the time stipulated or within a reasonable time thereafter, and the vendee does not waive such default, but neglects to tender performance on his part for an unreasonable time, the rescission of the contract may be presumed by mutual consent, and in such case the vendee may maintain an action to recover the money advanced upon the contract.

A. O. Barnes and *J. B. Busby*, for plaintiffs in error.
Perry & Rowland, contra.

COOK, J.; BURROWS, J., and LAUBIE, J., concur.

The action of defendant in error, plaintiff below, was to recover on two causes of action; one for five hundred dollars damages for breach of contract in the sale of land, and the other to recover back the sum of two hundred dollars paid on the sale at the time of the execution of the contract. There was a general denial to both causes of action, and also a claim of offset by the defendant for fraud claimed in the sale of some personal property. There was a verdict and judgment in favor of defendant in error.

August 1, 1906, William S. Rogers and wife, by contract in writing, sold to Wilber E. Simpson a tract of land for the sum of thirty-one hundred dollars, upon which sale Simpson paid two hundred dollars when the contract was executed. By the terms of the contract Rogers and wife were on the 1st day of April, 1907, to execute to Simpson a quit-claim deed in fee simple for the premises, at which time delivery of possession of the prem-

ises was to be made; and upon the delivery of the deed and possession Simpson was to pay eight hundred dollars and execute notes and mortgage upon the premises for twenty-one hundred dollars, the balance of the purchase money.

On the 1st day of April, 1907, nothing was done by either party respecting the contract, but several days thereafter Simpson demanded of Rogers his deed, but at the time of the demand Simpson made no tender of the eight hundred dollars, or of the notes and mortgage duly executed as required by the contract, and in fact the evidence shows that at the time of the demand he did not have eight hundred dollars or the notes and mortgage. Simpson made several subsequent demands of Rogers for the deed, but at no time upon making the demand does the evidence show that he had the eight hundred dollars or the notes and mortgage duly executed, or that he informed Rogers that he had the money and the notes and mortgage ready to be delivered, but as a matter of fact he did not have the eight hundred dollars and the notes and mortgage duly executed at the time he made such demands for the deed, or any of them.

Under the undisputed evidence therefore Simpson could make no claim for damages for breach of contract, and his case must necessarily fail upon that cause of action. This is distinctly held in the case of *Rondabaugh* v. *Hart,* 61 O. S., 73.

The next question that is made is: Could Simpson recover back the two hundred dollars paid upon the contract set up in his other cause of action?

The agreement of Rogers and wife was that they were to convey the land by a quit-claim deed in fee simple on the first day of April, 1907, when possession was to be delivered. On the first day of April, 1907, Rogers and wife did not have a complete title for the land; they only had title for the undivided one-third part of the land. They were aware of the defect in their title and endeavored to perfect it by obtaining quit-claim deeds from the owners of the other interest, but up to the time of the trial of the case they did not have a complete title. This amounted to a rescission of the contract upon their part. Demand had been made upon them under the contract for a deed

in accordance with the contract; this they refused for the reason they could not execute such deed and as Simpson was also not in position to perform the terms of the contract on his part, he is presumed to consent to the rescission. Such consent, however, did not deprive him of the right to be placed in the same position as before the contract was made. He should not be a loser by the mutual rescission of the contract.

In the case of *Money* v. *Kirk & Cheever,* 19 O. S., 379 it is held:

"The delinquency of the vendee in failure to tender payment for a week after the contract was made, gave rise to the conclusive presumption as against him, of his assent to a rescission of the contract, and authorized the vendor to act on that presumption."

In the case of *Lewis* v. *White,* 16 O. S., 444, it is held:

"Generally, in contracts of this kind, the parties being free by mutual consent to enter into them, they are, by like mutual consent, free to rescind them; and where the vendor by reason of an outstanding incumbrance, is unable, for more than two weeks after the time fixed by the contract, to convey the 'perfect title' which he was bound to furnish; and the vendee then demands from the vendor such conveyance, and offer to perform the stipulations of the contract on his part; and then, on the failure of the vendor to comply with such demand, notifies him that he rescinds the contract, and thereafter treats the same as rescinded, and the vendor remains delinquent for an unreasonable time thereafter, his consent to a rescission of the contract is conclusively presumed from his delinquency."

On page 454 in the opinion it is said:

"Now, these parties were free, by mutual consent, to enter into this contract; and they were as free, by like mutual consent, to rescind it. On the 8th of May, and from thence forward, the vendee actually and in terms consented to its rescission; and the vendor, by a delinquency on his part unwaived by the vendee, and unreasonable in itself, is conclusively presumed to have given like consent and such is the doctrine of the books. Parsons on Contracts, 677, *et seq.*, says:

" 'Generally, as a contract can be made only by the consent of all the contracting parties, it can be rescinded only by the con-

sent of all.. But this consent need not be expressed as an agreement. If either party, without right, claims to rescind the contract, the other party need not object, and if he permit it to be rescinded, it will be done by mutual consent. Nor need this purpose of rescinding be expressly declared by the one party, in order to give the other the right of consenting and so rescinding. There may be many acts from which the opposite party has a right to infer that the party doing them would rescind; and generally where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded.' * * *

"And we can see no reason why, on the facts assumed, the vendee has not a right, under his cross-petition, to recover back the money paid in hand by him on the making of the contract of sale."

We are therefore of opinion that the cause of action of plaintiff's petition wherein he sought to recover back the amount he had paid on the contract is well founded and as he recovered no greater sum than he was clearly entitled to, the judgment must be affirmed.

DEFECTIVE CHATTEL MORTGAGE AND CONDITIONAL SALE LIENS.

Circuit Court of Miami County.

BOYER ET AL v. HOWLAND ET AL.

Decided, 1908.

Chattel Mortgages—Failure to Refile—Subsequent Seizure of Property by Mortgagee—Rights of General Creditors—Conditional Sales—Stringent Compliance Required with Statutory Provisions—Sections 4155 and 4155-2.

1. Where a chattel mortgage expires without payment having been made and it is not refiled within thirty days pursuant to the statute, the lien becomes dead, and it can not be revived to the injury of creditors by the mortgagee taking possession of the property.
2. The policy of this state requires literal compliance with statutory provisions with reference to conditional sales, and omission by the vendee to file an affidavit with his claim in the office of the county

recorder renders the lien of the vendor under the conditional contract invalid.

DUSTIN, J. (orally); SULLIVAN, J., concurs; WILSON, J., not sitting.

William Howland absconded from the city of Piqua, leaving his business and family. Certain creditors, who had been, and considered themselves still, mortgagees of some machinery, undertook to take possession thereof, and brought proceedings for the appointment of a receiver to continue the business for a time and wind it up. Certain machinery not included in the chattel mortgage had been sold to Howland upon conditional terms of sale, title to pass when the payments were completed. This machinery was sold by parties in New York where the contract was made.

The parties who claim to have a chattel mortgage on the machinery had allowed the chattel mortgage to expire without refiling, pursuant to the statute. The parties in New York, who sold the machinery upon conditional terms as to title, had filed the conditional contract, but had not complied with the statute of Ohio in this, that there was no affidavit on the part of the vendor as to how much was due to the vendee.

The receiver by the consent of all parties sold the premises, including the machinery involved here, and the proceeds are for distribution. The abandoned wife of Howland put in a claim for homestead.

The common pleas court upon the facts presented, and they are not disputed, allowed the claim of the mortgagees as against general creditors, upon the theory that, by taking possession of the goods, a lien was effected which was good as against all others, notwithstanding the time for refiling the chattel mortgage had expired.

The common pleas court also held that the conditional sale was invalid as against creditors, both general and specific, and appeal was taken to this court by the dissatisfied parties. It has been quite an important and interesting case.

On the part of the receiver, as against these mortgagees, we have the argument, founded chiefly upon the case of *Cooper* v.

Koppes, 45th Ohio State Reports, page 625, that this mortgage was not renewed and was dead and inoperative and ineffective as to all persons, excepting of course as to the mortgagor.

The case of *Cooper* v. *Koppes* held as follows:

"1. A chattel mortgage which is not reverified and refiled within thirty days next preceding the expiration of one year from the filing thereof, in pursuance of Section 4155 of the Revised Statutes, is void as against creditors and *bona fide* purchasers and mortgagees; nor is it revived as to them by being reverified and refiled after the expiration of one year from the former filing.

"2. Such mortgage, so refiled four days after the expiration of the one year, creates no lien upon the mortgaged property as against a levy in favor of an execution creditor made after such refiling."

The argument on the behalf of the mortgagees is that although the statute, Section 4155, says in case of no refiling within thirty days next preceding the expiration of one year from the filing thereof, it shall be void as against creditors, mortgagees and innocent and *bona fide* purchasers, that what is meant is creditors who have obtained an attachment or judgment or otherwise fastened their liens upon the property, and not general creditors, although that is the phrase used. The language is as follows:

"Every mortgage so filed shall be void as against the creditors of the person making the same, after the expiration of one year from the filing thereof, unless within thirty days," etc.

How are we to get around that? It says "creditors." After the expiration of a chattel mortgage that was not refiled, all creditors have the right to presume, and are so notified by the condition of the record, that it has been settled. Why, if that is not to secure such creditors, are they included? It would be an injustice, it seems to us, and very grossly inequitable, to allow a mortgagee who had allowed his mortgage to expire to come in thereafter and take possession of the goods or refile his mortgage, as referred to in the case of *Cooper* v. *Koppes*—gross injustice to those who in the meantime had given the debtor credit upon the state of the record. The reasoning of the learned judge in the common pleas court, as against his own declared ideas, is

based on a series of decisions which in his view confirm the theory of the defense on behalf of the mortgagees, that they can, by taking possession, accomplish the same thing as by a new mortgage, or that they would have accomplished by the refiling of their mortgage. We do not hold to the same view—we can not reconcile our ideas to that theory; neither can we reconcile the decision in *Cooper* v. *Koppes* with that theory and the language of the court. Judge Owen, in the decision of that case, says:

"That the continuity of the lien was broken, and the mortgage was void * * * as to creditors. Here then, by common concession was as to creditors a dead lien. Where in the statute do we find authority to resurrect or revive it? There is none. The contract originally entered into between the parties was forever at an end, so far as it could affect creditors, and *bona fide* purchasers and mortgagees. He held it free from all liens as against creditors. It was not in the power of the mortgagor, by his own act, to create such a lien. Such lien could only have been created through convention of the parties. The possession by the mortgagor of the property presumed his ownership of it," etc.

We think that is the proper view of the matter, and we can not reconcile our ideas in this case to the theory of the court below, in which, as I have said, he decided against his own views, but presumedly in accordance with the authorities.

The lien was dead and it could not be revived so as to injure creditors—that means all creditors.

Now as to the other question, the conditional sale. We have examined that but not to our satisfaction; we do not propose to pass upon that question now; we have indicated our view upon the other matter, and I may add here that the homestead claim will be allowed as against the general creditors and against the mortgagees, but as to the other we would like to have further light. It does not seem to us justice or equity to allow the general creditors the advantage of having this machinery, which sold for much more than the lien of the vendor and yet had never been paid for. For, even after the vendor has been satisfied, it is beneficial to the creditors. To cut out the mortgagees for the reason that the affidavit was not signed by the vendor does not strike us favorably, and we want to see our way out of so

holding. Would it not be inequitable to allow that technicality to stand in the way of their receiving the value of their property? Nobody was deceived in the matter, the chattel mortgage or conditional contract of sale was on file, and the amount of the claim was stated there. We will not pass on that question now, but reserve it until later.

The general entry need not go on until we have more light.

Later, the court held that the lien of the vendor under the conditional contract was invalid. The policy of the state requires literal compliance with the statute, although seemingly working injustice in this case.

LANDLORD AND TENANT—QUITTING PREMISES WHICH HAVE DETERIORATED.

Circuit Court of Hamilton County.

GRAU ET AL v. LONGWORTH.

Decided, January 23, 1909.

The fact that premises have deterioated does not afford a tenant sufficient reason for quitting them, unless it appears that they have become unfit for occupancy for the purposes for which they were leased.

Colon Schott, for plaintiff in error.

Ernst & Cassatt, contra.

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

The evidence in this case does not tend to show that the building leased by Grau from Longworth was destroyed or so injured by the elements or other cause so as to be unfit for occupancy; and the court was right in instructing a verdict for the plaintiff. The evidence tends to show that the repairs made on the building made the premises less desirable for the business that plaintiff in error was engaged in, but this is not sufficient ground under the statute to authorize the tenant to quit the premises. The premises must be made unfit for occupancy and there was no evidence which tends to show this.

Judgment affirmed.

FAILURE OF A SCHOOL BOARD ACT IN UNIFORMITY OF OPERATION.

Circuit Court of Hamilton County.

STATE, EX REL STEPHEN B. MARVIN, v. JOHN M. WITHROW.

Decided, March 6, 1909.

Constitutional Law—Uniformity of Operation of Section 3897—Destroyed by Its Terms—Boards of Education—Office and Officer—Quo Warranto.

1. The uniformity of operation of Section 3897, relating to boards of education in city districts, as amended in 99 O. L., 584, is destroyed by force of the terms of the act, and as amended this act is therefore unconstitutional and void.
2. Previous to its amendment this act was general in character, and so far as its terms were concerned operated uniformly throughout the state, and divested of the amendment the act is unconstitutional.
3. The president of a board of education is an officer within the meaning of the statutes providing for his election and fixing his duties.

Simeon M. Johnson and *William Thorndyke,* for the relator.
Worthington & Strong, contra.

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

The facts which are decisive of the issues are not in dispute. Section 3897, Revised Statutes, passed in 1904, provided that in city school districts the board of education should consist of not less than two members nor more than seven members elected a large, and not less than two nor more than thirty members elected from sub-districts. It further provided that in cities containing a population of less than 50,000 the board of education should consist of not less than three members nor more than seven members elected at large.

Under the provisions of this act, the five cities of this state having a population of over 50,000 had, at the time this act was amended, May 9, 1908, boards of education constituted as follows:

CITY SCHOOL BOARDS.	AT LARGE.	SUB-DIS.
Cincinnati	3	24
Cleveland	5	2
Columbus	3	12
Toledo	3	2
Dayton	2	10

This act was amended May 9, 1908 (99 O. L., 585). By this amendment it is provided that in city school districts the board of education shall consist of not less than three nor more than seven members elected at large, provided that in cities having a population of more than 50,000 persons the board shall consist of not less than two nor more than seven members elected at large, and of not less than two members nor more than twelve members elected from sub-districts. By this act the members to be elected at large from cities is changed from "not less than two to not more than seven at large" to "not less than three to not more than seven," with a proviso that in cities of more than 50,000 it should consist of not less than two nor more than seven members at large and not more than twelve members from sub-districts. Cities of more than 50,000 are thus brought within the proviso, whereas in the former act cities of less than 50,000 were brought within the proviso. It is further provided in the act as follows:

"Provided, further, that whenever the number of the members of the board of education in the school districts of cities which at the last or any subsequent federal census may have a population of more than 50,000 persons is changed under the provisions of this act, then such board of education shall consist of not less than three members nor more than seven members elected at large by the qualified electors of such city school district."

The effect of this act was to change the board of education in Cincinnati and not in the other four cities in the same class. It deprived the city of Cincinnati from having in its board of education any members from sub-districts, and required the board to have at least three members at large instead of two members at large, which the other cities might have, and which the city of Dayton now has. The act, therefore, does not operate uni-

formly throughout the state in cities within the same class, and the uniformity is destroyed by force of the terms of the statute, and not by the discretion lodged in the cities themselves.

Nor does this act bring Cincinnati within the provisions of the statute applicable to cities under 50,000 persons—for the board created by this act contains members at large who were not elected by the qualified electors of the city at large, but members at large who were elected from sub-districts and who became members at large by being chosen by lot. The result is that this act applies only to the city of Cincinnati. That it was intended by the Legislature to apply only to the city of Cincinnati is certain by the terms of the act when considered in connection with the facts that existed at the time in the different cities of the state. If there could possibly be any question as to this, it is quickly dispelled by reading the House and Senate journals at the time of the passage of the act.

Having arrived at this conclusion, little else need be said; nothing by way of argument—for it is now a settled law of this state that a law of this character is a law of general nature and must have a uniform operation throughout the state, as required by Article II, Section 26, of the Constitution.

The Supreme Court of the state having so frequently declared such attempts to violate this wise provision of the Constitution to be invalid, it seems somewhat strange that this law was enacted.

It is urged that the office of president of the board of education is not a public office, and therefore Section 8, Revised Statutes, which provides that any one holding an office or public trust shall continue therein until his successor is elected or appointed or qualified, does not apply to the relator, his term of office having expired January 1, 1909.

We think, however, that the office of president of the board of education is an office coming under this section. Under Sections 3974, 3980, 3982, 3983 and 3984, the president performs other duties besides acting as presiding officer at the meetings of the board, and by virtue of his office he performs for the state the important office of executing deeds for real estate and being

the custodian of the bond of the clerk. It would seem to be an office under the holding of the Supreme Court in the case of *Attorney-General* v. *Anderson*, 45 O. S., 196.

It is further urged that the relator has estopped himself by his conduct in participating under the law in the reorganization of the board. We think this proposition can not be maintained. *Mt. Vernon* v. *State*, 7 O. S., 428, and the leading case of *Turnipseed* v. *Hudson*, 50 Miss., 429.

It is unfortunate, to say the least, that the affairs of this important board should be placed in this confused condition, and, while we regret it, it is not within our judicial power to prevent it.

It is urged that if the law of 1908 is unconstitutional the law of 1904 is also unconstitutional, but we are not inclined to hold that the law of 1904 is unconstitutional. The law is general in character, and, so far as the terms of the law are concerned, operates uniformly throughout the state. The discretion lodged in the cities as to the number of the members constituting the board does not destroy the uniformity of its operation.

If we are correct in our conclusions, it follows that the relator is entitled to the office.

DECISION ON REHEARING.

This case was heard and decided, and on motion for a new trial full time was given for oral argument, and additional briefs have been submitted on both sides. This is justified when the great importance to the public of the question involved is considered.

Before proceeding to a decision of the question at issue the court desires to say, that at the conclusion of the oral argument at the former hearing and the submission of briefs, the court did not understand that further briefs were to be submitted and the decision of the case postponed on that account. The court deemed the case of great importance to the community, and that an early determination by the court of the case would be desirable, especially as the Legislature was about to adjourn,

and if the court found any defects in the law such defects might be corrected by the Legislature before adjournment. With this idea in view the court immediately took up the case and considered it, and the result was the decision heretofore announced. The decision was reached before the additional brief of the relator was handed in.

In our former decision we thought the question raised, that the relator could not be heard in this action by reason of his conduct, was settled by the decision of *Turnipseed* v. *Hudson,* 50 Miss., 429. It seemed to us to be directly in point, and that it had the sanction of our own Supreme Court as correct law on the question that it did decide, and therefore we contented ourselves by simply saying that the question was determined by that case; but it is urged with much learning and ability by the learned counsel for the defendant that the Turnipseed case is not the leading case on the subject, and that it is not in point in this case.

This question is discussed by counsel under the heading "Acquiescence."

In *Herman on Estoppel and Res Judicata,* in Chapter XII, Estoppels *in Pais* and Equitable Estoppels, at Section 776. the author says:

"If a person having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act and who might otherwise have abstained from it, to believe that he assents to its being committed, he can not afterwards be heard to complain of the act. This is the proper sense of the term "acquiescence" and in that sense it may be defined *"quiescence" under such circumstances as assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct."*

The decisions in which this term is mostly found are those in cases involving rights to land. We have only found one case in the English cases in quo warranto where this term is used. (There may be many others, however, as we have made no extended search.) It is the case of *The King* v. *Dawes,* 1 W. Bl., 634. Lord Mansfield in deciding that case says:

"Therefore, upon these grounds, taken jointly and not separately (1) the behavior and long acquiescence of the informers knowing the disqualification, and (2) the motive of informers for now moving it, and (3) the probable consequences to the borough of granting this information, we are all of opinion that it would be contrary to the trust reposed in this court by the statute of Queen Anne for quickening the amotion of usurpers to permit these informers to have the assistance of the court in this case thus circumstanced."

The "long acquiescence" in this case was from 1753 to 1767.

In the other English cases to which we have been referred the rule of law that there obtains, we think, is fairly stated by Lord Denman in the case of *The Queen* v. *Greene,* 42 E. C. L., p. 760, as follows:

"I am of the opinion that the objection here taken is good. It is not necessary to scan particular cases. The principle is that he who has concurred in inducing a party to exercise an office can not be heard in this court on an application to turn him out of the office."

Williams, J., in the same case says:

"If Brassington, knowing the supposed irregularity in this election, still administered the declaration without which Greene could not act, he can not now complain that Greene is acting."

It can not be claimed that Marvin knew that this law was invalid. His conduct was brought about by the terms of the statute, and Withrow took the office, not by reason of the conduct of Marvin, but because as he thought the law authorized it, and which he still claims is authorized by it and which he claims is valid.

It is not necessary to set out the facts in the Turnipseed case, nor to refer to the different propositions contained in the syllabus. The force of the argument on which the decision rests is found in the latter part of the decision and is as follows:

"The true rule in a case like the one before the court would seem to be that in order to create a vacancy the party must permanently disable himself from performing the duties of the office, either by himself or deputy, or he must by acts and dec-

larations manifest a clear intention to willfully abandon the office and its duties, an intention not shown by the record.

"Holding the order of the board of supervisors declaring a vacancy in the office in dispute standing alone unacted upon, to be nugatory, this cause is narrowed down to the single question, whether the delivery by the respondent was a resignation by implication so as to create a vacancy. No determination on the part of the relator to abandon the office, in any sense of that term within the authorities, is manifest. On the contrary he did not desire to vacate. It is apparent that he was deluded by the unwise and illegal statute. * * *

"In view of this discussion the case at bar may be summed up thus: that both parties acted under a delusion caused by what proved to be an illegal statute and a void election; that Hudson acted upon no representation express or concealed of Turnipseed, but upon the statute referred to; and that the relator delivered the office to the respondent, not from a desire purposely or willfully to abandon the office and its duties, but in obedience to a law of the Legislature, approved by the Governor, and its enforcement threatened by the local district attorney. When the act which has caused this litigation was declared unconstitutional, the relator demanded of the respondent a restoration of the office to which, upon the record and the authorities as they are understood, he was legally and equitably entitled."

It can scarcely be claimed in the case at bar that the defendant was induced to take the office in controversy by any representations made by the relator, or that the relator did anything other than manifest a desire and willingness to comply with the act of the Legislature, which no doubt at the time he believed and had a right to believe was a valid act. No intention to abandon the office is shown by the relator, and there is a total lack of evidence tending to show that he either induced or tried to induce the defendant to accept the office, either through representations express or implied. If these elements are lacking in the case, it is difficult to see wherein the relator has estopped himself by this conduct from asserting his right herein.

We can not help but think the Turnipseed case is in point, the only difference being that in that case the law had been declared unconstitutional, and in this case it is sought to declare the law unconstitutional, the rights of the parties in either case depending on the illegality of the act. But this can make no difference

when considering the conduct of the parties with reference to the different acts. At the time the parties acted, both laws were regarded by the parties as being legal, and their conduct must be looked at with this idea in view. Of course in this case, if the law is valid, the relator has no standing in court. His rights depend upon its invalidity, and it seems to us that estoppel by conduct has not been shown.

We adhere to our former judgment in holding the law unconstitutional. Nor do we think much should be added to what was said in the opinion. While the act in question is properly subject to criticism as to its wording, its intention and meaning seem free from doubt. We arrive at this conclusion after giving due consideration to all of the words of the act, taken in connection with the facts that existed at the time and the mischief to be remedied by it. When thus construed it can have but one intent and purpose, and that is, to create in the city of Cincinnati a "small" school board. Courts can not profess ignorance of facts universally known.

It is equally clear that the intent and purpose of this act was that it should not affect the other four cities placed in the same class by the act of 1904. To hold otherwise would defeat the clear intention of the Legislature, and give an effect to the act that was clearly not contemplated. The purpose of this act was to change the school board of the city of Cincinnati, which it then had, and which was a large board consisting of twenty-seven members, to a small board consisting of not less than three and not more than seven members. At the same time it was the intention of the Legislature that the other cities in the same class with Cincinnati should not be compelled to change their boards from large to small boards. It follows that it did not operate uniformly throughout the state.

INJURIES FROM A FALLING SIGN.

Circuit Court of Franklin County.

OWEN SMITH v. HENRY MILLER AND JAMES T. MILLER.

Decided, February, 1909.

Negligence—Action for Injuries Where a Sign Fell on a Pedestrian—Landlord and Tenant—Circumstances Fixing Liability—Evidence—Verdict Directed for the Defendant.

1. The fact that a sign fell to the sidewalk, injuring a pedestrian who was passing thereunder, affords some evidence, as a matter of law, that someone was negligent in not maintaining it in a safe condition.
2. But liability in such a case depends upon who was in possession and control of the building at the time of the accident; and where there is no testimony that the defendants owned the building, or were in possession or control, and therefore no evidence that they were bound for repairs, it is not error to direct a verdict in their favor at the conclusion of the testimony for the plaintiff.

Samuel Huston, while the owner of a business block in Columbus, this state, rented certain front rooms to E. G. Orebaugh for the purpose of a real estate office, but reserved no control over these rooms. Mr. Orebaugh sublet desk room to D. B. Hillis, an insurance agent. Mr. Hillis placed a sign under the window in front of his office—a long board, upon which was painted the word "Insurance." In 1903, Mr. Huston sold the building to James Miller, and Mr. Orebaugh continued as a tenant under an annual lease. Less than one year after the sale of the property, the sign blew down during a storm, and in falling struck the plaintiff in error, who sued Henry Miller for $10,000, and subsequently brought in James T. Miller by amended petition.

Mr. M. E. Thrailkill argued in behalf of the defendants in error that, in Ohio, a tenant or lessee has a right to put up signs on a building which he leases, subject to municipal regulations. A tenant leases the outside as well as the inside of the build-

ing, and the lessor can not prevent his putting up signs unless such a restriction is in the contract of lease; and the weight of authority seems to establish the following rules:

1. Where there is an inherent fault in design or construction, chargeable directly to the lessor, he may be held liable.

2. Where the dangerous condition arises from an act of the lessee or tenant, or after the letting, the lessor is not liable unless he retains control over the premises and negligently permits a nuisance.

3. Where property is demised, and at the time of the demise is not a nuisance, but becomes so by the act of the tenant while in his possession, and injury happens during such possession, the owner or lessor is not liable. Citing: Shindelbeck v. Moon, 32 O. S., 264; Edwards, Admr., vs Rissler, 5 C. C.—N. S., 44; Burdeck v. Cheodle, 26 O. S., 393; Bailey v. N. O. U. Gas Co., 4 C. C., 471; Schwalbach, Admr., v. Shinkel, 42 B., 170; Persell v. English, 10 B., 143; 18 Am. & Eng. Enc., 240, *et seq.*; Thomas on Negligence, p. 710.

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

Plaintiff in error contends he was prejudiced by the courts below in sustaining the motion of the defendants in error to direct a verdict in their favor, at the conclusion of the testimony introduced by him in support of the averments of his petition. Judgment for defendants' costs was entered up against plaintiff in error, and these proceedings are brought to reverse said judgment.

The action was brought by plaintiff in error to recover damages for injuries resulting from the defendants' negligence.

The acts of negligence set forth in the petition are that the defendants, being owners and controllers of a certain building fronting and abutting upon High street in the city of Columbus, some five years prior to the injuries to plaintiff, the erection upon the front of said building upon the third story and about thirty feet above the sidewalk in front of said premises a wooden sign twenty-four feet long by two wide and one inch in thickness; that during all of said period it remained on said

building in the position described; that in its original construction or by lapse of years it became dangerous and unsafe to persons in the lawful use of the sidewalk immediately thereunder; that the defendants knew or by the exercise of ordinary care could have known of its dangerous condition, and plaintiff did not have such knowldege; that on or about the 26th day of December, while plaintiff was walking upon the sidewalk below and immediately in front of said building said sign suddenly gave way and fell upon plaintiff, causing the injuries of which he complains.

The answer of the defendants is a general denial putting in issue all averments of the petition necessary to be proven to entitle plaintiff to recover.

Whether the defendants were the owners or in control of the building when the accident occurred was by this answer made an issuable fact. We do not find any testimony in the bill of exceptions to sustain this averment of the petition.

Neither does the bill contain any testimony showing or tending to show that the method of attaching the sign to the building was faulty, and the fact as disclosed by the testimony that it had been there for several years prior to the accident would furnish a fair inference, at least, that there was no negligence on the part of any one in that respect. Aside from the fact of the sign falling, there is no testimony that in course of time the appliances attaching it to the building had become loosened, and no longer able to sustain the weight they gave way and the sign fell. This, however, was some testimony in support of the claim that some one at least was negligent in not seeing that the sign in its position was maintained in a safe condition, who would be liable for injuries resulting from this negligence as a matter of law, we think fully settled by the law of this state fixing it upon the party in possession and control of the building at the time.

In the absence of a contract to that effect the landlord is not bound for repairs. This obligation rests upon the lessee in such a case. If the defect which caused the accident occurred during the occupancy and control by the lessee then the land-

lord would not be liable. Here, in the first place, there is no testimony showing that the defendants were the owners at the time, or had any control over the building, and if either owned it, there is no testimony showing or tending to show they were bound for repairs. This being the state of the record, we are therefore of the opinion that plaintiff in error was not prejudiced by the court below directing a verdict for defendants and entering judgment against plaintiff for costs. The judgment is therefore affirmed at costs of plaintiff in error.

CHARACTER OF PROCEEDINGS FOR VACATION OF A STREET.

Circuit Court of Cuyahoga County.

IN RE VACATION OF PART OF HARTFORD STREET IN THE CITY OF CLEVELAND.

Decided, February, 1909.

Vacation of Street—Proceeding for, is Special—Not Appealable—Sections 1536-148-149-150 and 5236.

J. A. Fenner, for plaintiff.
Newton D. Baker, City Solicitor, contra.

WINCH, J.; HENRY, J., and METCALF, J. (sitting in place of Marvin, J.), concur.

Heard on appeal.

In this case we hold that a proceeding brought under favor of Sections 1536-148 to 150, Revised Statutes, for the vacation of a street, is a special proceeding, as distinguished from a civil action, and so is not appealable to the circuit court under Section 5226, Revised Statutes.

So holding, the appeal is dismissed for want of jurisdiction.

DISMISSAL OF INSUFFICIENT PETITION NOT RES JUDICATA.

Circuit Court of Lucas County.

ELLEN ST. AUBIN v. CITY OF TOLEDO.

Decided, January 16, 1909.

Res Judicata—Decision Adjudging Petition Defective and Directing a Verdict for the Defendant—Does not Preclude the Bringing of Another Action.

A decision of the common pleas court holding a petition insufficient in that it fails to state facts justifying its submission to the jury, and directing a verdict for the defendant, is not *res judicata* of an issue of fact in another suit based upon the same cause of action and between the same parties.

Peter Emslie, for plaintiff.

C. A. Northup and *C. H. Masters,* for defendant.

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

Error to Lucas Common Pleas Court.

This is an error proceeding to reverse a judgment of the court of comon pleas rendered in favor of the defendant below, who is the defendant here, upon the sustaining of a general demurrer to plaintiff's petition. Although the petition in the first instance clearly discloses facts originally constituting a cause of action, it adds allegations which are claimed by defendant to show that the right of the plaintiff is barred by a prior adjudication. The petition does allege the beginning of a former suit, its partial trial, a motion to arrest the case from the jury and says in substance that the court, holding the petition to be insufficient, directed a verdict for the defendant. It is not averred that either a verdict or judgment was rendered. There is in the present case, however, no demurrer on the special ground that the former action is still pending; and while the petition does not in terms say that the former suit went out of court upon the court's directing the jury to return a verdict, it is evident that the pleader really intended to charge that. Indeed,

counsel on both sides have construed this petition as treating the former action as at an end, as having been disposed of by the direction of the court to the jury to render a verdict. In one of the adjudications of the Supreme Court it is stated, in substance, that the rendering of a verdict by the jury after the court has directed one to be rendered is little more than a technical or formal thing. That the submission of a case to the court on motion to direct a verdict, and the ruling of the court upon that motion, is a decision of the issues to such an extent that it is treated as the final submission to the court, so that a party is not thereafter permitted to dismiss his cause without prejudice. That was held in a case in the Cuyahoga circuit in which I sat with two of the judges of that circuit, *Turner* v. *Car Co.*, 9 C. C.—N. S., 65 (affirmed, *Turner* v. *Car Co.*, 79 Ohio St., —), although the court at the time the plaintiff attempted to dismiss had not really directed the verdict, but had only expressed its intention to do so, having upheld the contentions of the defendant. We are disposed then to construe this petition somewhat liberally and broadly, but in accordance with the construction which has been placed upon it by counsel on both sides, as alleging that the former action was determined, and as assuming that the jury did what they undoubtedly should have done and probably did do, render a verdict as directed by the court, and that the court thereafter did what the court was required to do, that is, render a judgment upon the verdict in favor of the defendant. That being so, the question is, is that an adjudication of the cause of action so as to bar the present suit?

The case of *Rafferty* v. *Traction Co.*, 1 C. C. —N. S., 538, was decided by this court while Judges Parker, Hull and Haynes constituted its membership. The opinion was rendered by Judge Hull and the syllabus is:

"A cause of action does not become *res adjudicata* by reason of the fact that a former suit, involving the same subject-matter was dismissed on the grounds that the petition did not state facts sufficient to constitute a cause of action.

"A plaintiff in such a case stands in the position of one to whose petition a demurrer has been sustained; and the fact that no demurrer was interposed, but instead a motion to exclude

the plaintiff's evidence and direct a verdict for the defendant, which was granted and judgment rendered on such verdict, does not change the position of the plaintiff nor render his suit *res adjudicata.*"

This case went to the Supreme Court and was affirmed as entitled, *Toledo Trac. Co.* v. *Rafferty*, 71 Ohio St., 497, and the affirmation by the Supreme Court is important, in view of the fact that it is said by the Supreme Court, although the case is unreported in other respects, that the judgment is affirmed on the grounds stated in the opinion of the Circuit Court of Lucas county, *Rafferty* v. *Traction Co., supra.* In other words, the Supreme Court seem to have endorsed the views expressed by Judge Hull.

The petition before me in the case at bar states that upon the former petition the court concluded that the petition was insufficient, that it did not state facts, and for that reason directed the jury to render a verdict for the defendant. It is impossible for us in view of this allegation to distinguish the case before us from *Rafferty* v. *Traction Co., supra.* In other words, we are compelled to hold that the decision of the court of common pleas in the former suit begun by Ellen St. Aubin, that the petition therein was insufficient in that it did not state facts to justify letting the case go to the jury, and the consequent direction of a verdict for the defendant, did not adjudicate the issue of fact presented in the present suit, and I have already said that the present petition in other respects than those referred to is abundantly sufficient. We think, therefore, that the court below erred in holding that the demurrer should be sustained to this petition upon the ground that the petition does not state facts constituting a cause of action. Lor that reason the judgment is reversed and the cause remanded with directions to overrule the demurrer to the petition, and for further proceedings according to law.

ULTRA VIRES ACTS BY DIRECTORS.

Circuit Court of Hamilton County.

BALDWIN V. EGAN ET AL. *

Decided, December 5, 1908.

Corporations—Good Faith of Directors—Ultra Vires Agreements and Purchases of Property—Will not be Ordered Rescinded, When.

Where the necessities of a corporation required the rentention of real estate which had been acquired under an *ultra vires* contract and compromise of pending suits, a court will not in the absence of fraud or bad faith order that the agreements be rescinded and a reconveyance made.

Charles B. Wilby, for plaintiff in error.
Morison R. Waite, contra.

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

The contract of February 16, 1893, although referring to the purchase of the real estate by the pronoun "I" is signed by "The Egan Company. Thos. P. Egan, Pres't," and is therefore the contract of the company.

The agreement to pay $30,000 in stock of the J. A. Fay & Egan Company for the real estate and the agreement to repurchase the stock on or before ten years from date at $45,000 constituted one indivisible contract, and was assumed by the J. A. Fay & Egan Company when it purchased the business—assumed and agreed to pay the debts and liabilities of the Egan Company.

The contract could not, although *ultra vires,* be rescinded without a tender and ultimate reconveyance of the real estate.

The necessities of the company justified the retention of the real estate and a compromise of the pending suits to recover the $45,000 on return of the stock, and in the absence of fraud and bad faith the judgment will be affirmed.

* Affirming *Baldwin* v. *Egan et al,* 5 O. L. R., 476.

A DECREE OF DIVORCE MAY BE SET ASIDE AFTER TERM FOR FRAUD AND PERJURY.

Circuit Court of Mercer County.

MAGGIE MULLIGAN v. FRANK MULLIGAN.

Decided, December, 1908.

Divorce—Decree for, may be Reopened after Term—Where Asked on the Ground of Fraud and Perjury—Courts not Bound by Rules which Protect Fraudulent Practices—Such Rules can not Rest on Their Antiquity or a Mistaken Public Policy.

1. Courts inherently have the right to protect themselves and the public from fraud and perjury; hence, neither question of public policy nor rule of court which protects and encourages perjury and fraud can be permitted perpetually to impede justice, notwithstanding such rule has been observed for more than half a century and courts reluctantly upset well established rules.
2. A decree of divorce obtained by fraud and perjury, on the facts being shown, may be set aside after the term at which the divorce was granted, and notwithstanding remarriage of the guilty party. *Parish* v. *Parish*, 9 Ohio State, 534, and earlier Ohio decisions not followed.

HURIN, J.; NORRIS, J., and DONNELLY, J., concur.

Error to Mercer Common Pleas Court.

On March 5, 1907, Maggie Mulligan filed her petition in this action seeking to have set aside a decree of divorce obtained against her by her husband, the defendant, at a former term of the court of common pleas.

In her amended petition, subsequently filed, she alleges that that decree was obtained by fraud and perjury, in this, that her husband was not, at the time of filing his petition for divorce, a *bona fide* resident of Mercer county, and had not been a resident of the state for one year prior to the filing of his petition; that she had no actual notice of such action in time to make her defense; that no other service was sought to be had upon her than by publication in a newspaper. She alleges that she did not discover said facts during the term or terms in which said action was pending, nor until the twentieth of November in the

following year, and that she could not, with reasonable diligence, have discovered such facts. She alleges that Frank Mulligan at all times knew the address and place of residence of this petitioner and that the allegation of his affidavit for service by pulication that "the residence of the defendant, Maggie Mulligan, is unknown and can not with reasonable diligence be ascertained," was false.

She alleges that said Frank Mulligan practiced fraud and suborned witnesses in obtaining his decree of divorce; that the allegations of his petition as grounds for his divorce are false; she admits that she has been separated from him by reason of his aggression; that she is the mother of two living children and of one who has died, and she files a full answer setting up her defense to his action for divorce and asks that the decree of divorce be vacated and set aside and that she may be allowed to defend.

A demurrer to this amended petition was sustained, and the amended petition dismissed, and plaintiff, not desiring to plead further, prosecutes error to this court.

The original petition for divorce was filed April 12, 1905. It appears from one of the pleadings that the entry decreeing the divorce was probably dated June 17, 1905.

Plaintiff says in her petition that she did not learn of that decree until November 20, 1906. Her petition to set aside the decree was filed March 5, 1907, more than one year and eight months after the granting of the decree. It is not properly before us by any allegation of pleadings, but it is said by counsel in argument, as one reason for not granting the prayer of the petition, that the original plaintiff has married again and hence that the rights of his present supposed wife ought not to be interfered with.

Section 5354, Revised Statutes, provides that:

"The common pleas court, or the circuit court, may vacate or modify its own judgment or order, after the term at which the same was made:

"1. By granting a new trial for the cause within the time and in the manner provided in Section 5309 [and that section limits such action to one year after the final judgment was ren-

dered and not more than two terms after the discovery—evidently not applicable to this case at bar].

"2. By a new trial granted in proceedings against defendants constructively summoned, as provided in Section 5048 [which provides for the service by publication].

"3. For fraud practiced by the successful party in obtaining judgment or order."

Both of the two subdivisions last cited are apparently applicable to this case, as is also Section 5355, Revised Statutes, which provides:

"A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened, and be let in to defend; but before the judgment or order can be opened, the applicant shall give notice to the adverse party of his intention to make the application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear, to the satisfaction of the court, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; and each party may present affidavits."

It is under this section apparently that the action has been brought, and its provisions have been fully complied with by the present petitioner.

In its terms this section is clear and explicit, and apparently applicable to all cases of every kind where no other service has been obtained than by publication. But for some reason, wise or otherwise, the Legislature and the courts of this state have, for a long time, treated divorce suits as if governed by a separate rule and reason from all other suits.

The allegations of the petition in a divorce proceeding are not required to be verified. Distinct rules as to costs distinguish such suits generally from other suits; and it has been held that this statute, clear and explicit and of universal application as it appears to be, must not be held to apply to divorce suits.

The reason on which all of these judicial decisions are based is that public policy requires that a "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." See *Parish* v. *Parish*, 9 Ohio St., 534, 537.

This principle was first applied to divorce cases in this state in the opinion of Judge Lane in the case of *Bascom* v. *Bascom*, 7 Ohio (pt. 2), 125. He supports his conclusion by reasoning regarding the different forms of testimony in chancery cases and divorce cases—reasoning which would have but little weight under our present practice—but the only reason relied on apparently is that of public policy, which, without discussion, he assumes to be against the granting of any relief to the injured party in divorce cases. That case was followed in the case of *Laughery* v. *Laughery*, 15 Ohio, 404, but without discussion and merely as decisive of the question as to the appealability of a divorce case—a question now settled by statute.

Both the cases of *Bascom* v. *Bascom* and *Laughery* v. *Laughery*, *supra*, were cited and relied upon in the case of *Tappan* v. *Tappan*, 6 Ohio St., 64—not to determine the question here at issue, as to the right of a court which has granted a divorce to reopen the case on notice of fraud and perjury in obtaining the decree—but to support the holding that there can be no review in Ohio by a higher court of a decision of a lower court granting a divorce—a proposition not now before us.

Judge Scott, however, in an *obiter dictum* in *Tappan* v. *Tappan*, *supra*, states on page 67, that "these cases may be regarded as settling the question that, as the law then stood in Ohio, the decision of the court on the hearing of a petition for divorce was final, and beyond the reach of judicial revision." Even this statement of the law, though going beyond the question before the court at that time, and therefore not to be regarded as conclusive, would not necessarily be applicable to the law as it has since been amended; and, in his subsequent discussion in that case, Judge Scott proceeds to point out defects in the then existing law in certain respects and his views have since been embodied by the Legis'ature in the law as it stands today.

But in the case of *Parish* v. *Parish, supra,* the question now before us was squarely met by the Supreme Court, and the case was decided upon that issue alone, the facts of that case being practically identical with those in the case at bar.

In that case, after a careful review of the authorities Judge Peck concludes as follows:

"We therefore feel compelled, though reluctantly, to hold that sound public policy in this class of cases, forbids us from setting aside a decree of divorce *a vinculo,* though obtained by fraud and false testimony, on an original bill filed at a subsequent term."

It is evident from this quotation that the Supreme Court realized the extreme hardship which its decision would entail on innocent wives and children, deserted by unscrupulous men who without their knowledge had procured the protection of judicial decrees annuling their former marriages. It is perhaps significant that at the very time this decision was rendered the Legislature had already modified the statute relied upon by that court as showing that, at the time the divorce in that case was obtained, it was final. From page 537 of that opinion I quote:

"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.' 2 Curwen, 991."

It is significant, I say, that the last clause quoted, viz., "but the same shall be final and conclusive," had already been expunged from the statute (see 51 O. L., 377; S. & C., 514) and has never since been incorporated in the statutes of Ohio.

But, to continue the quotation, the court, referring to the statute as it had formerly stood, proceeds:

"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 presents to us in carefully chosen language the grave reasons which influenced that court in holding that a decree of divorce, obtained at a former term of the court which was asked to set it aside, could not be set aside or annuled.

We can not fail to recognize the gravity of the question. Yet there is another side which we must also consider. In cases such as *Parish* v. *Parish, supra,* and the case at bar, there are other innocent persons involved—the innocent wife and children of the perjured husband. Shall it be said that public policy demands that the wife, who for ten or perhaps twenty years has lived with her husband and borne children to him, has no rights which he may not avoid by quietly slipping off to another county and there swearing that he does not know her address? Has an affinity greater rights than a wife? Are the interests of a man's children less sacred than those of his paramour?

Suppose a case! A man has lived with his wife many years—in the city of Cincinnati, say. When she has lost some of her youthful charm, he tires of her and finds a younger and fairer charmer. He explains to his wife that he is interested in oil leases in Wood county, say, which will for a few weeks require his attention. He bids her an affectionate good-bye and betakes himself to Wood county, where he actually engages in the oil business. He writes to his wife constantly and affectionately and occasionally runs home and spends a day with her. But in Wood county he lets it be known that he is located there permanently and his occasional absences are not noticed. In a few weeks he files his petition for divorce, swearing that he does not know his wife's residence or address. He obtains service by publication, but the papers of that county do not circulate in Cincinnati and his wife never hears of the suit. On the last day of the term his case is tried, a divorce is granted on perjured testimony and the court adjourns. His wife has heard nothing of these proceedings and still supposes that she is his wife. Six months or a

year later she is confronted by her successor—who has been conniving with and probably living with her husband during most of these proceedings, and is then told for the first time that she is no longer a wife; and that the public policy of this great country forbids that the sacred rights of her husband's new wife should be interfered with by anything that she can do. Is this a mere dream—an imaginary case? In almost all of its essential facts it is but a recital of a case that actually occurred within the writer's professional experience. But in that case the wife did accidentally hear of the proceedings just in time to prevent the entry of the decree—and the husband suddenly and wisely disappeared. Had she been but a few days later in getting her information she would, under the authority of *Parish* v. *Parish, supra,* have been wholly without remedy.

There seems, then, to be two sides to the question. Public policy has grave responsibility resting upon it.

On the one side must be regarded the rights of the first wife and her children—rights guaranteed to them by all the formalities and legal safeguards which the law can provide. That wife has been married under a license issued in behalf of the state with rigid requirements as to how it should be obtained; her marriage has been formally performed and registered; she has openly lived with her husband as his wife in the face of all the world. Her children have been acknowledged by him as his; she has vested interests in his property and a vested right in his services for her support and the support of her children. Must she, after all this, watch him at her peril and see to it that he never leaves his home and remains away a week or a month at a time, no matter what his business may require? Must she never permit him to send her off with the children for fresh air and rest, under peril of finding herself deposed and her children fatherless on her return? Is she to live in constant fear that some day she will receive a newspaper clipping from a county of which perhaps she has almost never heard, announcing his divorce and remarriage on the same day and then learn that because the court on that same day adjourned for the term, the decree is final and she is helpless? If ill-health requires her to go to a hospital or

a sanitarium for treatment, must she enter its doors with the fear haunting her that when she recovers her physical strength and returns to her home, it will be to find another woman installed as wife and mistress of the household, and this under the full sanction of the law? That is the meaning to her of the case of *Parish* v. *Parish, supra.* That is what public policy is there said to do to her.

But much may be said on the other side. Where an innocent woman marries a man whom she has known perhaps for a year or for two or three years and has had no reason to suspect that he ever had a wife; when he tells her that he has lived where he never did live, or otherwise conceals his past; or where, possibly, he finally admits that he has been divorced and tells her truthfully that service was obtained by publication, but tells her also that his former wife had deserted him and that he knows nothing of her whereabouts. Suppose she investigates and finds nothing which discloses the true state of facts. What are her rights? Is she to be turned out of her home years after her marriage? Are her children to be declared illegitimate by a decree setting aside her marriage and the divorce from the former wife?

We frankly admit that we have sought in vain for a solution of this question which will do justice to both of these victims of this perjured husband—for by the demurrer he is admitted, for the purposes of this case, to be all that and more too, whatever the facts may be as to the truth of these charges of perjury and fraud.

But the question in this case goes further: Suppose that in fact there was no fraud and no perjury on the part of the party obtaining the divorce; suppose that the grounds alleged in the petition were all true; suppose that the residence of the defendant in fact was not known; suppose that it is the former wife who, angered at the present happiness of her former husband, now seeks to harass him by false and fraudulent claims! What then? Should the innocent party, having married again, be subjected to a retrial and his rights and those of his new wife be jeopardized?

But here it must be said that there is better protection against fraud and perjury; for the law requires actual notice of the

pendency of this application for a reopening of a case and gives every possible safeguard against fraud. Moreover, it requires an actual trial before the decree can be reopened with ample opportunity for proof, and if the charges are false, the party opposing has every opportunity of proving that fact. The parties both being in open court are both subject to the orders of the court—a very different situation from an *ex parte* hearing in the absence of the party most directly concerned and without her knowledge.

We have read with care the two Massachusetts cases relied upon by Judge Peck as supporting the decision in the case of *Parish* v. *Parish, supra.* Both rely on this same principle of public policy. Perhaps neither of those cases could be, strictly speaking, regarded as parallel to the case at bar; but the principles at issue were in each of them discussed.

The case of *Lucas* v. *Lucas,* 69 Mass. (3 Gray), 136, was an attempt, by a defeated plaintiff, to reopen a divorce case, and to obtain a divorce denied him at the former trial in which his petition was dismissed. The case was considered principally upon the technical question as to whether a divorce suit is a civil action or a judicial proceeding, and whether as a consequence a writ of review should be granted. But the opinion is based finally on the question of public policy.

The case of *Greene* v. *Greene,* 68 Mass. (2 Gray), 361, was an action by a wife asking a divorce on the ground of desertion, but alleging that the husband had previously (and, as she avers, falsely and fraudulently) obtained a divorce against her on the ground of adultery; and, as a basis for her suit, she asks that this former decree be set aside.

The opinion in that case is expressly stated to be based on the doctrine of *res judicata* as settled in that case and as applied to the case of divorce. This will not help us in this case at bar, for our statute expressly opens up all cases for reconsideration within five years in contradiction of the doctrine of *res judicata,* unless under the rule in *Parish* v. *Parish, supra,* a bar is established on other grounds.

But in the opinion in *Greene* v. *Greene, supra.* the court, after basing its decision on the doctrine of *res judicata,* turns

to a discussion of public policy as controlling the case and considers only the consequences that would follow a retrial without any consideration of what might follow a refusal of a retrial in a proper case. Neither of these Massachusetts cases therefore is helpful in the case at bar, except for the support which they give to the doctrine that public policy demands, in divorce cases, the adherence to a decree once rendered because of the evil consequences which are likely to follow the opening of such decree as affecting the rights of third parties.

When these cases and *Parish* v. *Parish* were decided, this question was comparatively a new one; but since that time the courts of almost every state in the Union have been called upon to consider it.

In some states the Legislature has passed laws governing the situation of the parties, as for instance Missouri, which by statute has provided that "no petition for review of any judgment for divorce rendered in any case * * * shall be allowed, any law or statute to the contrary notwithstanding." And the courts of that state hold that this statute bars the same court in the same proceeding, or even courts of equity, from setting aside a divorce decree in a new proceeding, where the record shows the necessary jurisdictional facts which are found by the court to exist. *Hansford* v. *Hansford*, 34 Mo. App., 262; *Salisbury* v. *Salisbury*, 92 Mo., 683. The latter case cites with approval *Parish* v. *Parish* and *Greene* v. *Greene*, *supra*.

In Kansas the statute allows six months after the rendition of the divorce decree. In that state and within that period, a defendant in divorce proceedings served by publication may bring suit to vacate the decree (*Hemphill* v. *Hemphill*, 38 Kan., 220). And if the action is commenced within two years after the discovery of fraud in obtaining the divorce, the decree may be vacated upon a proper showing. *Larimer* v. *Knoyle*, 43 Kan., 338.

In Illinois a decree of divorce against one notified by publication only and who does not appear is not absolute until three years after it is entered, but conditional and subject to be set aside, even though the complainant may have married before it

is set aside. *Laurence* v. *Laurence,* 73 Ill., 577. Also, *Whittaker* v. *Whittaker,* 151 Ill., 266.

And so, many other states have enacted similar statutes designed to meet the difficulties of such cases and to protect innocent parties from decrees of divorce obtained by fraud.

In Kentucky, under a statute similar to the Ohio statute, when a husband has obtained a divorce on constructive service, the wife is entitled to appear in court within five years and move for a rehearing. *Meyar* v. *Meyar,* 60 Ky. (3 Metc.), 298.

In Nebraska a similar statute was formerly (1880) held not to apply to a divorce case—see the case of *O'Connell* v. *O'Connell,* 10 Neb., 390; but in a later case, decided in 1893, it was held that the court, which had formerly allowed the decree (fraudulently obtained), could in the exercise of its general equity powers vacate it on proper showing of fraud and imposition, though the petition was not filed until eleven years after the decree. *Smithson* v. *Smithson,* 37 Neb., 535 (40 Am. St. Rep., 504).

In the case of *Wisdom* v. *Wisdom,* 24 Neb., 551 (8 Am. St. Rep., 215), it was held that courts of general jurisdiction have power to set aside or vacate decrees of divorce, after the term at which the decree was rendered, when obtained by fraud.

In Indiana, while the earlier decisions denied the right to a retrial of a divorce suit, even within the statutory time allowed in other cases (see *Ewing* v. *Ewing,* 24 Ind., 468), yet it was held in 1883 that a decree of divorce obtained by fraud will be vacated in a direct proceeding, if plaintiff had acted promptly after discovering the fraud. *Earle* v. *Earle,* 91 Ind., 27.

In New York the courts have gone a great way in granting protection to a party defrauded in a divorce proceeding. In the case of *Miller* v. *Miller,* 37 How. Pr., 1, a defendant was allowed to come in two years after the decree and file her motion set aside the decree. See, also, *Weidner* v. *Weidner,* 85 Hun., 432 (32 N. Y. Supp., 894); *Van Rhade* v. *Van Rhade,* 9 N. Y. S. C. (2 Thompson & Cook, 491); *Singer* v. *Singer,* 41 Barb. (N. Y.), 139; *Jewitt* v. *Jewitt,* 2 N. Y. Supp., 250; *Robertson* v. *Robertson,* 9 Daly (N. Y.), 44.

In Pennsylvania it was held in the case of *Fidelity Insurance Co's Appeal,* 93 Pa. St., 242, that:

"Upon sufficient cause shown, decree of divorce may be vacated, although the libellant is dead and more than twelve years have elapsed since the decree was made."

And so, in many of the states, the courts, independently of statute, have passed upon this question.

In Minnnesota a decree of divorce obtained by the fraud of the husband, was set aside in a suit commenced one year and seven months after the decree of divorce. *Young* v. *Young,* 17 Minn., 181; *Colby* v. *Colby,* 64 Minn., 549.

In Illinois a divorce obtained by fraud of which the proof was clear, was set aside on a bill of review brought after the lapse of fourteen years; and the fact that defendant had married again and had children was held of no consequence. The court then held that, notwithstanding a statute providing that the defendant in a decree rendered on constructive notice, may on petition within three years thereafter appear and answer, and that such decree if not set aside within that time shall be "deemed confirmed," this does not bar a defendant in a divorce decree, fraudulently obtained on publication, from filing a bill to impeach it after the expiration of three years. *Caswell* v. *Caswell,* 120 Ill., 377. And in that case the court say:

"The fact of appellee's remarriage, of there being children thereof—although we do not see in the record proofs of such children—and of the hardship which will result to innocent persons from setting aside the decree of divorce, are dwelt upon as objections to the granting of such relief. Such ill consequences we can appreciate and must regret, but yet they do not form reason sufficient for a denial of the exercise of the court's power to vacate such a decree, obtained by fraud, as has often been determined." Citing, *Crouch* v. *Crouch,* 30 Wis., 667; *Rush* v. *Rush,* 46 Ia., 648 (26 Am. Rep., 179); *Whitcomb* v. *Whitcomb,* 46 Ia., 437; *Edson* v. *Edson,* 108 Mass., 590 (11 Am. Rep., 393); Bishop, Mar. & Div., Sections 751-753*a,* and other authorities.

While the courts of Missouri, in obedience to a mandatory statute, follow the Ohio rule of *Parish* v. *Parish, supra,* and the supposed precedent of the Massachusetts cases of *Greene* v. *Greene* and *Lucas* v. *Lucas, supra,* we have found no case in any other

state, where upon facts similar to those in the case at bar relief has not been granted upon proof of due diligence on the part of the party complaining of the fraud.

But even in Massachusetts, the supposed precedents of *Greene* v. *Greene* and *Lucas* v. *Lucas* have been completely departed from or explained away.

In the case of *Carley* v. *Carley*, 73 Mass. (7 Gray), 545, it was held that:

"A decree of divorce, obtained by fraud, and without the libelee's knowledge, may be set aside on the application of the libelee *at the same term.*"

But in a later case, the case of *Edson* v. *Edson, supra,* this whole subject was reviewed and the court held as follows:

"This court has power, upon the petition of the party aggrieved, to vacate a decree of divorce obtained at a former term against the petitioner by false testimony, on a libel of which she had no actual notice, knowledge of which was fraudulently kept from her by the other party, and of which the court had only an apparent jurisdiction, founded on his false allegations of domicile."

The facts in that case were in all essentials indentical with those in the case at bar, and Bigelow, C. J., in his opinion says:

"The question to be determined, is whether a judgment so obtained can be re-examined and set aside by the party aggrieved by the fraud, or whether it is to be taken as forever binding and conclusive on the rights and obligations of the parties.

"The statement of the question is of itself sufficient to make it apparent that, if there is no remedy by which judgments so procured to be rendered can be impeached and annuled, courts of justice may be made instruments by which the grossest frauds may be successfully accomplished, to the great wrong and injury of innocent persons. Such a conclusion can not be supported, unless it is founded on adjudicated cases which the court is bound to regard as obligatory declarations of the law, or upon reasons of the most decisive and satisfactory nature.

"Upon careful examination of the authorities we are entirely satisfied that they do not sustain the doctrine, that courts have no power to grant relief to parties to a suit, against whom a judgment has been obtained by fraud. It is no doubt true, that

a decree or judgment which stands unreversed and in force can not be called in question or impeached in collateral proceedings by one of the parties to the original suit; but it is a very different proposition to maintain that an innocent party can not invoke the power of the court by which the original judgment or decree was rendered, to vacate and annul it on the ground that it was procured by a fraud practiced on the court to his gross injury. We believe it to be an established principle of jurisprudence, that courts of justice have power, on due proceedings had, to set aside or vacate their judgments and decrees, whenever it appears that an innocent party without notice has been aggrieved by a judgment or decree obtained against him without his knowledge, by the fraud of the other party. * * *

"The case of *Greene* v. *Greene*, 68 Mass. (2 Gray), 361, which is cited and relied upon by the respondent, is not in conflict with the general current of authorities. Some of the general expressions used by the court, when disconnected from the facts of the case then in adjudication, have been thought to give sanction to the doctrine that a decree of divorce, when once obtained, could not be impeached in any form or mode of proceeding, or set aside by one of the parties to the original suit, however fraudulent and conclusive may have been the conduct of the other party in its procurement. But such a conclusion is not a fair and legitimate result of the language and reasoning of the court, when considered, as it ought to be, solely with reference to the actual case before the court for adjudication."

Justice Bigelow then proceeds to distinguish the case of *Greene* v. *Greene, supra*, from the case then before the court, and concludes that it is not an authority for the proposition then before the court, and he thus concludes in words clearly applicable to the case now before this court:

"Nor does the petitioner seek to set aside a decree rendered against her in a suit of which the court had full jurisdiction, of the pendency of which she had due notice, and in which an opportunity to be heard was afforded her; but she asks only that she may not be deprived of her rights by a judgment rendered against her in a proceeding of which she not only had no notice, but of which all knowledge was fraudulently kept from her, and of which the court had no actual jurisdiction, but only an apparent jurisdiction, founded on a false allegation of domicile.

"It is hardly necessary to add that reasons of public policy, or a regard to the consequences which might ensue to innocent parties from the exercise of a power to invalidate a decree of divorce after it had become *res adjudicata*, do not constitute sufficient reasons for a denial of the existence of the power. Considerations of such a nature may well induce courts of justice to exercise the power with great caution, and only where the rights of parties are clear and there has been no neglect or failure to insist upon them in due season. Further than this, they can have no weight."

Thus it appears that Massachusetts, like all other states of whose adjudications on this question we have knowledge, excepting only Ohio and Missouri, distinctly declares the powers of courts to open up a divorce decree at a subsequent term on proof of fraud.

And so the courts of California hold to the same effect. See *McBlain* v. *McBlain*, 77 Cal., 507; and of Colorado, see *Morton* v. *Morton*, 16 Col., 358; and of Iowa, see *Rush* v. *Rush*, 46 Ia., 648 (26 Am. Rep., 179); and of Louisana, see *Bryant* v. *Austin*, 36 La. Ann., 808; and of Pennsylvania, see *Smith* v. *Smith*, 3 Phila., 489, and *Wanamaker* v. *Wanamaker*, 10 Phila., 466 (30 Leg. Int., 265); and of Wisconsin, see *Everett* v. *Everett*, 60 Wis., 200; and of Montana, see *Simpkins* v. *Simpkins*, 14 Mont., 386 (43 Am. St. Rep., 641); and of North Dakota, see *Yorke* v. *Yorke*, 3 N. D., 343.

The last case contains a very emphatic statement of the law:

"Courts of general jurisdiction have the inherent power, independent of any statutory provisions, and in divorce cases no less than in other cases, to set aside and annul any judgment or decree procured by the fraud and deceit of the successful party, practiced upon the complaining party to the action and the court."

Cases might be multiplied from many of the other states, all holding that fraud in obtaining a decree of divorce, like fraud in any other proceeding, vitiates it, and that it can be relieved in a divorce proceeding as in any other proceeding, even after the term at which the decree was taken.

Nor does the remarriage of a plaintiff who has obtained his divorce decree by fraud protect him from the consequences of his fraud. It is so held in Montana in the case of *Simpkins* v. *Simpkins, supra;* and in Colorado, see *Medina* v. *Medina,* 22 Col., 146; and in New York, *Wortman* v. *Wortman,* 17 Abb. Prac. (N. C.), 66; and in Texas, *Stephens* v. *Stephens,* 62 Tex., 337; and in Illinois, *Caswell* v. *Caswell,* 120 Ill., 377; and in Iowa, *Whitcomb* v. *Whitcomb, supra.*

Nor where rights of third parties have intervened. *Rush* v. *Rush,* 46 Ia., 648; and in Wisconsin, *Crouch* v. *Crouch,* 30 Wis., 667; and in Minnesota, *Bomsta* v. *Johnson,* 38 Minn., 230.

Nor under the holdings in several states will even the death of the former plaintiff be a bar to vacating a decree of divorce obtained by false representations in obtaining service by publication when personal service could have been obtained. See *Johnson* v. *Coleman,* 23 Wis., 452 (99 Am. Dec., 193); *Fidelity Insurance Co's. Appeal,* 93 Pa. St., 242; *Bomsta* v. *Johnson,* 38 Minn., 230.

From all of these cases it appears that the view that public policy demands the upholding of all decrees of divorce, no matter how fraudulently obtained, is now practically abandoned by courts generally.

In fact, with the single exception of Missouri, where a statute specifically protects such decrees from modification at subsequent terms of court, we have found no state in the Union, outside of Ohio, where such a view is now held as an absolute proposition. There may, of course, be others and probably there are, but we have not been able to find them.

The difficulty, as we have said, is great. No rule can be adopted which may not cause great injustice in some of its applications.

Public policy might equally well be invoked in support of either side of the question. But what is more serious in our view than any question of public policy is this: that to upset a rule which has been observed in this state for more than half a century can only be justified after the greatest consideration of the dangers involved.

But no rule which protects and encourages perjury, and fraud, and misrepresentations, can, it seems to us, safely be permitted to perpetually impede justice. Courts have inherently the right to protect themselves and the public from fraud and perjury.

That "fraud vitiates everything" is a maxim which has grown to be of almost universal application—and justly so. To arbitrarily, or in deference to a view of public policy which takes no account of other demands of public policy equally weighty, hold that a rule applicable to all other classes of cases, and made so applicable by statute, can have no application to divorce cases, seems only justifiable under most extraordinary conditions.

There are, as we have found, reasons which seem to us as weighty and more so why the ordinary rule should apply.

This view we have based upon an attempted consideration of the principles which should govern the case, and a review of all the accessible decisions of other states leads us to the conclusion that there is now a practical unanimity among the courts of all the states in holding that in divorce cases, as in all other cases, a decree obtained by fraud and perjury may, on the facts being shown, be set aside even after the term at which the divorce decree was rendered.

For these reasons the judgment of the court of common pleas will be reversed, the demurrer to the amended petition overruled and the cause remanded to that court for further proceedings in accordance with law.

LIABILITY FOR GOODS DAMAGED IN TRANSIT.

Circuit Court of Hamilton County.

C., C., C. & St. L. Railway Co. v. Barron, Boyle & Co.*

Decided, February 8, 1908.

Carriers—Shipment Passes over Several Lines—One Contract for Transportation Covers All, When—Goods Damaged in Transit—Liability to the Consignee.

Where a consignee pays to a railway company the full amount of the freight charges on a shipment of goods which had passed over a number of roads and been received in bad condition, and by agreement the consignee files with the railroad company a claim for damages, the company will be held to have recognized that there was but one contract for transportation from the point of shipment to destination, and in the absence of any knowledge as to where or how the damage occurred the company delivering the goods is liable, and a judgment for the amount of damages sustained will not be set aside.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.
C. L. Hopping and *W. M. Tugman,* contra.

Swing, P. J.; Giffen, J., and Smith, J., concur.

We are of the opinion that the agreed statement of facts in this case shows that there was but one contract for the transportation of the goods from Boston to Cincinnati through the M. D. T Co. over the B. & M. R. R., the N. Y. C. R. R., the L. S. & M. S. R. R. and the C., C., C. & St. L. R. R., and that separate contracts were not made with the several railroads for transportation of the goods over said different railroads. This is clearly shown by testimony of agent, Smith (bill of exceptions, p. 12). And when the damage to the goods was discovered at Cincinnati no claim was made by the railroad company that there were separate contracts.

But Barron, Boyle & Co., by the request of the railroad company, paid the amount of the freight in full to said company,

* Affirmed by the Supreme Court without report, *C., C., C. & St. L. Ry. Co.* v. *Barron, Boyle & Co.*, 80 Ohio State.

and by agreement of the parties filed their claim for damage with the said railroad company, thus clearly recognizing the fact that there was but one contract for transportation from Boston to Cincinnati. This must have been the construction that the parties placed upon the contract at the time. When the goods arrived at Cincinnati they were damaged. There is nothing to show when, where or how they were damaged, except that certain of the employes of the B. & M. R. R., who loaded the glass in the cars at "Mystic Wharf," testified that some of the boxes rattled in loading and some of the boxes were strained, but no examination was made to ascertain whether any of the glass was broken. It was admitted that each carrier gave to its predecessor a receipt, stating that the goods were received in good order. It was first ascertained that the goods were damaged when the goods were inspected after arrival at Cincinnati. The contract of the carrier was to deliver the goods in good order at Cincinnati, subject to certain exceptions, none of which are set up here, and it is admitted that the goods were not delivered in good order, and the amount of the damage is admitted, and it is agreed that the judgment of the court below was for this amount. It seems to us clearly a breach of contract for which the railroad company was liable and the judgment should be affirmed.

NECESSITY OF CHARGING CRIME IN THE LANGUAGE OF THE STATUTE OR ITS EQUIVALENT.

Circuit Court of Hamilton County.

JOHN L. OREBAUGH v. STATE OF OHIO.

Decided, March 6, 1909.

Criminal Law—Indictment for Embezzlement—Variance Between Charge and Proof—As to the Capacity in which Defendant Acted —Fraudulent Conversion by Attorney—Section 6842.

Where an indictment charges embezzlement as agent, but the proof is to the effect that the defendant was employed by the prosecuting witness as her attorney, and in that capacity received the money which he fraudulently converted to his own use, it is error to

overrule a motion for an instructed verdict finding the defendant not guilty on the ground of variance.

Ulrich Sloane and *Otto Krippendorf*, for plaintiff in error.
Arthur C. Fricke and *Coleman Avery*, contra.

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

The plaintiff in error was indicted under Section 6842, Revised Statutes, for embezzlement as agent, whereas the proof showed his employment as attorney at law, and the receipt of the money in that capacity. A motion was made at the conclusion of the evidence to instruct the jury to return a verdict for the accused on the ground of such variance.

In charging an offense in an indictment, the language of the statute defining the crime or its equivalent, which plainly and necessarily includes it, must be used, and it has accordingly been held in *Hagar* v. *State*, 35 O. S., 268:

"An indictment charging that the prisoner broke into a *storeroom*, is insufficient under a statute making it an offense to break into a 'storehouse,' and the defect is available to him, although the objection was not made until the verdict had been rendered."

An attorney at law is not necessarily an agent within the ordinary meaning of the term, and the distinction is shown by McIlvaine, J., in *Campbell* v. *State*, 35 O. S., 70, at 75:

"The controlling difference between the relation of attorneys, auctioneers, warehousemen, etc., with their employers, and the defendant with the employer, is this: the former engaged in an independent employment, subject only to the usages of their different line of business, while the latter was subject to the direction and control of his employer. And while the former may not be subject to the penalties of this statute, the latter is clearly embraced within its terms and meaning."

In that case the defendant was charged as agent with embezzlement under a statute that did not include attorney at law, but which was so amended in 1881 (78 O. L., 186).

The Supreme Court having recognized the distinction between an agent and an attorney at law under a statute defining embezzlement, and the Legislature having since amended the stat-

ute so as to make it an offense for an attorney at law to convert to his own use anything of value which shall come into his possession by virtue of his employment as such attorney at law, the decisions in other states are not controlling, and especially when they are far from uniform.

The statute now includes guardian, executor, administrator and assignee in insolvency, all of whom act in a representative capacity, yet it will hardly be claimed that proof of conversion of money in either capacity will sustain an indictment for such conversion as agent. The capacity in which the money or other thing of value is received and appropriated is of the essence of the offense, which must be proved as charged in the indictment, and the defendant is not required to meet a different charge although, if properly laid, constituting an offense under the statute. We are of opinion that the variance between the statement in the indictment and the evidence offered in the proof thereof was material to the merits of the case and prejudicial to the defendant. That the decision of the trial judge upon this question may be reversed if erroneous is expressly held in *State* v. *Buechler*, 57 O. S., 95.

Judgment reversed and prisoner discharged.

NATURE OF THE TENANCY WHERE A WRITTEN LEASE IS EXTENDED BY VERBAL AGREEMENT.

Circuit Court of Hamilton County.

HARRY F. HOPKINS v. BRIDGET F. CARROLL.

Decided, December 5, 1908.

Landlord and Tenant—Parol Contract for Lease—Where the Tenant is in Possession Under a Prior Written Lease—Statute of Frauds.

1. Where a tenancy was begun under a written lease for a term of five years, with a privilege of renewal for another five years, and the lessee entered upon his fourth term by virtue of a verbal agreement for another five years under the same terms as before, his possession is referable to the former written lease, and he becomes a tenant from year to year.

2. Justices of the peace have jurisdiction, under Section 6600, in cases of tenancy from year to year.

Cogan & Williams and *H. A. Reeve,* for plaintiff in error.
H. O. Kapp and *A. P. Foster,* contra.

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

The judgment of the trial court in sustaining the demurrer of defendant to the petition we think should be affirmed.

In *Armstrong* v. *Kattenhorn,* 11 Ohio, 265, it was decided that a parole contract for a lease between landlord and tenant in possession under a prior lease is within the statute of frauds unless possession be held solely under, and in performance of, the parole contract, the terms of holding clearly indicating the possession to be under the subsequent parole lease. If the possession can be referred to any other source than the parole contract the statute fails.

The petition sets out a tenancy for five years from January 1st, 1891, under a written lease, containing a privilege of renewal for another term of five years at the expiration of the first term. It also sets out that plaintiff in error entered upon his fourth term (took possession) as lessee by virtue of a verbal agreement for another term of five years upon the same terms and conditions as his former tenancies. This possession it seems to us is referable to the prior written lease, and the plaintiff in error became a tenant from year to year and is holding over his term.

Justices of the peace by Section 6600 having jurisdiction in cases of a tenancy from year to year, the demurrer to the petition was properly sustained by the court, and the judgment is affirmed.

ASSIGNMENT BY A RECEIVER OF MONEY DUE.

Circuit Court of Hamilton County.

STEINBICKER BROS. v. KUHN ET AL.

Decided, January 23, 1909.

Receiver—Assignment by, of Money Due—Rights of the Drawee—Where the Money was Collected by the Receiver.

Where a receiver gives an order for the payment of money due to him as receiver and afterward accepts the money from the debtor without the consent of the drawee of the order, he becomes personally liable to the drawee for the amount of the order.

Reemelin & Hosbrook, for plaintiff in error.
Oscar W. Kuhn, contra.

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

The cause of action stated in the petition is for money had and received by the defendants for the use of the plaintiff and arose in the following manner: The defendants as receivers were indebted to plaintiff for materials furnished and labor performed, and executed and delivered to plaintiff the following order:

JANUARY 26, 1905.

"MR. LEO J. OEHLERS, City.

"*Dear Sir:* Please pay to Steinbicker Bros. the sum of $318.94 due them for building tables at the Armory, out of the amount due me for services rendered, etc., as caterer Majestic Hotel Co. and agent of the receivers of said hotel.

"OSCAR W. KUHN,
"F. L. EMMERT,
"*Receivers Majestic Cafe.*"

Afterwards when a settlement was had between Mr. Oehlers and the defendants as receivers the former said: "I must hold out some money for Steinbicker Bros., but I don't know the amount." Thereupon Mr. Kuhn in the presence of defendant Emmert said:

"We are under bond, under $10,000 bond, we are personally responsible for that anyway because we signed that agreement

and the money was paid to us. We have got to stay, or we will pay Mr. Steinbicker the minute he presents his bill."

Mr. Oehlers then paid to the defendant the entire amount due to them originally as receivers. The plaintiff received one hundred dollars from the defendants and sues for the balance.

The order thus given to plaintiff was an equitable assignment to him of a part of a particular fund, which could not be revoked without his consent. 21 Am. & Eng. Ency., 940.

The money received by the defendants was not, to the extent of the order, due to them in their official capacity, nor, according to the statement made at the time by Mr. Kuhn, received in that capacity; but it was paid by the drawee to the defendants for the use of the plaintiff. They had no right as receivers to accept the money without the consent of the payee of the outstanding order; nor had the drawer any right to so pay it. Hence defendants became personally liable and the court erred in sustaining the motion of defendants, at the conclusion of plaintiff's evidence, for an instructed verdict.

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By a receiver of money due to him as receiver; rights of the drawee where the receiver afterward collects the money from the debtor himself. 607.

ASSUMED RISK—

Where a servant disregards a warning from his employer of danger, he assumes the risk, and an action on account of his death should be taken from the jury. 334.

ATTACHMENT—

In an attachment proceeding which is void by reason of a defect in the affidavit, jurisdiction is not conferred by the giving of bond. 48.

Upon reversal by the common pleas of an order by a justice of the peace overruling a motion to discharge the attachment, the common pleas should retain the matter for trial as upon appeal. 191.

What the affidavit must contain; statement of non-residence of defendant insufficient where made on belief only. 282.

Where it has been adjudged on review that the justice was without jurisdiction, any order he may have made as to the payment of the money becomes void, and it is the duty of the justice to return it to the garnishee, notwithstanding the dismissal of the petition by the reviewing court may have been erroneous. 354.

An allegation that the defendant has repudiated the contract upon which the claim in suit is based, is a sufficient ground for an attachment. 392.

The filing of a petition in error within the required time, together with an undertaking for retention of the attached property, is a sufficient compliance with Section 5563*b*. 479.

The averment of the affidavit that the defendant is a non-resident, when aided by an allegation of the petition that the defendant is a corporation under the laws of Kentucky, is equivalent to a statement that it is a non-resident corporation; but the affidavit must affirmatively show that the defendant is not within the exceptions contained in subdivision 1 of Section 5521. 479.

ATTORNEY AND CLIENT—

In an action for services by an attorney under contract, there can be no recovery where the proof tends to show no contract was entered into, and that the defendant sent to plaintiff a check for a substantial amount, having upon its face "in full for all claims or demands for services rendered

to date," which check was endorsed and collected by the plaintiff. 463.

Where money received in the capacity of attorney is wrongfully converted, conviction can not be had under an indictment charging embezzlement as agent. 603.

AUTOMATIC COUPLERS—

The state law relating to automatic couplers is not superseded by the federal act, and is constitutional; by the state statute the car is made the unit, and each car must be complained of separately in seeking to enforce the penalty. 482.

BAILMENT—

While a railway may change its position from carrier to bailee by placing in a warehouse goods which the consignee refused to receive, yet where the company has failed to respond to a demand by the shipper for a tracer and the goods are destroyed by fire the company is liable. 241.

BANKS AND BANKING—

A bank cashier, in the ordinary performance of his duties, is without authority to enter into an agreement whereby the liability of the sureties on a note is made secondary. 93.

Section 3821-85, providing a penalty for embezzlement by bank officers, employes and agents is constitutional; but if one provision of this act be unconstitutional, the corresponding section of the free banking act will stand unrepealed and under it an offender may be prosecuted. 537.

BAPTISTS—

See RELIGIOUS SOCIETIES.

BENEFITS—

Injunction will lie against the assessment for a township ditch which is grossly in excess of the benefits conferred, although no error is found in the proceedings. 347.

BIDS AND BIDDING—

It is not necessary to advertise for bids for coal to be used for public school purposes, or to let the contract of purchase to the lowest responsible bidder. 195.

Advertising for bids for trivial school supplies is not required. 195.

BILL OF EXCEPTIONS—

Failure to attach letters of administration to a bill of exceptions does not render the bill incomplete, where the administrator testified as to his appointment and to his acting as administrator, and no exception was taken thereto. 516.

Where exhibits are missing from a bill at the time it is offered for signature of the trial judge, the time for signing should be extended under the statute, rather than for the plaintiff in error to appear in a reviewing court with an incomplete bill, or to attempt to make it complete by subsequently attaching missing exhibits without the consent or knowledge of the trial judge. 505.

Where the bill does not contain the evidence heard on a motion for allowance of compensation for services, error will not lie to the overruling of the motion. 504.

BILL OF LADING—

Delivery orders distinguished from bills of lading. 417.

BILLS, NOTES AND CHECKS—

See PROMISSORY NOTES.

BLASTING—

Neither the owner of a burned building in a populous neighborhood, nor his contractor who is attempting to throw down a wall with dynamite, is liable on account of the killing of a spectator who was hit by a flying brick, when. 140.

BLINDNESS—

Where suffered by an employe, who alleged that it was due to the use of wood alcohol as a compound of shellac which he was re-

quired to apply to a tightly enclosed interior surface. 505.

BOARD OF EDUCATION—

See SCHOOLS.

BOARD OF REVIEW—

Complaint before, with reference to inequality in taxation; authority of board with reference to equalization. 111.

BOND—

The giving of, in an attachment proceeding does not confer jurisdiction. 48.

Necessary averments in an action on a bond executed by a contractor in favor of the county. 225.

The sureties on the bond of a village clerk are not liable for collections of street assessments made by the clerk under authority of an ordinance, when. 369.

Jurisdiction is conferred on appeal from a justice of the peace by approval of the undertaking by another justice of the same township. 432.

BREACH OF CONTRACT—

See CONTRACT.

BRIDGE—

An abutting property owner can not enjoin the connecting of buildings on the opposite sides of the streets by a bridge twenty feet above the pavement, when. 357.

BROKER—

See FACTOR AND BROKER.

BURDEN OF PROOF—

In a hearing before a common pleas judge under the Jones local option law. 33.

Charge of court with reference to burden of proving negligence on the part of the plaintiff misleading where the defense of contributory negligence is disclaimed. 69.

Is on one seeking to enjoin an assessment on the ground of omission of a statutory requirement. 85.

Where the non-delivery of a telegram is shown, the burden is on the company to remove the presumption of negligence thereby raised. 129.

Where it is claimed that a street assessment is excessive. 299.

As to the facts alleged in a Jones law petition is upon the petitioners; as to a signature being obtained by fraud is upon the one seeking to have his name withdrawn on that ground. 351.

In an action against a landlord on account of injury from falling on a defective step; burden of proving knowledge on the part of the landlord of the defect and negligence in permitting it to remain. 353.

In a will contest; presumption from probate. 433.

Evidence that a husband had possession of a check and notes, transferrable by delivery and received in payment for property belonging to his wife, is not sustained in an action against him for money had and received, in the absence of testimony that he realized the cash or its equivalent by using the check and notes. 489.

BURNS LAW—

An ordinance for the appropriation of private property for the building of a dike falls under the provisions of. 235.

Not applicable where land is to be appropriated and its cost can not be stated in advance of the appropriation. 511.

BY-LAWS—

See CORPORATIONS.

CANCELLATION—

Of oil and gas lease for purpose of reformation; failure to record new lease, and the recording of a subsequent lease to a third party held to have deprived original lessee of title. 337.

CARRIERS—

See RAILWAYS.

Where a shipment passes over several different lines and arrives in bad condition, one contract for transportation covers all the lines and the carrier delivering the shipment to the consignee in bad condition is liable for damages, when. 602.

CEMETERY—

Where interments were made for a fee without granting any title to the ground, and no interments have been made for forty years, the land may be appropriated by a village for use for parks and public buildings. 511.

CHARGE OF COURT—

As to the burden of proving negligence on the part of the plaintiff; is misleading where the defense of contributory negligence is disclaimed. 69.

Effect of misstating to the jury the plaintiff's age as thirteen or fourteen, when he would have been sixteen on his next birthday. 69.

Not erroneous because of omission in defining ordinary care to refer to the age of the plaintiff, a minor. 81.

In an action having reference to a contract for the sale of goods which proved unsatisfactory. 221.

Special charges in an action for damages on account of negligence are erroneous if conditions are omitted which are necessary to determine the question of negligence. 285.

An erroneous charge with reference to provocation, in an action for damages for malicious assault, constitutes reversible error. 288.

The pleadings may be read to the jury before explaining them. 289.

Weight of evidence must not be so defined as to exclude documentary evidence, or preponderance of the evidence as other than that evidence which determines the conclusion which must be reached. 289.

Error in refusing special instructions before argument, where of a proper character and properly expressed, is not cured by giving like instructions in the general charge. 353.

In a trial for theft a charge to the jury that the theft of the goods was not disputed or open to controversy is an invasion of the province of the jury and constitutes reversible error. 364.

In a will-contest it is essential that the jury be instructed that the evidence of the contestants, in order to warrant the setting aside of the will, should not only outweigh the evidence adduced by the defendants, but also the presumption arising from the order admitting the will to probate. 433.

An instruction which imposes on the defendant, in an action for personal injuries, the duty of proving that it was prudent and cautious, or that omits the qualification as to the negligence being the direct cause of the injury, is erroneous. 441.

In an action on a policy of insurance in a mutual benefit society, it is reversible error to charge the jury that the contract of insurance is embodied in the constitution of the society and the certificate, when the application is made a part of the contract both by its own terms and by the constitution of the society. 464.

A charge which authorizes the jury to return a verdict for the plaintiff for injuries, in the event that they find that certain facts are true, is erroneous if the essential fact constituting the negligence is omitted. 505.

CHATTEL MORTGAGE—

See MORTGAGE.

CHURCH—

See RELIGIOUS SOCIETIES.

CITY BOARD OF EQUALIZATION—

See TAXATION.

CIVIL SERVICE—

In Municipalities, see MUNICIPAL CORPORATIONS.

CLASSIFICATION—

As to the overthrow of the doctrine of classification of cities. 263.

Under Section 3821-85, providing for punishment of bank officers, employes and agents for embezzlement. 537.

Of cities with reference to the number to be elected to the board of education. 569.

COAL—

Where underlying coal is sold and conveyed after the regular decennial appraisement has been made, it is the duty of the county board of equalization, upon application by the owner of the land, to apportion the valuation between the owner of the surface and the owner of the land. 411.

COLUMBIAN SPIRITS—

See WOOD ALCOHOL.

COMITY—

As between states. 157.

COMMISSIONERS—

See COUNTY COMMISSIONERS.

COMMITMENT—

The regularity of an order of commitment can not be attacked on habeas corpus. 537.

COMMUNITY OF INTEREST—

In an action for recovery of money illegally paid to councilmen for services. 385.

CONDEMNATION—.

Recovery of damages for property taken by a municipality is a proceeding in the nature of a condemnation. 503.

CONDITIONAL SALES—

In an affidavit charging the retaking of goods sold on installments where the amount paid exceeds 25 per cent. of the contract price, it is necessary to allege that the transaction was a conditional sale. 303.

Strict compliance with the statutory provisions as to conditional sales is required, and omission by the vendee to file an affidavit with his claim in the office of the county recorder renders the lien of the vendor under the conditional sales contract invalid. 564.

CONDITIONS—

Rendering valid a gift *causa mortis*. 262.

CONSENTS—

The securing of, is a matter which concerns the abutting property owners only, and in the absence of complaint from them, failure to secure the requisite consents can not be used by the city as the basis of an ouster proceeding; moreover, such an objection will be regarded after the lapse of many years as waived. 263.

CONSTITUTIONAL LAW—

Section 4427*b*, relating to the lien of an innkeeper, is merely declaratory of the common law, and does not violate any provision of the Constitution. 174.

Section 9 of Article IV, amending Section 3 of Article XVII, and Sections 567 and 1442, Revised Statutes, construed with reference to time for electing justices of the peace. 107.

The objection does not lie that a claimant to title is denied his constitutional right to a trial by jury by being forced to litigate his claim in an action in foreclosure. 246.

As to the power of the General Assembly to order an investigation by a committee of alleged corruption in local governments; the procuring of information for the use of a future General Assembly not a sufficient justification for; real purpose of a resolution, and not its declared purpose, will be sought; revolutionary procedure not permissible. 257.

The provision of 99 O. L., 30, which makes it an offense to permit girls under eighteen years of age to work more than eight hours in one day in factories, etc., is constitutional. 472.

The state automatic coupler act (98 O. L., 75) is not in conflict

with the federal act relating to the same subject, but is supplementary to and in harmony with it, and is constitutional. 482.

Regulation of commerce and of the instruments of commerce distinguished; rights retained by the states under the federal Constitution. 482.

While the question could not be raised in a collateral proceeding, the court is of the belief that Section 1536-884a, involved in this case, is unconstitutional. 518.

Section 3821-85, providing a penalty for embezzlement by bank officers, employes and agents, is not unconstitutional because not of uniform operation. 537.

But if it be true that one of the provisions of this act is unconstitutional, it follows that the corresponding section of the original free banking act, passed before the adoption of the present Constitution, is unrepealed and still a valid and constitutional act, under the provisions of which an offender may be prosecuted. 537.

The uniformity of operation of Section 3897 as amended in 99 O. L., 584, relating to boards of education in city districts, is destroyed by force of the terms of the act, and the act is therefore unconstitutional as so amended. 569.

Previous to its amendment Section 3897 was general in character, and so far as its terms were concerned operated uniformly throughout the state, and divested of the amendment the act is constitutional. 569.

CONTRACTS—

Which are against public policy; an agreement by a school teacher not to demand pay for attending the teachers' institute is void. 103.

Obligation of sureties on a note not affected by promise of bank cashier to obtain collateral and make the liability of the sureties secondary. 93.

For sale of real estate; specific performance of, can not be enforced, when. 143.

For delivery of a telegram; breach of. 129.

Express terms of the warranty, showing what the parties had in contemplation at the time the contract was made. 189.

Of sale; broker entitled to his commission, where the principal refused to accept the contract when offered by the broker, but afterward accepted the same contract direct from the customer. 231.

Prerequisites for entering into a contract with county commissioners are not for the benefit of the sovereign power alone, but are of the essence of the contract, which without them becomes null and void. 22b.

Necessary averments with reference to a contract entered into by county commissioners. 225.

Existing contracts are not affected by a change in judicial construction. 263.

An action in attachment, based on the allegation that the defendant has repudiated the contract upon which the claim in suit is based, is an action on contract in the sense in which that word is used in the statute. 392.

Action for recovery for services rendered by an attorney under a contract; failure of proof to establish a contract; accord and satisfaction. 463.

Where for the maintenance of a street railway on private property for a period not exceeding a specified term of years, the agreement is a mere permit or license which can not be enforced by the owner of the land in the face of an ordinance providing for a different route. 429.

Where the contract with a real estate agent specifically states that he is to be paid for his services "when the property is sold," failure of a prospective purchaser to take the property because of defective title deprives the agent of the right to a commission. 480.

For sale of land; a rescission of, may be presumed, and the vendee

maintain an action for recovery of money advanced on the contract, when. 561.

For transportation, where the shipment passes over several different roads. 602.

Made by a corporation for the purchase of property and *ultra vires* in character; a court will not order such a contract rescinded, when. 584.

Parol contract for a lease, where the tenant is in possession under a prior written lease. 605.

CONTEMPT—

An appellate court has jurisdiction to adjudge a receiver who was appointed by the nisi prius court, to be in contempt, and to punish him for disobedience of its order. 525.

CONTINUANCE—

A justice of the peace may grant an indefinite continuance, when it is done at the request of both parties. 99.

CONTRIBUTORY NEGLIGENCE—

See NEGLIGENCE.

CONVERSION OF EQUITY—

The sale of realty in which the widow had been given a life interest but elected not to take, does not entitle her to a distributive share in the proceeds. 49.

CONVEYANCE—

By a devisee of devised property during the interim between the death of the testator and the probate of the will; title good in the grantee. 205.

CORPORATIONS—

A certificate authorizing the officers of a corporation to sign a mortgage will not be held insufficient because it was not recorded in the minutes of the company. 356.

Parties dealing with a corporation are not bound to know that every formality has been complied with. 356.

In the absence of fraud or other illegal action, complaint will not lie because of the obtaining of control of a corporation by a combination of stockholders or by cumulative voting. 335.

A sale of treasury stock will not be set aside because made in furtherance of a scheme to retain control, where the sale was made by the proper officers in the presence of all the parties in interest, and there is no claim that the stock would have brought more in the open market or that it would bring more at a re-sale. 335.

Where full opportunity was given stockholders to take their *pro rata* of a new issue of stock and they failed to do so, they will be deemed to have waived the right thereto; and purchasers from them four years later of their stock of the original issue acquire no rights to stock of the new issue still remaining in the treasury. 335.

The statutory provision that the books and records of corporations shall be open for the inspection of stockholders at all reasonable times has no reference to corporations not for profit. 384.

A corporation has no insurable interest in the lives of members of its board of directors who are not indebted to it. 401.

The execution of a corporation note is unauthorized unless it is in furtherance, either directly or indirectly, of the purpose for which the company was chartered. 401.

Action by a board of directors as a board, and not by members of the board acting separately or individually, is necessary to give validity to a matter requiring the approval of the directors. 401.

An action may be maintained by a corporation for cancellation of policies of insurance on the lives of members of its board and for recovery of premiums paid thereon out of the company's treasury, when. 401.

One not a creditor who in good faith assists a corporation by a loan, and takes security therefor, is entitled to preference in the

event of the corporation becoming insolvent. 533.

An action by a stockholder for recovery of a dividend on the ground of fraud will not lie, when; demand by a stockholder for his *pro rata* share of a stock dividend is necessary before bringing an action for recovery of such dividend; failure to make such a demand does not suspend the statute of limitations. 553.

If a trust was created by the resolution adopted by the board of directors in the case here considered, it was terminated more than six years before the bringing of the action. 553.

Nature of the obligation incurred by the declaration of a dividend. 553.

Where the necessities of a corporation required the retention of real estate which had been acquired under an *ultra vires* contract and compromise of pending suits, a court will not in the absence of fraud or bad faith order that the agreement be rescinded and a reconveyance made. 584.

CORPUS DELICTI—

Is put in issue under a plea of not guilty; a charge to the jury which assumes that the commission of the crime occurred as charged constitutes reversible error. 364.

COST—

Negligence in the manufacture of goods is an element which should be excluded in determining the actual cost of manufacture. 221.

COUNCIL—

See MUNICIPAL CORPORATIONS.

COUNTY AUDITOR—

Compensation of, for services as member of city decennial board of equalization; distribution of special tax levy. 128.

Where a municipal assessor fails to qualify his place should be filled by appointment by the county auditor. 209.

Approval of official bonds of assessors and the appointment of assistant assessors are not within the powers of a deputy county auditor. 209.

Not entitled to additional compensation for furnishing blanks to assessors. 305.

COUNTY BOARD OF EQUALIZATION—

See TAXATION.

COUNTY COMMISSIONERS—

Have no authority, under Sections 1077 and 1078, to allow additional compensation to county auditors for furnishing blanks to assessors. 305.

Are without authority to collect surface water and by turning it into a ditch with an inadequate outlet cause an overflow of the lands of a lower owner. 359.

Jurisdiction of, for the purpose of deepening and widening a joint county ditch in order to provide a more adequate outlet for streams emptying therein. 359.

Not liable to a pedestrian who fell through a bridge on a public road from which a traction company had removed the plank in laying its tracks. 527.

COUPLERS—

See AUTOMATIC COUPLERS.

COURTS—

State courts not bound by an adjudication in the federal court of appeals, wherein the judgment was reversed and the cause remanded for a new trial. 177.

It is not merely discretionary but is the duty of a trial judge to interpose when improper remarks are made to the jury, and failure so to do and to instruct the jury to disregard such argument is ground for a new trial. 289.

A court may set aside a decree of divorce for fraud and perjury after the term at which it was granted. 585.

The protection of themselves and the public against fraud and perjury, which is an inherent right in

the courts, is of more commanding importance than the following of ancient rules or mistaken though time-honored theories of public policy. 585.

COVENANTS—

Holding as to breach of, with reference to cigar privileges in other parts of the same building. 63.

CRIMINAL LAW—

Failure of the sheriff to deliver a copy of the panel to the accused as required by Section 7273, is not ground for reversal, where the irregularity is not carried into the bill of exceptions. 4.

Objection to the competency of a witness on the ground of his mental incapacity. 4.

Testimony of the accused before the grand jury properly admitted; evidence establishing death by violence; declaration made by prosecuting attorney in presence of the jury held not to have been misconduct. 4.

Knowledge and criminal intent must be averred in an affidavit charging violation of Sunday closing law. 13.

Failure to file motion to quash waives objection to duplicity or indefiniteness. 113.

Where a sentence is illegal and the accused is remanded for resentence, a fine or imprisonment or both may be imposed as at the original hearing. 113.

An indictment is not bad for duplicity where it charges numerous offenses committed in one county within a specified period and blends them all into one count. 113.

Allegations which state a violation of Section 4427-1, known as the Valentine anti-trust law. 113.

The time laid for receiving the money in an indictment for embezzlement is immaterial, when it appears that at the time of the embezzlement the ownership of the property was as alleged in the indictment. 271.

In a prosecution for retaking goods sold on installments where the amount paid exceeds 25 per cent. of the contract price, an affidavit is necessary that the transaction was a conditional sale. 303.

An individual member of a partnership may be convicted of embezzlement of money which was converted to the use of the partnership. 324.

While abstracts and schedules prepared by an expert from voluminous books or documents are admissible in evidence, the books or documents should be first offered or at least be in the custody of the court. 324.

In order to convict one under Section 6842 as amended, of embezzling a thing of value, it must appear that it came into his possession after the passage and taking effect of this section as amended. 324.

Where a defendant enters a plea of not guilty he puts in issue all the material facts, including the *corpus delicti;* a charge of court to the effect that the theft of the goods was not disputed or open to controversy is an invasion of the province of the jury and constitutes reversible error. 364.

Extradition can not be prevented by habeas corpus where no error in the proceedings is disclosed by the record and authority for the issuance of a warrant of extradition by the Governor appears. 457.

Larceny may be converted into robbery by pursuit and a struggle; violence is concomitant with the taking, when. 461.

Section 4403*c*, relating to the practice of medicine, surgery and mid-wifery, is a criminal statute. 458.

The act making it an offense to employ girls under eighteen years of age in factories more than eight hours a day is constitutional. 472.

A conviction for suffering a game of chance on the premises

must be reversed, where the affidavit merely charged that the offense was committed within four miles of the city of Cincinnati and county of Hamilton, with no averment and no proof that the offense occurred "within" the county of Hamilton and state of Ohio. 473.

Assault with malicious intent to maim or disfigure; evidence necessary to convict; intention inferred from the circumstances; maim and mayhem. 495.

A conviction of keeping open on Sunday a place where intoxicating liquors were sold will not be set aside because of failure to prove that the place was not a regular drug store, when the testimony offered was to the effect that the place was a saloon where intoxicating liquors were sold on other days of the week. 536.

Prosecution of a bank officer for embezzlement under Section 3821-85. 537.

There is a fatal variance where the indictment charges embezzlement as agent, and the proof shows that the money embezzled was received by the defendant in his capacity as attorney. 603.

CROSSINGS—

By tracks of steam, electric, interurban or street railways outside of municipal limits; construction of Section 3333-1 with reference to division of cost; company first on the ground without special rights. 17.

Construction of Section 3277, providing for changing the line of a railway for the purpose of avoiding a dangerous grade or curve; diversion of a highway in order to secure an overhead crossing. 419.

CROSS-PETITION—

That portion of an answer which seeks affirmative relief must be treated as a cross-petition; if the facts therein set forth entitle the defendant to any relief, the defense thus set up is good as against a general demurrer. 189.

CUMULATIVE VOTING—

The obtaining of control of a corporation by, will not be set aside in the absence of fraud or other illegal action. 335.

CUSTOM—

Custom of yard brakemen of going between cars to adjust a coupling is admissible in evidence in an action for damages on account of injuries due to such practice. 65.

DAMAGES—

Negligent failure of a telegraph company to deliver a message renders it liable for nominal damages; evidence warranting compensatory damages; for unexcused failure to deliver a message the company is liable for such damages as naturally flow from a breach of the contract or may fairly be supposed to have been within the contemplation of the parties. 129.

In an action by a car company for recovery for a car sold to a carrier, where the defense of breach of warranty is set up and damages are asked because the car became disabled and defendant lost the use of it, the amount of damages and whether the defendant had another car which could have been used while the disabled car was being repaired are questions for the jury. 189.

Measure of, where goods proved unsatisfactory; negligence in manufacture is an element which should be excluded in determining actual cost of manufacture. 221.

The element of earning power in fixing damages for a wrongful death. 285.

An award of, for malicious assault must be set aside although warranted by the evidence, where an erroneous charge was given with reference to provocation. 288.

Recovery of, for property taken by a municipality is in the nature of a condemnation proceeding. 503.

To property from a sewer; where a cause of action has been stated, and the uncontradicted evidence shows liability for whatever damages resulted and also that the plaintiff suffered greater damages than were awarded him by the jury, errors of law or in the admission or rejection of evidence become immaterial. 501.

For the wrongful death of a widow, fifty-seven years of age, engaged in market gardening with an income of $500 a year, a judgment of $2,000 is liberal compensation to her children for their loss. 516.

DEBTOR AND CREDITOR—

Omission by the vendee under a conditional sales contract to file an affidavit with his claim in the office of the county recorder renders his lien invalid. 564.

The lien of a chattel mortgage is lost by failure to refile within thirty days, and can not be revived to the injury of creditors by the mortgagee taking possession of the property. 564.

Where a party who is not a creditor makes a loan to a corporation in need of assistance, and accounts are assigned to him as security therefor, and the company subsequently goes into the hands of a receiver, the one making the loan is entitled on distribution to be paid as a preferred creditor. 533.

DECISIONS—

Finality of an affirmance as shown by the record can not be changed by looking to the opinion. 1.

The judgment of a reviewing court is found in its mandate and not in its opinion. 177.

A change in judicial construction does not have a retroactive effect on existing contract rights. 263.

A decision by an appellate court will be followed in the same case by the circuit court to which the jurisdiction of an appellate court has been transferred, unless error clearly appear. 553.

Will not be followed, although time honored, where the effect is to protect and encourage fraud and perjury. 585.

DECLARATIONS—

By a deceased wife that a gift was intended to her husband of her separate property in his possession. 489.

DEEDS—

Operation of a deed according to its intent; interest of a brother believed to be dead quit-claimed before the expiration of seven years after his disappearance. 396.

The fact that the consideration upon which a wife released her interest in her husband's property has wholly failed, does not constitute ground for setting the deed aside, unless it is further alleged that the consideration was wholly inadequate at the time the deed was made. 470.

DE FACTO OFFICERS—

Two persons can not be at the same time *de facto* officers of an office for which one incumbent only is provided by law. 209.

Injunction is the proper remedy for a *de facto* officer to prevent being disturbed in the performance of the duties of the office; mandamus will not lie to enforce his claim. 209.

DEFENSES—

A judgment for a defendant should be affirmed where a single valid defense has been interposed. 225.

A stockholder in the Union Mutual Fire Insurance Company is not barred by the decree of the Supreme Court in the ouster proceedings from questioning his liability for an assessment or from setting up any other defense. 297.

The defense of contributory negligence, if well pleaded in an action for damages for personal injuries, is not inconsistent with a general denial. 441.

The six years statute of limitations is a good defense in an action to enforce a lien for money paid for lands at a delinquent tax sale which proved to be invalid. 509.

DELIVERY—

Constructive delivery of grain on track in railway yard, and conditions attaching thereto. 417.

DEMAND—

A demand by a stockholder for his *pro rata* share of a stock dividend is necessary before bringing an action for recovery of such dividend. 553.

DEPOSITIONS—

Taken during the progress of a Jones law trial can not be filed under Section 5282; yet no prejudice results from their taking. 351.

DEPUTY CORONER—

One appointed to the position of deputy coroner, under the provisions of Section 1209*a*, is not an officer, and quo warranto will not lie to determine his right to hold the position. 414.

DESCENT—

Effect on the descent of property of the failure of the widow to take under the will; in this case the testator was held to have died intestate as to property devised to his widow for life with a power to sell which was not exercised, and the widow became owner in fee of the intestate property devised to her for life but took only a dower interest in the property devised to her in fee. 474.

DEVISE—

A title by devise relates back from the probate of the will and takes effect as of the date of the death of the testator; or if not at the death of the testator, the devisee takes upon probate of the will no more than a naked legal title, and where he has made a coveyance of his interest during the interim between the death of the testator and the probate of the will, he takes the legal title upon probate of the will as trustee for his grantee. 205.

Of residuary estate to legal heirs. 267.

Devise of property to a widow in fee while other property was devised to her for life with power to sell; effect of her failure to take; intention to create a life estate prevails over an inference arising from a power to sell. 474.

DIKE—

An ordinance for the appropriation of money for, falls within the provisions of Section 1536-205, known as the Burns law. 235.

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Finality of, as shown by the record can not be changed by looking to the opinion of the court. 1.

Conclusive on demurrer by way of estoppel. 1.

A judgment of reversal, wherein the case is remanded for further proceedings, is not a final order, when. 177.

The judgment of a reviewing court is embodied in its mandate, and not in the opinion of the court. 177.

The lien of a magistrate's judgment may be asserted in an action to sell property of a decedent to pay debts, where the party against whom the judgment was obtained has an interest in the property as an heir. 204.

A judgment for a defendant should be affirmed, if a single valid defense was interposed or there is other sufficient reason under the law for sustaining the judgment. 225.

Where rendered for an amount greater than that endorsed on the summons, the error can not be cured by a remittitur. 368.

Sufficient averment of fraud in obtaining a judgment against a wife; judgment may be set aside where no defense was interposed, notwithstanding there was service of summons. 383.

A manifest mistake in a verdict may be corrected in the judgment, when. 433.

In an action to compel adult coparceners to account to infants for profits derived from purchase at an inadequate appraisement of land held in common, the court is not bound to apportion the judgment among the joint wrong-doers, but may render a general judgment against all the defendants. 439.

A decision directing a verdict for the defendant on a defective petition does not preclude the bringing of another action. 581.

When against a municipality for property taken, the sinking fund trustees can not be compelled to pay by mandamus proceedings. 503.

JUDICIAL NOTICE—

A court may take judicial notice as to the party politics of newspapers publishing notice of a Jones law petition. 351.

JUDICIAL SALES—

All persons having any interest in the property should be made parties, including an outstanding claimant, although he does not claim title from the defendant or his immediate predecessors in title. 177.

Policy of the law for the protection of purchasers at. 246.

JURISDICTION—

Of the court with reference to railway crossings under Section 3333-1. 17.

Not conferred in attachment by the giving of bond. 48.

To grant a motion for a new trial, where the words "and for a new trial" were added by amendment after time. 77.

Is not lost by a justice of the peace by granting an indefinite continuance, when. 99.

A justice of the peace is without jurisdiction in an action for recovery of profits, where the amount has not been determined by an accounting or a court. 124.

Dilatory objections to jurisdiction. 157.

In attachment, not obtained under an affidavit where the nonresidence of the defendant is declared on belief only. 282.

Is conferred on appeal from a justice of the peace by approval of the undertaking by another justice of the same township. 432.

An appellate court has jurisdiction to punish for contempt in disobeying its order a receiver appointed by the nisi prius court. 525.

A petitioner for a writ of habeas corpus who attacks the jurisdiction of the trial court will be heard. 537.

JURY—

The right of trial by, is not denied by forcing a claimant to title to litigate his claim in an action for foreclosure. 246.

Discharge of, in a civil case during trial or after submission and before verdict is not discretionary in a court; but must be based on a finding that a necessity for the discharge exists or upon consent of both parties; unauthorized discharge deprives the court of jurisdiction and a motion to dismiss should be granted. 255.

The jury may take the pleadings to their room. 289.

A charge of court, in a trial for larceny, to the effect that the theft of the goods is not disputed or open to controversy is an invasion of the province of the jury, and constitutes reversible error. 364.

JUSTICE OF THE PEACE—

The continuance of a cause by, for an indefinite period does not work a discontinuance, when done by consent of both parties. 99.

Election of, under the bi-ennial election amendment; election of successors of incumbents premature and void, when. 107.

Where a transcript of proceedings before, is certified as true, its correctness can not be attacked in a court of review. 124.

Has no jurisdiction in an action to recover profits until the amount of the profits has been determined by an accounting or a court. 124.

Upon reversal of an order by, overruling a motion to discharge an attachment, the common pleas should retain the case for trial as upon appeal. 191.

Duty of, where an order has been made for the payment of money by a garnishee, and the reviewing court has subsequently held that the justice was without jurisdiction. 354.

Reversal of proceedings before a justice of the peace speaks as of the date of the reversal. 354.

Jurisdiction on appeal from a justice of the peace is conferred by approval of the undertaking by another justice of the same township. 432.

A justice of the peace has jurisdiction, under Section 6600, in cases of tenancy from year to year. 605.

KNOWLEDGE—

On the part of one who knew his name had been forged to a note; silence as to the forgery not culpable, unless. 72.

Of the president of an oil and gas company as to the time the signing of a cancellation of his lease would become effective. 337.

LABOR—

The provision of 99 O. L., 30, limiting the hours of work of girls under eighteen years of age in factories to eight hours, is constitutional. 472.

LACHES—

In an action by sisters to recover corporate stock from a brother to whom it was assigned for voting purposes, laches or the statute of limitations can not be pleaded. 58.

A mortgagee is guilty of, when acting upon the theory that his security is ample he delays the enforcement of his claim until long after the death of the mortgagor and the closing up of his estate and the sale of other property to innocent purchasers for value who have erected improvements thereon; such innocent purchasers can not be proceeded against by the mortgagee after exhaustion of his security. 372.

The doctrine of stale equity or laches does not apply to an action at law, governed by the statute of limitations, which does not begin to run during coverture. 424.

LANDLORD AND TENANT—

At the request of the property owner and for the purpose of reforming the lease, cancellation was entered on the old lease and a new lease executed, which was not immediately left for record; in the meantime the owner executed another lease to a third party who placed it on record; injunction granted against interference with his possession. 337.

Where it is alleged that the landlord had knowledge of a defect which resulted in the injury of plaintiff, and the plaintiff did not have such knowledge, and the landlord negligently permitted the defect to continue, the plaintiff assumed the burden of proving these allegations, and the landlord upon request is entitled to special instructions delivered before argument embodying the law with reference to such knowledge and negligence. 353.

In an action against a landlord on account of injuries from a defective step, the fact that the proof discloses the plaintiff to be the wife of one of the tenants of the building does not present a material variance. 353.

A movable partition of the kind involved in this case can not be regarded as a permanent addition to the freehold. 488.

The fact that premises have deteriorated does not afford a tenant sufficient reason for quitting them, unless it appears that they have become unfit for occupancy for the purpose for which they were leased. 568.

Character of tenancy where begun under a written lease for five years, and continued at the end of each five year period by verbal agreement. 603.

The question of liability for injuries from a sign falling upon a pedestrian passing along the sidewalk depends upon who was in possession and control of the building at the time of the accident. 577.

LARCENY—

May be converted into robbery by pursuit and a struggle; violence is concomitant with the taking, when. 461.

LEASE—

Of cigar privilege; covenant of restriction; alleged breach of. 63.

Where a lease provides by its terms that it may be surrendered by the parties, the endorsement thereon of cancellation and surrender constitutes a legal surrender, notwithstanding the statutory provision that any interest in land must be duly executed, acknowledged and witnessed. 337.

A gas and oil company which consented to cancel its lease in order that it could be reformed and was granted a new lease which it failed to have recorded, will not be heard to claim that its president in signing the cancellation of the old lease acted upon the belief that the cancellation would not be effective until the new lease was recorded. 337.

A lease for gas and oil is of no validity except between the parties until it is filed for record, and a subsequent lessee with knowledge, whose lease is recorded, is entitled to hold the premises against all persons claiming under a prior unrecorded lease. 337.

A lessee has the right to remove a movable partition of the kind involved in this case. 488.

Deterioration of premises not ground for their abandonment by the tenant, unless they have become unfit for the purpose for which they were leased. 568.

Where a tenancy was begun under a written lease for a term of five years, with a privilege of renewal for another five years, and the lessee entered upon his fourth

term by virtue of a verbal agreement for another five years under the same terms as before, his possession is referable to the former written lease and he becomes a tenant from year to year. 605.

LEGACY—

See DEVISE.

LEGAL REPRESENTATIVES—

Where these words are used in a life insurance policy they may be shown by the context and surrounding circumstances to mean "heirs and next of kin." 406.

LEGISLATURE—

The plain language of a statute must be followed irrespective of the intention of the Legislature. 161.

Power of, to order an investigation by committee of alleged corruption in local governments; revolutionary procedure not permissible. 257.

The real purpose of a resolution adopted by a Legislature will be sought, and not its declared purpose. 257.

The adjournment of the Legislature referred to in the Ohio Railroad Commission act is the adjournment of the session, and not a mere recess for a specified period. 547.

LICENSE—

Long use of a footway over railway tracks implies a license to pedestrians to cross at that point. 61.

Regulating chattel mortgage and salary loan brokers; provision requiring signature of wife to application of the pledgor of no effect. 273.

An agreement for the maintenance of a street railway track on private property for an indefinite period not exceeding twenty-five years is a mere permit or license, and can not be enforced by the owner of the land in the face of an ordinance requiring a different route. 429.

A licensed physician can not invoke in his own behalf and in a civil proceeding the prohibition of a criminal statute against the practice of medicine by unlicensed physicians; nor can the property right conferred by a statutory license be protected by injunction against the unlawful competition of those unlicensed. 458.

LIEN—

Section 4427*b*, relating to the lien of an innkeeper, is constitutional. 174.

The lien of an innkeeper attaches to a typewriter, left at the inn by a guest who departed without paying his bill, notwithstanding the guest had no title to the machine and had obtained possession of it by false pretenses. 174.

Of a magistrate's judgment may be set up in the probate court in a proceeding to sell property of a decedent to pay debts, where the party against whom the judgment was obtained has an interest in the property as an heir. 204.

The lien on other real estate of a mortgagor is lost by a mortgagee who delays enforcement of his claim, on the theory that his security is ample, until long after the death of the mortgagor and the closing up of his estate and sale of such other property to innocent purchasers who have made improvements thereon. 372.

A lien is established on the funds of a mutual benefit society by the adjudication of the claim by duly authorized trustees and delivery of the order. 438.

For money paid for lands at a delinquent tax sale which proved invalid can not be enforced after the six years statute of limitations has run. 509.

LIFE ESTATE—

Owner of a life estate in land which has been sold for taxes, but the sale has not yet been confirmed, is the proper party to serve with notice of a proposed street improvement. 344.

An intention to create a life estate prevails over an inference arising from power to sell. 474.

LIGHT AND AIR—

Obstructions to, in the form of a bridge connecting buildings on opposite sides of the street. 357.

Easement as to, does not exist against a municipality. 357.

LIMITATION OF ACTIONS—

Can not be pleaded in an action by sisters to recover from a brother corporation stock assigned to him for voting purposes. 58.

Application of Section 6113 to the administrator of a wife seeking to recover under the doctrine of subrogation. 95.

The six years statute runs against an assessment levied on a policyholder in the Union Mutual Fire Insurance Company; running of the statute not barred by the approval by the Supreme Court of a second assessment against the same party, when. 297.

Bar of the statute as to a claim to title to an interest in land, which had been prematurely quitclaimed by the brother of the missing owner, supposed to be dead. 396.

The doctrine of stale equity or laches does not apply to an action at law, governed by the statute of limitations, which does not begin to run during coverture. 424.

The statute of limitations does not run in favor of a tenant in common in the occupancy of premises, against his co-tenant, until some overt act of an unequivocal character, clearly indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant. 451.

The running of the six years statute of limitations defeats the lien for money paid for lands at a delinquent tax sale which proved invalid. 509.

The immunity of the statute of limitations which is enjoyed by the state is not transferable. 509.

The operation of the statute of limitations is not suspended by failure on the part of a stockholder to make demand upon the corporation for his *pro rata* share of a stock dividend; the six years statute of limitations applies in such a case. 553.

LIQUOR LAWS—

At a hearing before the common pleas court under the Jones local option law it is prejudicial error to deny the ordinary process of the court, when request is made therefor in good faith and within reasonable bounds. 33.

Character of the hearing before a common pleas judge; what it comprehends; burden of proof; description of territory; final jurisdiction. 33.

A petition under the Jones law can not be taken as *prima facie* evidence of the facts necessary to decide upon its sufficiency, except in the absence of a request of any elector to be heard. 351.

The burden of proving the facts alleged in a Jones law petition is upon the petitioners; the burden of proving that a signature was procured through fraud or misrepresentation is upon the party seeking to have his name withdrawn on that ground. 351.

The number of signatures to a Jones law petition must equal a majority of the votes cast at the last municipal election. 351.

Prosecution for keeping open on Sunday; failure to prove the exception provided by the statute not a ground for setting a conviction aside, when. 536.

MALICIOUS PROSECUTION—

A petition for damages for, states no cause of action, where it is merely alleged that "the said cause was terminated by the plaintiff being obliged to pay the costs of the prosecution." 374.

MANDAMUS—

Will not lie to compel the entering of judgment on a verdict during pendency of a motion to vacate verdict. 77.

To compel distribution of a special tax levy is premature, when. 128.

Will not lie at the instance of a *de facto* officer to enforce his claim of title to the office. 209.

Will not lie to compel sinking fund trustees to pay a judgment against the municipality for land taken, when. 503.

MARRIAGE—

Is a business partnership. 238.

MASTER AND SERVANT—

Action by a minor for injuries; effect of a misstatement of his age in the charge to the jury; a charge as to the burden of proving negligence on the part of the plaintiff misleading where the defense of contributory negligence is disclaimed. 69.

Evidence as to the custom of employes in the carrying on of their work is competent where negligence is charged. 65.

Negligence claimed on account of extra hazard from change of material which a minor was feeding into a machine. 81.

As to liability for injury to a spectator from the seting off of a blast. 140.

Where a servant disregards a warning from his employer of danger, he assumes the risk. 334.

Where an employe was injured at a machine which was known to be out of order and an attempt had been made to repair; refusal to set judgment in his favor aside because not supported by sufficient evidence. 493.

Action by an employe alleging that he became blind from the fumes of wood alcohol used as a compound of shellac and applied to an interior surface. 505.

Where it is claimed injuries have resulted from a defective appliance, it is necessary to aver that the appliance used was negligently selected or that there was a failure to warn the servant of the danger connected with its use. 505.

MAYHEM—

Mayhem and maim are equivalent words, the difference being in the orthography and not in the sense. 495.

MERIT SYSTEM—

See MUNICIPAL CORPORATIONS.

MINES AND MINING—

In an action growing out of an injury due to an alleged defect in the roof of a coal mine, evidence as to facts existing at the time of the accident should be given to the jury in preference to expert testimony with reference thereto. 293.

MINISTERIAL ACTS—

Approval of official bonds of assessors and the appointment of assistant assessors are not merely ministerial acts, but require the exercise of judgment, and are not within the powers of a deputy county auditor. 209.

MINOR—

See INFANT.

MISCONDUCT—

Of counsel in argument to jury; reviewing court will not undertake to apportion the blame for; failure of trial judge to interpose and instruct jury to disregard such argument is ground for a new trial. 289.

Of counsel in his remarks to the jury can not be considered as a ground of error unless properly brought into the record. 365.

Where counsel make statements of fact within hearing of the jury, which are prejudicial, incompetent, or not at issue, it is the duty of the trial judge to interpose and correct the wrong without waiting to be reminded of it by opposing counsel; default in so doing, or if the wrong be one that

can not be nullified but makes necessary that the jury be discharged and the cause continued, requires that the judgment be reversed. 493.

MISNOMER—

Of a street railway company in ordinance extending its grant does not afford ground for ouster. 263.

MISTAKE—

A manifest mistake in a verdict may be corrected in the judgment, when. 433.

A matter can not be treated by the court as a mistake in the absence of an averment that it was mutual. 470.

MONOPOLIES—

See VALENTINE ANTI-TRUST LAW.

MORTGAGE (Chattel)—

Requirement that the giving of a chattel mortgage be endorsed on the policy of insurance covering the property is reasonable. 193.

Where a chattel mortgage expires without payment having been made, and it is not refiled within thirty days pursuant to the statute, the lien becomes dead, and it can not be revived to the injury of creditors by the mortgagee taking possession of the property. 564.

MORTGAGE (Real Estate)—

A mortgagee is not bound by an appraisal and award made by the mortgagor and insurance company without his knowledge, when; proper procedure by the mortgagee. 28.

Foreclosure proceedings contemplate an appraisement and sale of the entire land mortgaged, and not merely the equity of redemption; an outstanding claimant should be made a party although making no claim of title from the defendant or his immediate predecessor in title. 177.

Joinder of a party claiming title in fee simple in an action for foreclosure of a mortgage given by another defendant. 246.

The certificate of authority for the signing of a mortgage by officers of a corporation will not be held insufficient because not recorded on the minutes of the company. 356.

Lien against other property for balance due from a decedent lost by estoppel, when. 372.

MOTION—

Amendment after time of motion for vacation of verdict by adding the words "and for a new trial." 77.

Mandamus will not lie to compel the entering of judgment on a verdict during pendency of a motion for vacation of the verdict. 77.

MUNICIPAL CORPORATIONS—

Liability of, for injury due to a defective sidewalk; not negligence as a matter of law to attempt to pass over a defective sidewalk, when. 161.

An ordinance appropriating private property for the building of a dike is void if no certificate has been previously filed and recorded as required by the Burns law (Section 1536-205); appropriation proceedings under such an ordinance may be enjoined. 235.

Delay in passage of an ordinance extending a street railway grant beyond expiration of the original grant does not render the grant invalid, when; an extension grant is not rendered invalid by reason of failure to read it on three different days, or to publish it, or failure to secure the requisite consents, or because the correct name of the company was not used, when; effect of a change in judicial construction on such an ordinance is not retroactive. 263.

Licenses for chattel mortgage and salary loan brokers; a fee of $250 not unreasonable; keeping a record of loans, rate of interest etc., open to inspection; requirement that if the pledgor is a married man his wife must sign the

application for the loan is of no effect. 273.

Discretion in the levying of street assessments; potential character of the property may be considered; assessment will not be interfered with by the courts unless grossly excessive. 299.

Injunction will not lie on the petition of an abutting property owner, against the connecting of buildings on opposite sides of the street by a bridge twenty feet above the pavement, where the injury which the plaintiff will sustain, if any, is not different in kind from that suffered by the public at large. 357.

Whether the municipality is liable for an injury occurring on a board sidewalk, known by plaintiff to have been in bad repair, is a question for the jury, where it appears that other parts of the street were also in a condition unsafe for travel. 382.

Money paid to councilmen for their services before such payments have been authorized by ordinance may be recovered back in a suit by a tax-payer, and all councilmen so illegally paid may be joined in one action. 385.

Mandamus will not lie to compel sinking fund trustees to pay a judgment against the municipality for land taken, the value whereof has been fixed by the court in a proceeding filed by the property owner subsequent to the taking of possession by the municipality. 503.

Where a cause of action is stated against a municipality, and the uncontradicted evidence shows liability for whatever damages resulted, and also that the plaintiff suffered greater damages than were allowed him by the jury, errors of law in the charge to the jury or in the admission or rejection of evidence become immaterial. 501.

A cemetery wherein interments were made for a fee without granting any title to the ground, and where no interments have been made for forty years, may be appropriated for use as parks and public buildings; certificate that money to meet the expense is in the treasury is not required; harmonious purposes of the appropriation; necessity for; designation of the parties where the defendant is a religious society. 511.

The merit system provided by the municipal code is limited in its application to the classified service to individual removals for specific causes, and in case of a reduction of the police force does not require that preference shall be given to seniority in service. 521.

The authority conferred upon council by Section 1536-1005, to fix the number of employes of the department of public safety includes the power to reduce the number of such employes. 521.

Sections 1536-703 and 1536-912, providing that no removals shall be made from the classified service except for cause and continuing in office certain municipal employes, are provisional in their scope and gave incumbents their status under the new code, but confer no higher right to position than is enjoyed by those subsequently placed in employment by examination under the merit system. 521.

MUTUAL BENEFIT SOCIETIES

An order issued by the trustees of a mutual benefit society and delivered to the claimant is equivalent to a cashier's check. 438.

The adjudication of a claim by the duly authorized trustees of a fraternal soceity, with delivery of the order, establishes a lien on the funds of the organization which a court of equity will recognize as against a subsequently appointed receiver or assignee of the organization. 438.

In an action for recovery on a policy of insurance, the society will not be permitted after trial and

verdict to claim the exemptions provided by Section 3631-14. 464.

Where the application for the insurance is made a part of the contract both by its own terms and by the constitution of the order, it is reversible error to charge the jury that the contract of insurance is embodied in the constitution and the certificate. 463.

NEGLIGENCE—

Where a yard brakeman was injured by going between cars to adjust a coupling which was out of order. 65.

Where the defense of contributory negligence is disclaimed, a charge of court as to the burden of proving negligence on the part of the plaintiff is misleading and constitutes reversible error, when. 69.

Child struck by a train at a foot crossing of railway tracks; question of negligence should have been left to the jury. 61.

Where the undisputed facts show contributory negligence on the part of the plaintiff, but there is evidence tending to show negligence on the part of the defendant, it is error to direct a verdict for the defendant. 61.

Where a minor was injured while feeding a machine; effect of omission of reference to plaintiff's age in charge of court as to ordinary care. 81.

One driving along a car track is without excuse if his vehicle is wrecked by a car coming up behind, when. 123.

Presumption of, in failing to deliver telegram, is on the telegraph company, when. 129.

Neither the owner of property, nor his contractor who sets off a blast to demolish a wall and causes the death of a spectator thereby, is liable as for negligence, when. 140.

It is not negligence as a matter of law to attempt to pass over a defective sidewalk, when. 167.

In the manufacture of goods, negligence is an element which should be excluded in determining the actual cost of manufacture. 221.

In an action for damages on account of negligence, special charges to the jury should state all the conditions necessary to a determination of the question of negligence. 285.

In an action for damages on account of fatal injuries from being struck by an electric car, the belief of the decedent that he had time to clear the tracks and its reasonableness must be considered, not in connection with the direct testimony alone, but in view of all the surrounding circumstances. 285.

Evidence as to the facts and circumstances surrounding the accident should be given to the jury where practicable, in preference to expert testimony with reference thereto. 293.

Disregard by a servant of a warning from the master of danger warrants the taking of the action on account of his death from the jury on the ground that the risk was assumed. 334.

A finding by a jury that injury to a locomotive fireman was caused by the negligence of fellow-servants is inconsistent with a finding that the engineer assured the fireman it was safe to go under the engine, although no precautions had been taken to protect him while there. 379.

A finding by a jury that the injury was the result of accident negatives the allegation of the petition of malice and willfulness on the part of the defendant. 379.

Whether the use of a board sidewalk known to be in bad condition was negligence, when other parts of the street were also unsafe for travel, is a question of fact to be determined by the jury. 382.

Injuries from being struck by a runaway horse held, under the

circumstances of this case, to belong to that unfortunate class of accidents for which the law affords the injured party no relief. 441.

The defense of contributory negligence, if well pleaded in an action for personal injuries, is not inconsistent with a general denial. 441.

An interrogatory which raises an issue as to the comparative negligence of the plaintiff and defendant is erroneous. 441.

An instruction to the jury which imposes upon the defendant the duty of proving that it was prudent and cautious, or that omits the qualification as to the negligence complained of being the direct cause of the injury, is erroneous. 441.

Where the evidence clearly shows that the machine at which the plaintiff was employed was not working properly, and that an effort was made to fix it, and plaintiff was then told it was all right, a judgment in his favor for injuries thereafter received and due to defects in the machine will not be set aside because not supported by sufficient evidence. 493.

In an action for injury to a servant from a defective appliance, it is necessary to aver that the appliance was negligently selected, or that there was a failure to warn the servant of the danger in its use. 505.

Action by a brewery employe for damages for loss of eyesight, alleged to be due to the use of wood alcohol in the shellac used in varnishing the interior of large casks. 505.

Where a woman driving a light wagon was thrown from her seat and killed by a car coming up from behind and striking the wagon. 516.

Where a pedestrian fell through a bridge on a public road, from which a traction company had removed the plank in laying its tracks. 527.

The averment in a petition that the plaintiff, while a customer of the defendants' store and having no knowledge of the existence of an open stairway, stepped backward into the entrance to said stairway and was violently precipitated to the basement below, raises a presumption that the plaintiff was himself negligent. 551.

The fact that a sign fell to the sidewalk, injuring a pedestrian who was passing thereunder, affords some evidence as a matter of law that some one was negligent in not maintaining it in a safe condition. 577.

But liability in such a case depends upon who was in possession and control of the building at the time of the accident, and in an action for damages on account of the injury, it is not error to direct a verdict for the defendants, in the absence of evidence that they owned the building or were bound for repairs. 577.

NEW TRIAL—

Amendment after time of motion for vacation of verdict by adding the words "and for a new trial." 77.

Form of; irregularities should be disregarded, when; what must be in writing. 77.

Failure of the trial judge to interpose when improper argument is made to the jury, and to direct the jury to disregard such argument is ground for a new trial. 289.

It is not error to overrule a motion for a new trial filed after term and based on newly-discovered evidence, when. 289.

It is not error to refuse to grant a new trial for the purpose of hearing new evidence discovered by accident and proffered as a new defense after final submission, where the application therefor was not made by motion under Section 5307, or by petition under Section 5309-424.

NOTICE—

To property owner to build a sidewalk; assessment valid against a subsequent purchaser, when. 440.

Known heirs are not barred by an action to quiet title, where they are not made parties and have no actual notice of the proceedings. 451.

To municipality of defect in sewer. 501.

NUISANCE—

Injunction will lie against creation of, by laying a railway track in the street in such a way as to interfere with gutters, drains, etc. 97.

The connecting of buildings on opposite sides of the street by a bridge twenty feet above the sidewalk is not such a nuisance as to give the right to an abutting property owner to enjoin. 357.

Question of liability of owner of property, or his contractor, where a spectator was killed by the setting off of a blast in a populous neighborhood. 140.

OFFICE AND OFFICER—

Effect of the bi-ennial election amendment on existing terms of office of justices of the peace. 107.

Office of assessor becomes *ipso facto* vacant by refusal to qualify within the prescribed time. 209.

Mandamus will not lie at the instance of a mere *de facto* officer to enforce his claims to title to the office; injunction the proper remedy to prevent interference with *de facto* officer until the legal title to the office has been determined. 209.

Two persons can not, at the same time, be *de facto* officers of an office for which one incumbent only is provided by law. 209.

Approval of official bonds of assessors and appointment of assistant assessors are not merely ministerial acts; are not within the powers of a deputy county auditor. 209.

Public officers are not entitled to compensation in addition to their salary for services required of them by the statute, unless the statute provides therefor in express terms. 305.

County auditors are not entitled to additional compensation in furnishing blanks to assessors. 305.

Councilmen are not entitled to be paid for their services until such payment is authorized by ordinance, and money received by them prior to the passage of the ordinance may be recovered back in a proper action; all councilmen so receiving money illegally may be joined in one action. 385.

A deputy coroner, appointed under the provisions of Section 1209*a*, is not an officer; quo warranto will not lie to determine the right of such an appointee to the position. 414.

Seniority of policemen in service affords no preference in case of reduction in the number employed. 521.

A "recess appointment" by the Governor is of no validity unless made after the final adjournment of the session of the Legislature, whether it be a regular or extraordinary session. 547.

No exception is made in the Ohio Railroad Commission act to the rule that an outgoing official can not appoint for a term to begin after his own has expired. 547.

Acquiescence in another succeeding to the office held by the relator; estoppel by words and conduct against disputing the title of another to an office; demand for restoration; delivery of office amounts to a resignation, when. 569.

The president of a board of education is an officer within the statute providing for his election and fixing the duties of his office. 569.

OHIO RAILROAD COMMISSION

In providing that members of this commission shall be appointed in January for terms of office be-

ginning February 1, the Legislature intended that when a new Governor takes his seat on the second Monday in January, the rule that an outgoing official can not appoint for a term to begin after his own has expired shall be operative. 547.

The adjournment of the Legislature referred to in this act is the *sine die* adjournment of the session whether regular or extraordinary, and not a mere recess for a specified period; and a "recess appointment" has no validity unless made after final adjournment of the session. 547.

OIL AND GAS—

A lease for, has no validity, except between the parties, until filed for record; a subsequent lessee with knowledge, whose lease is recorded, is entitled to hold the premises against all persons claiming under a prior unrecorded lease. 337.

A company canceling its lease for the purpose of reformation and accepting a new lease, will not be heard to claim that its president signed the cancellation under the belief that it would not be effective until the new lease was recorded. 337.

The fact that the claimant under an unrecorded lease has drilled within certain territorial limits does not constitute such actual and open possession of the land as to give effect to such unrecorded lease under the provision of Section 4112*a*. 337.

ORDINANCE—

Extending a street railway grant is not invalid because passage of is delayed beyond expiration of original grant, when; duty of publishing and effect of failure to publish; is not of a general or permanent nature. 263.

Fixing a license fee for chattel mortgage and salary loan brokers. 273.

Validity of, where authorizing the connecting of buildings on opposite sides of the street by a bridge. 357.

Authorizing a village clerk to collect street assessments; such service not thereby rendered a "duty pertaining to his office." 369.

An ordinance authorizing the payment of councilmen for their services must be passed before such payments can be legally made. 385.

Conflicting provisions of, with reference to a street railway route. 429.

OUSTER—

See QUO WARRANTO.

PARENT AND CHILD—

Land given to a son-in-law upon receipt from the daughter and son-in-law that it was by way of advancement to the daughter, held to have been an advancement and not an implied trust. 375.

Purchase by a son of property appraised by his father held to have amounted to a secret trust in favor of the father. 41.

PAROL CONTRACTS—

See CONTRACTS.

PARTIES—

Idiots are made parties to an action to sell real estate to pay debts by the filing by their guardian of an answer and cross-petition wherein the allegations of the petition are admitted, service waived, and the court is asked to grant the prayer of the petition. 481.

In a foreclosure proceeding all persons having claims against the property should be made parties, including an outstanding claimant, although he makes no claim to the title from the defendant or his immediate predecessors in title. 177.

In an action by a tax-payer for recovery of money illegally paid to councilmen for services, all

councilmen so illegally paid man be made parties. 385.

In an action to quiet title, notice to unknown heirs by publication does not divest known heirs of title, where they are not made parties to the action and have no actual notice of its pendency. 451.

In Ohio an outstanding claimant of title to mortgaged real estate is a proper party defendant in a proceeding to foreclose the mortgage. 246.

Where a religious society is defendant in an appropriation proceeding, the trustees of the society should be individually named as such in the caption. 511.

Where property is being appropriated which belongs to a religious society, the trustees of the society should be individually named as such in the caption. 511.

Where judgment has been obtained by a contractor against a railway company, it is not error to permit the company to make material-men and others asserting claims against the contractor, parties to the action for the purpose of distribution. 367.

PARTITION—

Where adult co-parceners conceal from an infant co-parcener the true value of the land, and after taking it at its appraised value sell it at a greatly enhanced figure, they will be required to account to the minor for the profits thus derived. 439.

In such a case the court is not bound to apportion the judgment among the joint wrong-doers, but may render a general judgment against all the defendants. 439.

Where land was released by a co-parcener for a valuable consideration, the release including an interest inherited by the grantor from a brother then believed to be dead, but it developed many years later that the absent brother was not dead at the time the release was made; title held to be good in the grantee. 396.

PARTNERSHIP—

An action for the dissolution of a partnership is an equitable action; division of partnership assets; appeal. 381.

An individual member of a partnership who receives money as an agent, and secretes it with intent to embezzle and convert it to the use of the partnership, may be convicted under Section 6842. 324.

Profits of a partnership can not be recovered in an action before a justice of the peace until the amount has been determined. 124.

PENALTY—

For failure to comply with ordinance requiring the taking out of a license. 273.

PERFORMANCE—

Non-performance by both parties to a contract affords ground for a presumption that it has been rescinded by mutual consent, when. 561.

PERJURY—

A decree of divorce may be set aside for, after the term at which it was granted. 585.

PERSONAL INJURIES—

See NEGLIGENCE.

PHYSICIAN AND SURGEON—

A licensed physician can not invoke in his own behalf and in a civil proceeding the prohibition of a criminal statute against practice by unlicensed physicians. 458.

A court will not interfere with the practice of medicine by one person on the petition of another, merely because such practice is unskillful and patients are being deceived by false claims as to skill; nor because a property right to practice medicine, conferred upon the plaintiff by his statutory license, is interfered with by the unlawful competition of one who is unlicensed. 458.

PLEADINGS—

A petition in an action for damages for malicious prosecution

states no cause of action where it is merely alleged that "the said cause was terminated by the plaintiff being obliged to pay the costs of the prosecution." 374.

An allegation of malice and willfulness on the part of the defendant is negatived by a finding by the jury the the injury was the result of accident. 379.

In an action against a landlord on account of injury from falling on a defective step. 353.

In an action for a *quantum meruit* for professional services rendered, a complete defense is stated by the allegation that the plaintiff agreed to prosecute the case, if necessary, to the court of last resort for a contingent fee of one-third of the amount recovered, and that after losing the case in the court below he refused to take it to the highest court unless paid for so doing, whereupon he was dismissed from the case. 390.

A confession and avoidance is not inconsistent with allegations of the petition, when; and where the reply denies nothing in the answer except what is "inconsistent with the petition," a court may properly give judgment for the defendant on the pleadings; where this was done and the case was tried to a jury who found for the defendant, it is immaterial whether error intervened in the admission of evidence or charge to the jury. 390.

If the defense of contributory negligence is well pleaded in an action for personal injuries, it is not inconsistent with a general denial. 441.

In an action for damages for injuries sustained in falling down an unguarded stairway. 551.

In an action for foreclosure where there were prior encumbrances and an outstanding claim to title in fee simple. 246.

No intendments are made in favor of a plea of estoppel; pleader must aver all facts necessary to its existence with particularity and precision. 72.

Not essential that the interest to be acquired by an appropriation proceeding be declared in the application. 511.

Under the rule that a master can be held liable only for acts negligently done or omitted to be done and so alleged, it is necessary to allege that the appliance which caused the injury was negligently selected, or that there was a failure to warn the servant of the danger from its use. 505.

Necessary allegations in an action to set aside a deed in which a wife released her rights in her husband's property for a consideration which wholly failed. 470.

That portion of an answer which seeks affirmative relief must be treated as a cross-petition, and if the facts therein set forth entitle the defendant to any relief, the defense thus set up is good as against a general demurrer. 189.

May be read by trial judge to jury before explaining them; may be taken by the jury to their room. 289.

Necessary averments in an action by a county against a contractor and his sureties for damages for failure to complete a contract entered into with the county commissioners. 225.

POLICE COURT—

See COURTS.

POLICE JUSTICE—

Of a village, appointed by virtue of the authority conferred by Section 1536-884*a*, has under the present statutes of Ohio the same jurisdiction as the mayor of such village; while the question could not be raised in a collateral proceeding, the court is of the belief that this statute is unconstitutional. 518.

POLICE DEPARTMENT—

See MUNICIPAL CORPORATIONS.

POLICY OF THE LAW—

Conflicting policies in different states with reference to making

prior incumbrancers parties to an action in foreclosure. 246.

POSSESSION—

By a husband of his deceased wife's separate property during more than thirty years of affectionate married life treated as corroborative evidence of declarations that a gift of the property to him was intended; but no presumption of a gift arises. 489.

Evidence that a husband had possession of a check and notes, transferrable by delivery and given in payment for property belonging to his wife, does not sustain the burden of proof required in an action against him for money had and received, in the absence of testimony that he realized the cash or its equivalent by using the check and notes. 489.

Not sufficient to give effect to an unrecorded oil and gas lease under the provisions of Section 4112*a*. 337.

Reduction by a husband of his wife's property into his possession; circumstances which clearly constitute such reduction. 424.

PREFERENCE—

One not a creditor who loans money to a corporation in need of assistance, taking an assignment of accounts as security, is entitled to preference. 533.

PRESUMPTION—

Arises that the publication of an ordinance extending a street railway franchise was regularly made. 263.

Arising in a will contest from the probate of the will. 433.

A reviewing court will not presume with reference to a question which a witness was not permitted to answer below, that the answer would have been material, or favorable to the plaintiff in error, or that the sustaining of the objection thereto was prejudicial 436.

As to the negligence of the plaintiff raised by an averment as to his having stepped into an open stairway while a customer in defendants' store. 551.

In the absence of a declaration of the interest to be acquired by a village in an appropriation proceeding, a fee simple will be presumed. 511.

No presumption of a gift arises from possession by a husband of his wife's separate property whether with or without her consent. 489.

A presumption of necessity, where it is proposed to change the location of a railway line in order to avoid a difficult grade or curve. 419.

The presumption that where the debt of a wife is paid by her husband from his own means a gift was intended, does not apply where the debt was to a firm of which the husband was a member and was a balance due for the construction of a building on a lot owned by the wife. 424.

Of negligence in failing to deliver telegram. 129.

Rescission by consent of a contract for the sale and purchase of land, may be presumed from nonperformance by both parties. 561.

In habeas corpus proceedings to prevent extradition, it will be presumed that a warrant of extradition was issued, when. 457.

That a consideration was adequate, where action to set the conveyance aside is delayed for a great length of time. 470.

PRINCIPAL AND SURETY—

See SURETIES.

As to competency of the testimony of one of the alleged makers of a note, paid by one claiming to be a surety who has sued the estate of a deceased principal. 371.

PRISONER—

A constable is without authority to take a prisoner to another county unless the sentence so provides, notwithstanding the writ directs such confinement. 466.

PRIVILEGE—

Covenant in cigar privilege; alleged breach in the granting of privileges in other parts of the same building. 63.

PROCESS—

See SUMMONS.

It is error to refuse process in a hearing before a common pleas judge under the Jones local option law. 33.

PROMISSORY NOTES—

Knowledge of one that his name had been forged to a note; estoppel not created against him by his omission to speak, unless. 72.

Parol evidence not admissible to show agreement between bank cashier and sureties whereby the liability of the sureties was to be made secondary; limitation of authority of cashier. 93.

The execution of a promissory note by a corporation is unauthorized unless it is in furtherance, either directly or indirectly, of the purpose for which the company was chartered. 401.

Where there are several makers, and one claiming to be a surety has paid the note and brought suit against the administrator of one of the alleged principals, a third maker who is not a party may testify under Section 5242. 371.

PROPERTY RIGHTS—

There is no property right conferred by a physician's license which can be protected by injunction against one who possesses no license. 458.

PUBLICATION—

See ADVERTISEMENT.

PUBLIC POLICY—

With reference to setting aside decrees of divorce after term for fraud and perjury. 585.

QUANTUM MERUIT—

Pleading in an action for. 390.

QUIET TITLE—

See TITLE.

QUO WARRANTO—

For the ouster of a street railway company from its franchise; irregularities in passage of ordinance; consents; misnomer; publication; change in judicial construction. 263.

Will not lie to determine the right of one appointed deputy coroner, under Section 1209*a*, to hold the position. 414.

In an action to determine the legality of the small school board provided by the amendment to Section 3897. 569.

RAILROAD COMMISSION—

See OHIO RAILROAD COMMISSION.

RAILWAYS—

See STREET RAILWAYS.

Construction of Section 3333-1 with reference to crossings. 17.

Long use of a footway over railway tracks implies a license to pedestrians to cross at that point. 61.

It is the right of a shipper to demand that goods which have failed to reach the consignee be traced and reported back to him by the carrier; failure to trace goods which were finally destroyed in a burning warehouse; carrier liable to the shipper as a matter of law. 241.

A carrier may place goods which consignor refuses to accept in a warehouse and thus change its position to that of bailee. 241.

May make material-men and others parties before payment of a judgment in favor of a contractor. 367.

No judicial interpretation is necessary to authorize a railway to change the grade of its line in order to avoid a difficult grade or curve; but where an appropriation of land is required in order to make the proposed change, proof should be made to the court as to

the necessity of the proposed change. 419.

The word "construction" as used in Section 3284, providing that a highway or stream may be diverted in the construction of a railway, is not limited to the original building of the road. 419.

The state law, requiring that all locomotives and cars used in moving intrastate traffic shall be equipped with automatic couplers, is not in conflict with the federal act making the same requirement as to locomotives and cars used in moving interstate traffic, but the state law is rather supplementary to the federal law and in harmony with it. 482.

Under the state automatic coupler act the car is made the unit, and each car must be complained of separately in seeking to enforce the penalty. 482.

Where a shipment passes over several different roads one contract for transportation covers all, when. 602.

The company delivering a shipment of goods which has passed over several roads will be held liable for its damaged condition, when. 602.

REAL ESTATE—

Where underlying coal is sold, it is the duty of the county board of equalization, upon application by the owner, to apportion the tax valuation of the property between the owner of the land and the owner of the coal. 411.

RECEIVER—

A receiver appointed by a nisi prius court may be adjudged in contempt by the appellate court and punished for disobedience of its order. 525.

Where a receiver gives an order for the payment of money due to him as receiver and afterward accepts the money from the debtor without the consent of the drawee of the order, he becomes personally liable to the drawee for the amount of the order. 607.

RECESS APPOINTMENTS—

A "recess appointment" to office by the Governor is without validity unless made after the final adjournment of the session of the Legislature, as distinguished from a mere recess of that body for a specified period. 547.

RECORD—

Finality of judgment as shown by record can not be changed by looking to the opinion of the court. 1.

Where objection to a question propounded to a witness is sustained, the record must show that error intervened in order that it may be made available on review. 436.

REFORMATION—

Lease canceled for the purpose of, and a new lease executed which was not recorded; property released to a third party whose recorded lease was held to give him the right of possession. 337.

RELIGIOUS SOCIETIES—

Claim of the Free Baptists to be the successors of the Free Will Baptists confirmed; no substantial departure by the Free Baptists from the faith and tenets of the Free Will Baptists. 145.

A judgment obtained by one of two existing factions in a church determining rights in the property of the church is *res judicata* in all subsequent suits of all matters thus determined, so long as unreversed. 145.

Where property of a religious society is being taken by appropriation, the trustees of the society should be individually named as such in the caption. 511.

REMITTITUR—

Where judgment is rendered for an amount greater than that endorsed on the summons, the error can not be cured by a remittitur. 368.

RENTS AND PROFITS—

Decree for recovery of; prosecution of error. 448.

REPLEVIN—

A vendor of grain sold on the floor of a chamber of commerce, the rules whereof require payment when the grain is weighed, may replevin the grain from an innocent sub-vendee, where payment had not been made by the vendee. 417.

RES JUDICATA—

A judgment determining rights in church property, obtained by one faction of the church, is in subsequent suits and so long as unreversed *res judicata* as to all matters so determined. 145.

A judgment by a federal court of appeals, reversing the judgment below and remanding the cause for a new trial, is not a final order or conclusive adjudication binding upon a state court. 177.

A decision of the common pleas holding a petition insufficient in that it fails to state facts justifying its submission to the jury, and directing a verdict for the defendant, is not *res judicata* of an issue of fact in another suit based on the same cause of action and between the same parties. 581.

RETROACTIVE LAW—

A change in judicial construction is without retroactive effect on existing contracts. 263.

REVERSAL—

A judgment of reversal and ordering a new trial or further proceedings is not a conclusive adjudication in another jurisdiction. 177.

Of proceedings before a justice of the peace speaks as of the date of the reversal. 354.

RIGHTS—

Suspended rights; estoppel as to one who knew his name had been forged to a note and who did not speak. 72.

ROADS—

See HIGHWAYS.

County commissioners not liable for damages for injuries to a pedestrian who fell through a bridge on a public road, from which a traction company had removed the plank in order to lay its tracks. 527.

ROBBERY—

Larceny may be converted into robbery by a pursuit ending with a struggle; violence is concomitant with the taking, when. 461.

SAFE PLACE TO WORK—

Not involved in an action for damages for loss of eyesight, alleged to be due to the fumes of wood alcohol forming a compound of shellac and applied to a tightly enclosed interior surface. 505.

SALARY—

A board is without authority to reduce compensation which is fixed by law. 103.

SALES—

Construction of contract of sale with reference to the right of the purchaser to approve the goods delivered. 221.

Measure of damages where goods proved unsatisfactory; negligence in manufacture is an element which should be excluded in determining actual cost of manufacture. 221.

Where a broker brings a contract of sale to his principal, which the principal declines to accept for the reason that there would be no profit in the sale after payment of a commission, but afterward the principal accepts the same contract direct from the customer, he is liable to the broker for his commission. 231.

Where grain is sold on the floor of a chamber of commerce, the rules whereof require payment when the grain is weighed, subsequent purchasers are put on inquiry as to title, and where payment has not been made the vendor may replevin the grain from

an innocent sub-vendee for value. 417.

Recission by consent of a contract for the sale and purchase of land, may be presumed from nonperformance by both parties, and an action may be maintained by the vendee for money advanced on the contract. 561.

SCHOOLS—

A stipulation that a teacher will not demand pay while attending the teachers' institute is against public policy and void, and the teacher may recover the sum fixed by the statute. 103.

Advertising for bids for trivial supplies for the schools is not required; supplies of coal may be purchased without advertising for bids or purchasing from the lowest responsible bidder. 195.

A broad discretion is reposed in boards of education regarding the purchase of necessary supplies for the schools. 195.

Section 3897, as amended in 99 O. L., 584, relating to boards of education in city districts, is unconstitutional, but divested of the amendment the act operates uniformly throughout the state and is constitutional. 569.

The president of a board of education is an officer within the meaning of the statute providing for his election and fixing the duties of his office. 569.

SENTENCE—

Where an illegal sentence is pronounced and the accused is remanded for resentence, fine or imprisonment or both may be imposed as at the original hearing. 113.

A prisoner can not be committed to the work house of another county, unless the sentence so provides. 466.

SERVICES—

Action by an attorney for a *quantum meruit;* pleading; allegations constituting a complete defense. 390.

Real estate agent can not recover for, where the contract provides that he shall be paid "when the property is sold," and the sale fails because of a defect in the title. 480.

Where a motion for the allowance of compensation is overruled, the evidence heard on the motion must be included in the bill of exceptions, or error will not lie. 504.

SEWERS—

Validity of assessment not affected by a change, made by inadvertance, in the depth of the sewer during construction, where the cost was not thereby increased and the rights of lot owners were not substantially injured. 85.

Assessment for sanitary sewer not affected by proximity of public park. 85.

Provision for payment by the corporation of the cost of intersections has no reference to the crossing of streets by a sanitary sewer. 85.

The burden of showing the omission of a statutory requirement is on one seeking to enjoin an asessment on that ground. 85.

Damages to private property from; ownership of sewer; notice of defect; errors at trial are immaterial, when. 501.

SHERIFF—

Not liable for failing to index a foreign execution docket, or to execute a foreign writ of execution, or to do other things enumerated in Section 1212, unless his fees are deposited as required by Section 5596. 161.

SIDEWALK—

Injury to a pedestrian due to defect in; degree of care required in selecting a route; not negligence as a matter of law to attempt to pass over a defective sidewalk, when. 167.

Whether the use of a board sidewalk known to be in bad repair was negligence, when other parts of the street were also unsafe for

travel, is a question of fact to be determined by the jury. 382.

Where notice to build a sidewalk is served upon an abutting property owner who sells the property and the walk is subsequently constructed by the city, the assessment is valid against the subsequent owner. 440.

SIGN—

Action for injuries to a pedestrian from a sign falling upon him as he was passing along the sidewalk. 577.

SILENCE—

Omission to speak not culpable, unless. 72.

SINKING FUND TRUSTEES—

Can not be compelled to pay a judgment for property taken by the municipality, when. 503.

SPECIFIC PERFORMANCE—

Of contract for sale of real estate will not be decreed, when. 143.

STAIRWAY—

Necessary allegations in an action for damages on account of injuries received in falling down an unguarded stairway. 551.

STATE—

The immunity of the state from the operation of the statute of limitations is not transferrable. 509.

STATUTES—

The plain language of a statute must be followed irrespective of results or of the intention of the Legislature. 161.

STATUTES CONSIDERED—

Section 7273, providing that copy of panel shall be given to accused. 4.

Section 3333-1, having reference to railway crossings. 17.

98 O. L., 68, known as the Jones local option law. 33 and 351.

Section 5404, making sale of property to an appraiser in judicial proceedings void. 41.

Section 5307, providing when application for a new trial must be made. 77.

Section 5308, providing how application for a new trial must be made. 77.

Section 6113, known as the two years statute of limitations. 95.

Section 567, relating to vacancy in the office of justice of the peace. 107.

Section 1442, relating to the holding of elections. 107.

Section 4091, providing that teachers may dismiss school to attend a teachers' institute. 103.

Sections 4727, 4727-4 and 4727-10, known as the Valentine anti-trust law. 113.

Section 2816, relating to decennial city boards of equalization. 128.

Section 6279, providing when a foreign guardian of a foreign ward may demand or receive property of his ward in this state. 157.

Section 6290, relating to foreign minors and guardians. 157.

Section 6707, providing what is a final order. 189.

Section 1212, providing for the keeping of a foreign execution docket. 161.

Section 5596, providing for amercement of an officer for failure to execute or return an order or process. 161.

Section 6524, relating to error in discharging or refusing to discharge an attachment. 191.

Section 6526, relating to the filing of a bill of particulars before a justice of the peace. 191.

Section 6733, relating to change of place of trial before justice of the peace. 191.

Section 4427*b*, relating to the lien of an innkeeper. 174.

Section 5594, relating to amercement proceedings against a sheriff or other officer. 161.

Section 5055, providing what pleadings are permissible. 189.

Section 3987, relating to necessary provisions for the public schools. 195.

Section 3988, relating to bidding for and letting contracts for school supplies. 195.

Section 4017, relating to the control of the public schools. 195.

Section 1518, providing what vacates an office. 209.

Section 1536-3, relating to township offices when boundaries of township and city become identical. 209.

Section 1536-998, relating to official bonds to be delivered to the city clerk. 209.

Section 1536-999, providing when council may declare an office vacant. 209.

Section 799, relating to contracts entered into with county commissioners having reference to public buildings. 225.

Section 5006, relating to joinder of defendants. 246.

Section 5195, relating to the discharge of a jury before verdict. 255.

Section 5196, providing when a cause may be re-tried where the jury has been once discharged. 255.

Section 1536-205, known as the Burns law. 235.

Section 5702, providing for what cause alimony may be allowed. 238.

Section 2502, relating to proceedings for establishing a street railway route. 263.

Section 31 of the municipal code, providing that vested rights and contracts already entered into shall not be impaired or enlarged by the adoption of this code. 263.

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Section 5971, providing that a devise or bequest shall not lapse by the death of the devisee or legatee. 276.

Section 5522, fixing the requisites of an affidavit in attachment. 282.

Section 1536-213, relating to the limitation of street assessments. 299.

Section 4155-2, providing when a conditional sale of personal property shall be void. 303.

Section 4155-3, providing that a vendor of personal property conditionally sold may not retake it without repaying a certain part of the price paid. 303.

Section 4155-4, providing a penalty for violation of Section 4155-3. 303.

Section 1078, providing what shall constitute full compensation for county auditors. 305.

Section 1528, providing that county auditors shall furnish all blanks to assessors. 305.

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Section 1069, fixing the compensation of county auditors. 305.

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Section 6842, relating to embezzlement by an agent. 324.

Section 4533, relating to appeals to the probate court in the matter of township ditches. 347.

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Section 4560, providing for relief to parties injured by the digging of a township ditch. 347.

Section 4491, providing how far proceedings with reference to county ditches may be declared void. 347.

Section 4112*a*, with reference to the validity of unrecorded oil and gas leases. 337.

Section 2268, relating to notice on life tenant of proposed street improvement. 344.

Section 5282, providing when depositions may be filed. 351.

Section 28 of the municipal code, giving council control of the streets. 357.

Section 1762, providing when a city clerk shall perform the duties of city auditor. 369.

Section 5242, relating to the competency of a party to testify. 371.

Section 4427, relating to the liability of innkeepers for loss of valuables deposited with them, by guests for safe-keeping. 380.

Section 3254, providing that the books and records of corporations shall be open for inspection of stockholders at all reasonable times. 384.

Section 5521, fixing the grounds upon which a plaintiff may have an attachment. 392.

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Section 197 of the municipal code, relating to compensation to councilmen for services. 385.

Section 5008, providing when one or more may sue or defend. 385.

Section 1209*a*, providing for the appointment of deputy coroners. 414.

Section 2753, relating to the assessment of realty for taxation; changes making decennial valuations incorrect. 411.

Section 2792*a*, relating to the assessing of land for taxation where the title to the fee of the soil and of underlying minerals is not in the same person. 411.

Section 3277, providing for a change in the location or grade of a railway. 419.

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Section 5290, providing when a party is entitled to inspection and copy of books and writings. 443.

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Section 845, relating to the liability of county commissioners for damages on account of injuries sustained on roads in bad condition. 527.

Section 3821-85, providing a penalty for embezzlement, etc., by bank officers, employes and agents. 537.

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The sale and removal of timber from land does not entitle the owner of the land to any reduction from the decennial appraisement. 411.

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Titles at judicial sale should be protected by making all persons who have any claim against the property parties, or who claim title therein, although not claiming from the defendant or his immediate predecessors in title. 177.

Want of, by a guest in property left by him at an inn which he left without paying his bill, does not prevent the lien of the

innkeeper from attaching to the property. 174.

A title in a devisee relates back from the probate of the will and takes effect as of the date of the death of the testator; or if not from the death of the testator, the devisee takes upon probate of the will no more than a naked legal title, and holds as a trustee for a grantee subsequent to the death of the testator. 205.

Joinder of a party claiming title in fee simple, where the action is for foreclosure of a mortgage executed by another defendant. 246.

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Where a tenant in common releases for a valuable consideration to a co-tenant by a quit-claim deed all his right, title and interest in certain land, expressly including the interest inherited by him from a brother then believed to be dead, the grantee takes a good title where he has been in peaceable possession for more than twenty-one years and has made extensive improvements, notwithstanding the brother was not dead at the time of the execution of the release. 396.

Subsequent purchases of grain sold on the floor of a chamber of commerce, under rules requiring payment when the grain is weighed, are put upon inquiry as to title. 417.

In an action to declare a trust in land and for recovery of rent and profits, the final decree from which error can be prosecuted as to the question of title is the decree wherein the controversy as to title was decided. 448.

An action to quiet title against unknown heirs is not effective against known heirs who are not made parties to the action, and had no actual knowledge of its pendency; such heirs are not barred by the proceedings from asserting their title in the land. 451.

Refusal of a prospective purchaser to take the property on account of a defective title deprives the agent of a right to a commission, where the contract specifically states that he is to be paid for his services "when the property is sold." 480.

TOWNSHIPS—

Neither appeal nor error will lie against an assessment for a township ditch; but an injunction will be granted restraining its collection when shown to be grossly in excess of the benefits conferred. 347.

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Duty of judge when prejudicial or improper remarks are made by counsel to the jury. 493.

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A guardian held to have acquired land in trust for his ward, where conveyed to him by the purchaser of personalty belonging to the ward. 38.

Purchase by a son of land appraised by his father held to have been a secret trust for the father and in fraud of the estate owning the land at the time of the judicial sale. 41.

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A devisee may become trustee for his grantee, where the devised property was conveyed by the devisee to the grantee after the death of the testator but before the probate of the will. 205.

Neither an implied nor a resulting trust is created by the gift of a tract of land to a son-in-law and payment by the donor of part of the purchase price of another tract, where the daughter of the donor and her husband unite in a receipt for the property by way of advancement. 375.

Where it is sought to declare a trust in land and to recover rents and profits, the final decree to which error can be prosecuted as to the question of title is the decree determining the question as to title. 448.

ULTRA VIRES—

The execution of a corporation note for a purpose not directly or indirectly in furtherance of the purpose for which the company was chartered is *ultra vires*. 401.

Where the necessities of a corporation require the retention of real estate which has been acquired under an *ultra vires* contract and compromise of pending suits, a court will not in the absence of fraud or bad faith order that the agreement be rescinded and a reconveyance made. 584.

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UNFAIR COMPETITION—

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VALENTINE ANTI-TRUST LAW.

Allegation of "unlawful trust or combination" not open to attack for indefiniteness. 113.

Where the sentence imposed was illegal and the accused is remanded for resentence, a fine or imprisonment or both may be imposed as at the original hearing. 113.

VARIANCE—

In an action against a landlord for damages on account of injuries due to a defective step, the fact that the proof shows the plaintiff to be the wife of one of the tenants of the building does not present a material variance. 353.

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VENDOR AND PURCHASER—

Where grain is sold on the floor of a chamber of commerce, the

rules whereof require payment when the grain is weighed, subsequent purchasers are put on inquiry as to title, and where payment has not been made the vendor may replevin the property from an innocent sub-vendee. 417.

Non-performance by both parties to a contract for the sale and purchase of land creates a presumption that the contract has been rescinded by mutual consent, and the vendee may maintain an action for recovery of money paid on the contract. 561.

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It is error to direct a verdict for the defendant, where the evidence shows negligence on the part of both the plaintiff and defendant. 61.

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Properly directed for the defendant in an action for damages for the killing of a spectator by the explosion of a blast in a populous neighborhood. 140.

Manifest mistake in verdict, where in the nature of surplusage, may be corrected in the judgment; wrong date of probate of will given in verdict sustaining the will treated as surplusage. 433.

Where a general verdict in such a case as the one at bar is consistent with special findings by the jury, it will not be disturbed. 551.

It is not error to direct a verdict for the defendants in an action for injuries from a sign falling upon a pedestrian on the sidewalk, where it does not appear from the testimony that the defendants owned the building or were bound for repairs. 577.

The direction of a verdict for the defendant for the reason that the petition does not state facts justifying the submission of the case to the jury does not preclude the bringing of another suit based on the same cause of action and between the same parties. 581.

VENUE—

A true venue is not laid by the allegation that the offense was committed within four miles of the city of C and county of H, where there is no averment that it occurred "within" the county of H and state of Ohio. 473.

VILLAGE—

The collection and disbursement of street assessments is not a statutory duty of a village clerk or a duty pertaining to his office, and where such service is performed under authority of an ordinance his bondsmen are not liable for failure to account for collections so made, when the condition of the bond is the faithful performance of his duties as clerk. 369.

Appointment of police justices under Section 1536-884*a;* doubt as to the constitutionality of the statute. 518.

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Where stockholders were given a full opportunity to take their *pro rata* share of a new issue of stock and failed to do so, they

will be deemed to have waived their right thereto. 335.

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WIDOW—

Who was left a life estate but elected not to take, held not to be entitled to a distributive share in the proceeds of realty after its sale. 49.

A widow can not elect whether she will take as heir at law or devisee, but she must take either as widow or devisee. 474.

Devise of property to widow in fee; other property devised to her for life with power to sell; effect of failure of widow to take; intention to create a life estate prevails over an inference arising from power to sell; dower. 474.

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Widow who was left a life interest, but elected not to take, held not entitled to a distributive share in the proceeds of realty sold. 49.

Where land devised by will is conveyed by the devisee after the death of the testator but before the probate of the will, the grantee takes a good title. 205.

The meaning of the expression "legal heirs" as used by a testator is those upon whom the law would cast the estate if the testator had died intestate. 276.

Where the testator bequeathed his residuary estate to the legal heirs of a deceased brother, and at the time of making the will one of the sons of this deceased brother was himself deceased leaving heirs. 276.

Where a jury in returning a verdict sustaining a will fix the probate as of the wrong date, the mistake may be corrected in the judgment. 433.

Declarations of a party to the record in a will contest, who is a legatee under the will, are inadmissible to prove that the will was contrary to the intentions of the testator or was procured by undue influence. 433.

In a will contest it is essential that the jury be instructed that the evidence of the contestants, in order to warrant the setting aside of the will, should not only outweigh the evidence adduced by the defendants but also the presumption arising from the order admitting the will to probate. 433.

Where objection was made to a question to a witness in a will contest, and the record failed to disclose what the answer of the witness would have been, the error, if any intervened, is not available on review. 438.

Where a husband possessed of real estate acquired by purchase dies testate but without issue, property devised to his widow in fee, with no devise over in the event she elects not to take or fails to take under the will, does not be-

come intestate property as to her within the meaning of Section 4159, and she can not take as heir at law the property thus devised to her in lieu of dower and distributive share. 474.

As to the fee of property devised to a widow for life with a power to sell which has not been exercised, the husband must be held to have died intestate; in the case under consideration the widow becomes the owner in fee of the intestate property devised to her for life, but as to the property devised to her in fee she has only a dower interest. 474.

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A constable has no authority to commit a prisoner to a work house in another county unless the sentence so provides, notwithstanding the writ directs such commitment. 466.