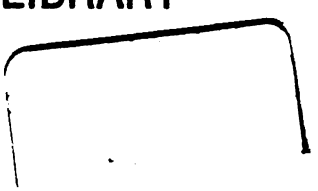

OHIO APPELLATE AND CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME XXIII.

CASES ADJUDGED

IN

THE COURTS OF APPEAL AND CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY,
1915.

JUDGES OF THE APPELLATE (FORMERLY CIRCUIT) COURTS OF OHIO.

HON. H. L. FERNEDING, *Chief Justice*, Dayton.
HON. PHILLIP M. CROW, *Secretary*, Kenton.

FIRST DISTRICT.

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

EDWARD H. JONES ..... Hamilton
OLIVER B. JONES ..... Cincinnati
FRANK M. GORMAN ..... Cincinnati

SECOND DISTRICT.

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

H. L. FERNEDING ..... Dayton
ALBERT H. KUNKLE ..... Springfield
JAMES I. ALLREAD ..... Greenville

THIRD DISTRICT.

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

PHILLIP M. CROW ..... Kenton
TIMOTHY T. ANSBERRY ..... Defiance
WALTER H. KINDER ..... Findlay

FOURTH DISTRICT.

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

EDWIN D. SAYRE ..... Athens
MATTHEW F. MERRIMAN ..... Gallipolis
FESTUS WALTERS ..... Circleville

FIFTH DISTRICT.

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

ROBERT S. SHIELDS ..... Canton
LOUIS K. POWELL ..... Mt. Gilead
LEWIS B. HOUCK ..... Mt. Vernon

SIXTH DISTRICT.

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

SILAS S. RICHARDS ..... Clyde
CHARLES E. CHITTENDEN ..... Toledo
REYNOLDS R. KINKADE ..... Toledo

SEVENTH DISTRICT.

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

W. H. SPENCE ..... Lisbon
JOHN POLLOCK ..... St. Clairsville
WILLIS S. METCALFE ..... Chardon

EIGHTH DISTRICT.

Counties—Cuyahoga, Lorain, Medina and Summit.

WALTER D. MEALS ..... Cleveland
CHARLES R. GRANT ..... Akron
A. G. CARPENTER ..... Cleveland

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OHIO APPELLATE AND CIRCUIT COURT REPORTS.

NEW SERIES—VOLUME XXIII.

CAUSES ARGUED AND DETERMINED IN THE COURTS OF APPEAL AND THE CIRCUIT COURTS OF OHIO.

INCOMPETENT RECITAL OF A STOCK LEDGER.

Court of Appeals for Hamilton County.

JOHN N. RUSSELL, ADMINISTRATOR OF THE ESTATE OF J. N. RUSSELL, DECEASED, v. THE FOURTH NATIONAL BANK OF CINCINNATI.*

Decided, May 28, 1915.

Corporations—Transfer of Stock Without Surrender of the Old Certificates—Recital of Stock Ledger as to Transfer Incompetent as Against the Administrator of the Holder of the Original Certificate—Plausible Presumptions as to What Occurred of no Weight Against the Uncanceled Certificate.

Stock was transferred fifty years ago by the defendant bank to one of its officers without surrender of the old certificate. The original holder received no further dividends on the stock and ultimately died in poverty. The old certificate was found among decedent's papers, and an action was brought by his administrator for a transfer of the stock to him on the books of the bank. A by-law of the bank required a surrender of an old certificate as a condition of the issuance of a new one, and the same requirement appeared on the face of the certificate. At the trial below an entry from the stock ledger of the bank was admitted over objection, which purported to show a transfer of the number of shares in question from the decedent to the said officer of the bank.

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*Reversing *Russell, Admr.*, v. *Fourth National Bank*. 15 N.P.(N.S.), 184.

Held: That the recital in the stock ledger is a self-serving declaration by an interested party, of great advantage to the said party and of corresponding disadvantage to the representative of the decedent, and its admission was prejudicial error for which the judgment rendered below in favor of the bank must be reversed, notwithstanding the plausible presumptions arising from the conduct of the parties, the unexplained laches of the decedent and the further defense of a bar to the action by the lapse of time.

Tuttle & Ross, for plaintiff in error.
Charles B. Wilby, contra.

GRANT, J.; MEALS, J., and CARPENTER, J (sitting in place of Judges Jones, Swing and Jones), concur.

This is a proceeding in error, the petition in which asks for the reversal of the judgment of the Superior Court of Cincinnati.

The facts which we regard as material in this cause, and which are essential to its determination here, are these: The plaintiff is the administrator named in the title. The defendant is a banking corporation.

In 1865 the plaintiff's intestate became the owner of thirty shares of the capital stock of the defendant corporation, his ownership being evidenced by certificate No. 123, of due form and signature.

That certificate bore upon its face a provision that it could be transferred on the books of the corporation only upon the surrender of itself, properly endorsed. At the time this certificate was issued there was in force a by-law or regulation of the corporation bank to the same effect as to the condition of transfer only upon surrender appearing on the face of the certificate.

The plaintiff's intestate was paid the dividends to which his stock was entitled for two years after he became the owner of it, or thereabout, but no more, although dividends thereafter were earned to the corporation in which the stock represented by the certificate named was entitled to share and be paid. It is not shown that the intestate had notice of the declaration of such subsequent dividends. After his death the certificate in question was found among his papers and came to the hands of the plaintiff as evidence of, and representing assets of the estate, to be administered by him, if it has value as such. Demand

was made by the plaintiff of the defendant corporation for a transfer to him upon its books of the certificate referred to, and for an accounting to him for the dividends earned on the stock represented by it, but not paid, which demand was refused.

The prayer of the petition was that the defendant be required to make the transfer requested and account for the unpaid dividends.

The answer of the defendant denied generally, and then alleged a sale of the stock in 1867 to one Colburn, accounting for the non-surrender of the certificate—which is not questioned—by an averment that it was at the time lost.

In a separate defense laches on the part of the plaintiff's intestate in asserting any claimed right to the stock or its earnings was pleaded, as were also in other defenses several statutes of limitation in bar of the action. There was a cross-petition which asked that the plaintiff be compelled to surrender for cancellation the certificate in his possession and be prohibited from disposing of it in the meantime.

The reply denied the affirmative matter of the answer.

The trial below was to the court. The issues were found to be with the defendant, and there was judgment accordingly, dismissing the petition, ordering the surrender of the certificate for cancellation, and against the plaintiff for the costs of suit.

To reverse this judgment error is prosecuted here.

In the view we take of the record before us in this cause, our determination of it may proceed over a much narrower field than that traversed in the briefs and the arguments at the bar.

The plaintiff produced in evidence the original certificate, wholly unindorsed and unassigned by his intestate.

It did not appear by any evidence that the intestate had notice or knowledge of any dividend being declared subsequent to those which he took.

It appeared that the stock book of the bank covering the period during which the plaintiff's intestate took dividends and later, that is to say, the book from which his certificate presumably was detached from its correlative stub, and to which regularly it should have been restored when surrendered for transfer, was long ago lost. At all events it could not be pro-

duced and was not forthcoming at the trial. If it had been it could not have shown the certificate as surrendered, for that was in the possession of the plaintiff. Consequently, it could not have shown a compliance with the inseparable condition of an effectual transfer through surrender, in accordance with the provision of the certificate itself and of the defendant's own by-law. This inability to produce can not be traced to the intestate and is not to be imputed to him or his representative, the plaintiff, as a default in exoneration or excuse of the defendant's otherwise liability.

The defendant offered in evidence—and it was admitted, over the objection of the plaintiff—an entry on one of its books—called, perhaps, the stock ledger (the name is not material)—purporting to show, as of January 9th, 1867, a charge to the intestate of thirty shares of the bank's stock, and a corresponding credit, as of the same date, of a like number of shares to one W. F. Colburn, the account in the book produced being marked, "J. N. Russell." Colburn, it is said, was at the time a vice-president of the defendant bank. He was dead at the time of the trial, and no witness undertook to say who made these entries in the stock ledger, or under what circumstances, or by whose or what authority they were made. Nothing appears that tends to connect the intestate with them, by act, assent, acquiescence, sufferance or knowledge. The inference from his position is deducible that Colburn had the opportunity to make them, or cause them to be made. No explanation is forthcoming as to why the entries were made in the absence of a surrender of the certificate—the act of making them without the surrender doing violence both to the requirement of the certificate itself and failing to meet the like condition of the defendant's self-adopted by-law. The averment of the answer to the effect that the certificate was then lost, that is, lost as far as Russell was concerned, was not made good by any evidence, the conclusion that it must have been lost because of his subsequent dire poverty resting in conjecture only.

From these observations it becomes apparent, we think, that the foundation upon which the judgment attacked by this petition rests, and the reasoning upon which the finding preceding it must have proceeded, was this entry upon the stock ledger.

the admission of which in evidence is assigned as a principal error. If the contention is right and the foundation is swept away, the entire superstructure of the defense falls.

It is difficult to see upon what reasonable hypothesis, upon what rational footing of legal principle, this fundamental piece of alleged evidence was received and allowed to mould and coerce to effect the judgment complained of.

It is but a statement of an interested party, of advantage to the same party, and to the decisive disadvantage of the representative of the other party, but who was no party to the transaction which it purports to narrate. And this *ex parte* statement is now judicially forced into the service of the only one who made or agreed to it, so far as appears. Otherwise spoken, it is but the self-serving declaration of an interested party, allowed to be used to the detriment of one in no way responsible for, or acquiescent in it, so far as the record shows. And not only so, but a party to the transaction is thus through a paper permitted to speak to a fact very much to the detriment of the man whose estate is adversely to be affected by it, while the mouth of that other man is closed in death—thus defeating one benign safeguard which the law puts up for dead persons, that of setting each upon an equality with the other in that respect.

The fact, the mere accident, that the statement appears in writing and on the books of the concern, does not make it any the less a statement, or raise it to any force or dignity above a statement, as seems to be mistakenly supposed in some quarters. Reducing it then to its proper level of a statement and no more, and annexing to it its self-appearing quality of self servingness, and its incompetency to conclude one not served by it and a stranger to it, for aught that is shown, becomes clear, as we think. The admission of it, under ordinary circumstances, would seem to be at variance with two well settled principles of the law of evidence. It is the self-serving declaration of a party. It is allowed to speak against one who can not speak for himself; it is permitted to weigh—conclusively, in this case—against what might be the decisively opposing word of a dead man, were he alive again and could he speak.

The fact that the paper admitted is the book of a bank—national or other—is wholly beside the question. Banks are not

sacrosanct, so that letters of marque must be granted to them by the courts in matters affecting the competency of testimony, and the paper has no greater or other probative effect than any statement, of farmer Smith, for example, to the effect that he owns farmer Brown's horse, which, however, still remains in the latter's pasture, with no bill of sale or other evidence of a change of title outstanding.

On the score of principle and the manifest reason of the thing, we are quite unable to agree that this, the only tangible defense to overcome and control the effect of the visible certificate produced, is itself defensible.

As was to have been expected in what we feel bound to regard as so plain a case, authorities are not wanting to support this conclusion of our own.

Many of these, more or less in point, are marshalled and discussed in the briefs of counsel, with commendable industry and ability. We shall not comment upon them more particularly or *seriatim,* for the reason that we find what they amount to, to our apprehension, summed up in a compact text-book statement to be cited presently.

It certainly is true that under some circumstances and for some purposes, the regular and orderly writings of a corporation may be used in evidence. But they are so competent, it is believed, only as affecting the corporation in its capacity as a body, as a corporate entity; in other words, only *qua* corporation. They are so competent only in their relations to the internal affairs of the organized body. This limitation, or distinction will appear in the quotation about to be made. It is stated here only to show that it has not been overlooked and that the case at bar does not come within its purview, or the allowed exception to the general rule to the contrary, as is believed.

In *Commentaries on the Law of Evidence,* sometimes known as the "Blue Book of Evidence," by Mr. Jones, Vol. III, Section 516*a*, the law appertaining to this question, as we understand it to be, is tersely, but rather informingly stated, as applied to the matter in hand, as follows:

"Thompson, in his monumental work on corporations, clearly announces his conclusions. He says: 'The general rule is believed to be that, except for the purpose of proving what the

corporation did, or what action its corporators took in effecting its organization, its books and records are not evidence as against a stranger, or as against a stockholder holding adversely to it. * * * But where it is sought to use the records of a private corporation, as evidence of the facts which they recite, for the purpose of concluding, or even influencing the rights of third parties who are strangers to the record, then such records are not admissible, on the same principle which operates to exclude the records of legal judgments when offered for a similar purpose, on the principle that they are *res inter alios acta*, or in plainer language, upon the principle that the rights of A can not be concluded or displaced by the facts that C, D, E and F met together in conclave, in the room of a board of directors of a private corporation, and there adopted a certain resolution, or passed a certain vote, or enacted a certain by-law intended to have that effect. The sound rule, then, is that the records of a private corporation can not be used in evidence for the purpose of sustaining a claim of the corporation against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers anyway. * * * As between members of the corporation, they are evidence of corporation acts therein recorded; but they can not be used in an action against a stranger to connect him with the corporation, unless made so by an act of the Legislature. Nor can they be used in evidence in suits by the corporation against its members, for the purpose of proving, on behalf of the corporation, entries which are in its interest. If the contrary were the rule, a corporation might manufacture evidence in its own favor, and those who were its guilty agents in so doing would not be subject to the penalties of perjury. Nor are such books evidence to prove private agreements of the stockholders. Upon the same basis of reasoning, the records of a corporation are not evidence of the truth of the facts therein recited, as between a member of the corporation, and a stranger, or between two strangers.' Wharton says that even in suits by a corporation against its members its books can not be used as evidence in proving in behalf of the corporation self-serving entries. 'Entries in the books of a corporation of private pecuniary transactions with a stockholder are not admissible against him, especially when it does not appear by whom the entries were made.' "

Cognate following sections may also be read with advantage, but we shall not take the space to quote them. In one of these (517) it is said: "It has frequently been declared that the books can not in general be adduced by the corporation in sup-

port of its own claims, *against a stranger,* or to affect strangers in any way;" citing in support, *Commonwealth* v. *Woelper,* 3 Serg. and R., 29; *Greenleaf, Ev.,* Section 493; *Wharton, Ev.,* Section 628. It is to be said that in the transaction now under review the plaintiff is—as his testator was—a stranger-in-law to the bank. Being a stockholder did not make him less so.

The authorities cited to sustain the text do so abundantly, as we think, and this is said only after an attentive examination of many of them. And this is an added reason for a perhaps scant discussion here of those brought forward in the briefs.

Thus viewing the question, and finding the law so to be, it follows, manifestly, as we must think, that the admission of the entry purporting to recite that the testator parted with his stock holdings in the defendant was error. And as it went to the heart of the controversy and was the only thing that could have resolved the issue adversely to the plaintiff, it was of course prejudicial error and, therefore, reversible error.

As to the other considerations more or less vehemently urged upon us in the argument at the bar, we do not feel called upon to say very much, since obviously and as already intimated the paper which we have found should have been excluded but was admitted, formed the keystone of the entire arch of defense against the certificate in the hands of the plaintiff.

It is said—plausibly enough, to be sure—that it is impossible to think that the dead man should have lived in abject and miserable poverty and yet have been, by the ownership of this certificate, potentially a rich man. Perhaps so. But it will not do to push this supposed impossibility too far. It is a trick that misers have to appear to live poor while they are getting ready to die rich. At most, the consideration is but a conjecture, and when a conjecture comes against a very matter-of-fact stock certificate, the presence of which in wrongful hands—if it is wrongful—is solely due to the neglect of the sworn duty of the now conjecturer and to its own disobedience of its own laws—in such case, we say, the conjecture is at a disadvantage and must go to the wall. It is, we suspect, small consolation that the patient dies according to the books—that is, in consequence of an infirmity which when it was acquired the sufferer had it within its easy power to prevent—namely, by requiring a surrender of

the certificate before transferring the stock to any one, bank officer or no bank officer.

So also in regard to the statement in argument that the bank must have taken, and doubtless *did* take, an indemnity, before transferring Russell's stock. Again, perhaps so.

But these are all inferences, suppositions, guesses. One guess is as good as another, and no guess can push the law of evidence from its stool. The hard fact of an unsurrendered certificate of stock is a visible and workable thing, to the confusion of any number of might-have-beens, or even must-have-beens.

In regard to the other defenses alleged in the answer—those of laches and the barring of the action by limitation or lapse of time—we desire to say no more than that none of them seems to us to be of merit to control the conclusion otherwise reached here. They are denied.

Because of the error found the judgment complained of is without support in law and for that reason is reversed, and the cause is remanded to the court from whence it came, for such further proceedings there as may be proper.

JURISDICTION TO ENJOIN EXECUTION ON A JUDGMENT.

Court of Appeals for Licking County.

ANNA BETZ v. WALTER C. BETZ.

Decided, March Term, 1915.

Alimony—Sale Under Execution to Satisfy Balance Due Under Judgment for—May be Enjoined, When—Jurisdiction in Equity.

Where it is sought by execution to enforce payment of a balance due under a decree for alimony granted by the probate court, the common pleas court has jurisdiction to entertain an action by the defendant to enjoin sale of his property on the ground that the judgment entered against him upon which the execution is based has been fully satisfied; and this is true notwithstanding the right of the complainant to proceed by motion in the court issuing the execution to have satisfaction of the judgment entered and the execution set aside.

Smythe & Smythe, for plaintiff in error.
Carl Norpel and *A. S. Mitchell,* contra.

SHIELDS, J.; POWELL, J., and HOUCK. J., concur.

This proceeding in error is prosecuted to reverse the judgment of the court of common pleas of this county.

It appears that a decree for alimony was granted the plaintiff in error against the defendant in error by the Probate Court of Licking County; that afterward the plantiff in error caused an execution to issue out of said probate court upon said decree for alimony to the sheriff of said county, who levied the same upon the property of the defendant in error to satisfy what was claimed to be an unpaid balance due on said decree for alimony, amounting to something like $900; that said sheriff was proceeding to advertise the property of the defendant in error, so levied on, for sale to satisfy said claim of the plaintiff in error, when the defendant in error, in an action commenced by him in the court of common pleas of said county, procured a temporary injunction against said sheriff restraining him from selling said property, on the ground that he had then already paid the full amount of said decree for alimony so awarded against him, and a sum largely in excess of said sum, and that said execution so levied upon his property was therefore wrongful and unjust.

An answer was filed in this proceeding, denying payment of the alimony as alleged by the defendant in error, who afterwards filed a reply thereto, and after a full hearing was had upon the merits of the claims of said parties said common pleas court found that payment of said decree for alimony had been made by the defendant in error, as alleged by him in his petition, and said temporary injunction was thereupon made perpetual.

The plaintiff in error afterward filed a petition in error in this court to reverse said judgment of said common pleas court on the ground that said court had no jurisdiction to hear said last named cause for the reason that the probate court of said county had first acquired and retained jurisdiction thereof, and that if the defendant in error was seeking any relief his remedy was by motion in said probate court.

The rule that a judgment or lien for alimony is a continuing and subsisting claim against the husband and that it does not become dormant, nor become affected by injunction or other proceedings until paid is well recognized; but not unlike any other obligation created by the judgment of a court, when such judgment or lien for alimony is paid, such obligation is discharged. Here, it was claimed that the decree for alimony, made and entered by the probate court, was paid, and because of this alleged payment and satisfaction of said decree the sale of the property of the defendant in error, sought to be reached by the plaintiff in error on execution, was enjoined upon petition filed by the defendant in error setting up such payment and satisfaction of said decree. This action of the common pleas court is assigned as error, the plaintiff in error contending that said court had no jurisdiction over the subject-matter of said proceeding. The record herein shows that the defendant in error filed a petition in said court setting up payment of said alimony adjudged against him; that the plaintiff in error was duly served with process and voluntarily submitted herself to the jurisdiction of said court by filing an answer therein; that upon the hearing thereof she made the defense alleged in her said answer, and that said court, after hearing had upon the merits of the claims of the respective parties thereto, by its order made said injunction perpetual. Under this state of facts were the rights of the plaintiff in error determined and concluded in this proceeding? We think they were, and we further think that the proceeding instituted by the plaintiff in error in the common pleas court was a separate and independent proceeding from the action pending in the said probate court, and that said proceeding was not unauthorized by the facts and circumstances of the case. True, a motion filed in the probate court might have served the purposes of the defendant in error, and it might not. Surely it would have been of no avail if not heard and passed on by said court favorably to the rights of the defendant in error before the sale of his property. Whatever the action of the court had it been so filed, we do not think such remedy was exclusive to work out the rights of the defendant in

error as found by the court of common pleas; and having submitted to the jurisdiction of said court without objection, we think relief was properly granted to the defendant in error by injunction. In this connection we quote the opinion of Judge White in *Miller et al* v. *Longacre et al,* 26 O. S., 297, who cites therein with approval the principle of law laid down in *Crawford* v. *Thurmond et al,* 3 Leigh, 65:

"Jurisdiction in equity has been maintained to enjoin the enforcement by execution of a judgment which had been paid, notwithstanding the right of the complainant to proceed by motion in the court issuing the execution to have satisfaction of the judgment entered and the execution set aside."

We are of the opinion that the common pleas court had jurisdiction to grant the relief asked for, and the judgment of said court is therefore affirmed, at the costs of the plaintiff in error.

EXPENSES OF LAST SICKNESS AND FUNERAL OF LIFE TENANT.

Circuit Court of Logan County.

JOHN T. KENNEDY AND HARRY KENNEDY, PARTNERS AS KENNEDY BROTHERS, v. JOHN A. PRICE AS ADMINISTRATOR DE BONIS NON, ETC., OF THE ESTATE OF MAGGIE L. HOVER, DECEASED. *

Decided, October 8, 1909.

Estate Left for the Support for Life of the One Designated—Chargeable with the Expenses of Last Sickness and Funeral.

Where the consort of a deceased husband or wife received the entire property of said decedent by virtue of a devise for his or her support during life with the remainder over, and said consort died leaving no estate, the expenses of his or her last sickness and funeral are a legal charge against the estate which passed to him or her for life.

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*Affirmed without opinion, *Price, Admr.*, v. *Kennedy et al*, 83 Ohio State, 472.

DONNELLY, J.; NORRIS, J., concurs; HURIN, J., dissents.

This is an action brought by Kennedy Brothers against Judge Price, as administrator, to recover for the funeral expenses and last sickness, etc., of Mr. Hover. The petition is about as follows: that in November, 1907, said Washington Hover died; that Maggie L. Hover, by her will, after directing that all her just debts and funeral expenses and those of her last sickness and expenses of administration of her estate be first paid, said testatrix, by said will, bequeathed and devised all of her estate to her said husband, Washington Hover, named therein as executor, for life, coupled with the power of disposing of and using the same or any part thereof as he should deem best as the same should be necessary for his personal wants, necessities, comforts, etc., for and during the term of his natural life, and further provided that at the death of the said Washington Hover, all of the properties of said estate remaining unconsumed by the said Washington Hover should be applied to the payment of certain legacies therein named, amounting to nine hundred dollars, etc. The petition goes on and further alleges that after this time, Washington Hover died; and that the said John T. Kennedy and Harry Kennedy furnished the funeral expenses, coffin and such other things as were necessary for his proper burial; and brought an action against Judge Price, the administrator *de bonis non* of Maggie L. Hover, the party who made the will and whose property it was.

To this petition, the defendant filed a general demurrer and it was tried on that question and the demurrer was sustained. The plaintiffs not desiring to plead further, judgment was entered and such proceedings were had on the record that it is now presented to this court for review.

Washington Hover died without any property, having nothing to pay any of his debts with. This case was submitted by counsel on both sides without any authorities that are applicable to this case being cited. The only question that this court is called upon to decide is as to whether or not the funeral expenses of a person occupying a position or relation under the will

of a deceased wife is a necessary charge against her estate; in other words, are the funeral expenses such a charge, as for instance the expenses of his last sickness or doctor bills? That is denied and that is the only question in the case.

There is no authority that we could find, except I have a decision of the circuit court at Findlay. That court decided a case that is very similar and in all respects, according to our idea, with the one at bar. It is the case of *Charles et al* v. *Wachter, Administratrix.* A decision was rendered in the Circuit Court of Hancock County, Ohio, on the 24th day of June, 1901, by Judges Norris, Day and Mooney. The opinion is as follows:

"Anna Charles et al v. Mary Wachter, Administratrix.

"NORRIS, J.; DAY, J., concurs; MOONEY, J., dissents.

"The plaintiff in error as plaintiff below filed their petition making the numerous parties to the action for the partition of certain real estate which they say they together with the other parties named are the tenants in common as the children and only heirs of one Philip Rauen, deceased. They plead the necessary facts for partition and ask that such finding be had as that each may take his interest in severalty. Mary Wachter, as the administratrix of the estate of Lucy Rauen, deceased, files an answer in the action and says, that on the 18th day of June, 1871, one Philip Rauen died, testate, seized of the land described in the petition. By his last will, Philip Rauen gave to his wife, Lucy Rauen, now deceased, all his property both real and personal, of which he died seized during her natural life, to be used for her support, and after her death to be divided among his children according to the statute of descent and distribution. Said Lucy was made executrix of this will. Lucy Rauen, during her life, used and consumed for her support all of the personal property, and all of the rents and issues and profits of the real estate and died leaving no estate except that which she received under said will.

"The expenses of the last illness of Lucy Rauen and her funeral expenses and cemetery charges amount to $116.50, and the costs of administration of her estate will amount to $20.

"The plaintiffs and defendants, except Mary Wachter, refuse to contribute to defray the expenses of the last illness and burial of Lucy Rauen.

"Mary Wachter presents and attaches to her answer a certificate from the probate court showing the amount necessary to

pay the charges recited in her answer, and she asks for an order to sell the real estate to obtain the sum necessary to pay said expenses, or that an amount be set apart and paid to her, sufficient to cover these expenses, out of the proceeds of any sale of said property.

"To this answer and cross-petition, plaintiff filed a general demurrer, which demurrer the trial court overruled. Plaintiffs not desiring to plead further to said answer and cross-petition, the court finds the allegations of the same to be true and declares the sum set out in the cross-petition to be a lien and charge on the premises described in the petition, and orders the same to be paid out of the proceeds of the sale of said premises. To this finding and judgment of the court, the plaintiff prosecutes error, because the court overruled said demurrer, that the court found the expenses of the last illness and funeral expenses of Lucy Rauen to be a lien on the premises described in the petition; that the court ordered that the same be paid out of the proceeds of any sale of said premises.

"By the allegations of this cross-petition, Philip Rauen gave, by his will, to his wife, Lucy, all of his property during her life to be used for her support. Now, what thought was the testator by this will giving this act? What did he mean by support—'for her support'? What had he in view when he used that word—'for her support'?

"As the court says in 62 O. S., 411, the will should be construed so as to give effect to the intention of the testator as fairly ascertained from consideration of all the provisions of the will and from his situation at the time. And it may well be added that the purpose of his bequest, when the purpose is given, and the situation and necessities of the object of his bounty were known to the testator, when the will itself indicates that he knew the situation and necessities present and prospective, as here, and made his will for the express purpose of meeting the situation and that which must inevitably follow—where all this appears it may all be kept in view when the court is giving construction to the will. Now, what was within the sight of Philip Rauen when he was seeking to make provision for the support of his wife, to supply her means of maintenance, to furnish her that which she would need out of his estate? He knew that his wife was alive and likely to long survive him. He knew that for support she was dependent upon his estate; he knew that her last sickness would come and her death and her burial: he knew that these things were not contingent, but were inevitable; they were there present and were a part and helped

to make the situation, for which he was then making provision. He did not intend to abandon her to charity in her last sickness; it was not his purpose to fix a document which would consign her body to the potter's field; a construction so shuddering and awful as this can not be contemplated. He intended his property should stand between his wife and a fate like this, and that she should take whatever estate in it was necessary to accomplish this, his intention. In other words, he intended that these things should be a charge upon his property, and so made them as plain as words could make them, and for such of his estate as was not so used, he made provision that it be divided among his children according to the law of descent and distribution.

"The court, by majority, are of the opinion the demurrer was properly overruled; the judgment of the common pleas is therefore affirmed at cost of plaintiff in error, and the cause is remanded for execution.

"Judge Mooney does not concur."

Now, following that case, using that as an authority for this case, I think the court below erred in sustaining the demurrer to the petition. It will therefore be reversed and remanded for such proceedings as required by law. To this conclusion Judge Hurin dissents.

Judge Hurin: I dissent, not because I don't think that ought to be the law, but I am unable to see, as yet, that it is the law.

LIQUOR TRAFFIC IN "DRY" TERRITORY SUBJECT TO THE DOW-AIKEN TAX.

Court of Appeals for Williams County.

HARVEY J. BRANNAN, TREASURER, v. FRANK SCHARTZER ET AL.

Decided, May 15, 1915.

Dow-Aiken Tax Not a License—Liquor Traffic in Dry Territory Subject to Assessment—Such Assessment Superior to a Prior Mortgage—Section 6071.

1. When the business of trafficking in intoxicating liquor is carried on in a county in which such traffic has been prohibited, the business is subject to the Dow-Aiken tax.
2. An assessment under the Dow-Aiken law is in no sense a license fee and confers no authority to sell intoxicating liquor, but is a tax on the business which the law makes a lien on the premises where the business is carried on.
3. The lien of such a tax is superior to that of a mortgage executed and recorded prior to the entering of the tax on the duplicate or to the beginning of the traffic on the premises.

John H. Schroder, Prosecuting Attorney, and *A. O. Dickey,* for plaintiff.

Newcomer & Gebhard, contra.

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

This action is brought by the treasurer of Williams county to enforce a lien for taxes and penalty against the property of the defendant, Frank Schartzer. In July, 1914, Frank Schartzer pleaded guilty to two indictments charging him with violating certain liquor laws. Fines aggregating $460 were imposed upon him and he was sentenced to thirty days in jail.

Thereafter, by direction of the Auditor of State, the county auditor placed upon the liquor traffic duplicate an assessment under the Dow-Aiken law against the property of the defendant, Frank Schartzer, for the amount of $859.90, and $171.98 penalty, making a total for assessment and penalty of $1,031.88. The plaintiff seeks to have this assessment and penalty declared

a first lien and asks that the liens against the property of the defendant be marshaled, the property sold and the proceeds applied to their payment. The defendant, the Home Savings, Loan & Building Association Company, sets up the lien of a mortgage upon the property of Schartzer, given long before the imposing of the fines upon the defendant and the levying of the Dow-Aiken assessment upon his property. The building and loan company also sets up a tax title by reason of its purchase of the property at a tax sale held since the Dow-Aiken assessment was levied. The defendant, C. L. Newcomer, sets up a mortgage lien dating from September 23, 1914. The state of Ohio also sets up a lien for the unpaid portion of the fines that were imposed upon Schartzer for violation of the liquor laws. The defendant, Schartzer, filed an answer in which he sets up various facts in defense.

On trial in the common pleas court the petition of the plaintiff was dismissed and a finding and decree entered in favor of the loan company and other cross-petitioners and defendants.

There are few disputed facts arising in this case, and there does not appear to be any question as to the priority of the several liens except as to the lien for the Dow-Aiken tax. It is an undisputed fact that at the time of the alleged illegal sales the business of trafficking in intoxicating liquors was prohibited in Williams county.

It is contended, in the first instance, that no assessment under the Dow-Aiken law can be lawfully levied upon the business of trafficking in intoxicating liquors in a dry county, and that for this reason there is and can be no lien upon the property of the defendant Schartzer, because of the attempt to make such levy. Section 6071, General Code, provides that there shall be assessed yearly the sum of $1,000 upon the business of trafficking in intoxicating liquors. The law is stated in plain language and makes no exceptions because of the place in which, or the manner in which, such business is conducted. Wherever in the state of Ohio such business is carried on, the law provides that the sum of $1,000 shall be assessed upon the business. To hold

that this act does not apply to such business when conducted in dry territory would be to read into the statute an exception that is not found therein.

This question, however, is no longer open to discussion, as the the Supreme Court has directly passed upon it in *Burrell* v. *Holtz*, without opinion, 84 Ohio St., 497. We have been furnished with certified copies of the proceedings in the court of common pleas and circuit court and a copy of the journal entry in the Supreme Court. The identical question was raised in that case and the Supreme Court held that such assessment might be imposed upon the business when conducted in so-called dry territory. The Supreme Court decision affirmed the judgment of the circuit court on the authority of *Adler* v. *Whitbeck*, 44 Ohio St., 539, and of *Conwell* v. *Sears*, 65 Ohio St., 49.

Counsel for defendants contend that the Supreme Court reached a different conclusion in affirming the case of *Remick* v. *Haas*, without opinion, 85 Ohio St., 466. That case was considered by the circuit court on two different occasions. The opinion on the first consideration of the case is reported in *Haas* v. *Remick*, 13 C.C.(N.S.), 1(31 O. C C., 591), and was rendered in March, 1910. The decision there rendered was upon a demurrer to the petition. In the common pleas court a demurrer to the petition had been sustained and the plaintiff not desiring to plead further, final judgment was entered in that court and the cause appealed to the circuit court. Upon appeal, the circuit court overruled the demurrer and no final judgment was then entered in that court. In the course of the opinion of the circuit court upon their determining the question presented by the demurrer, that court did reach a conclusion contrary to that announced by the Supreme Court in *Burrell* v. *Holtz, supra.* Thereafter, in September, 1910, the cause came on further for hearing before the circuit court, when the case was disposed of upon grounds other than those mentioned in the opinion on the demurrer. The Supreme Court affirmed this judgment. It can not be said, therefore, that the affirmance of this decision by the Supreme Court is in conflict with the decision of the Supreme Court in *Burrell* v. *Holtz, supra.*

It is argued that the decisions above cited were rendered before the amendment to the Constitution in 1912 and the passing of the liquor license laws, and that the effect of the constitutional amendment and the liquor license laws is to render the above decisions inapplicable. It is contended that the imposing of the Dow-Aiken assessment amounts to a license to conduct a business that is illegal and that for this reason, it can not become a valid lien upon the property. We think it is a sufficient answer to this argument to state that the Dow-Aiken assessment is in no sense a license fee and does not confer any power upon the dealer in intoxicating liquors to conduct such business. It is purely a tax or an assessment upon the business which is made by statute a lien upon the property where the business is conducted. *Adler* v. *Whitbeck, supra.*

It is next urged that even if the assessment does constitute a lien upon the property, it is a subsequent lien to that of the mortgages to the Home Savings, Loan & Building Association. This question has been decided adversely to the claims of the loan company in the case of the *Pioneer Trust Co.* v. *Stich,* 71 Ohio St., 459. The tax and assessment liens will be paid from the proceeds of the sale of the property as provided in Section 2670, General Code.

It is further urged that the lien does not properly attach to more than that portion of the property owned by the defendant Schartzer, upon which the building stands in which the illegal sales took place. The evidence discloses that the entire premises described in the petition constitutes a single piece of property and that there is no part of it separated from the remainder by a fence, or any part that is used as a separate and distinct piece of property from that occupied by the residence in which the sales were made. The lien, therefore, we hold attaches to the entire premises described in the petition.

The limits of an opinion preclude the discussion in detail of the many other questions raised on this hearing. We have considered all the questions and have reached the conclusion indicated in this opinion.

A decree may be drawn in favor of the plaintiff, placing upon the tax duplicate such assessment as will correctly represent the time during which the premises were used for the sale of intoxicants, as provided by law; this amount to be determined by counsel and the auditor in the drawing of the journal entry. The cause will be remanded to the common pleas court for the purpose of carrying into effect the decree drawn in accordance with the foregoing opinion.

WAGES SEQUESTERED TO DEFEAT ATTACHMENT.

Court of Appeals for Hamilton County.

L. KRUCKEMEYER CO. v. JOHN J. BURCKHAUSER.

Decided, May 28, 1915.

Attachment and Garnishment—Wages of Employee Sequestered in Order to Defeat Attachment Proceedings.

Where an action in attachment is brought against an employee and his employer is made garnishee, the employer is not at liberty to sequester wages thereafter earned by the employee up to the time of trial and the rendering of judgment; and where it is attempted by the device of paying the employee his wages in full each day in advance, judgment will be awarded to the creditor against the employer up to the amount which became due to the employee during the pendency of the action, if not in excess of the judgment recovered by the creditor.

W. R. Collins, for plaintiff in error.

Jos. B. Derbes, contra.

GRANT, J.; MEALS, J., and CARPENTER, J., concur.

This is a proceeding in which we are asked to reverse the judgment of the court of common pleas, for alleged errors there intervening.

The cause was begun in the court of a justice of the peace, from whose judgment an appeal was taken.

The petition for substance averred that the plaintiff recovered a judgment against one Jack Abrams.

In that action the defendant was served with a writ of garnishment, in due form, by which he was required to appear and made disclosure of the indebtedness, if any, existing from him to Abrams. He did not appear and did not answer, as he was commanded.

Thereafter the defendant was duly served with a warrant charging him as for a contempt, for his default in failing to answer under the process of garnishment referred to, and upon a hearing had in that behalf did not purge himself of the disobedience imputed to him.

Such further proceedings were then had that the magistrate's court, where the action was pending, found and adjudged that the defendant owed Abrams an amount of money, and ordered him to pay it, up to the sum of the judgment theretofore rendered against the latter in favor of the plaintiff.

The defendant made default in this respect also, and wholly neglected to pay the money into court, or to satisfy the plaintiff's judgment.

To recover the sum thus required to be paid, but which was not paid, was the prayer of the petition.

The defendant answered, admitting that Abrams was in his employment when the order of garnishment was served upon him, but denied that he then owed Abrams anything, or at any time thereafter.

Upon the issue as thus made up, the cause was put to trial before a jury. Testimony was brought forward on both sides, and at the conclusion of it all each party asked the court to direct a verdict in their favor, respectively.

The court did instruct the jury to return a verdict for the defendant, which was done.

An exception was saved, a motion for a new trial was made and denied, and final judgment was entered upon the verdict against the plaintiff for costs.

And this is the judgment complained of, and sought to be reversed here.

The evidence in the case is all before us on the record in a bill of exceptions, whereof the material part is of the following tenor and effect: The defendant admitted that he entirely and knowingly ignored the order of the magistrate requiring a disclosure from him as to whether he owed Jack Abrams anything or not. In fact his disobedience of that legal process was displayed by him rather ostentatiously than in contrition or apology. His theory of how he might safely help the plaintiff's debtor to beat the law and his creditor's rights under it, arose upon about the following state of facts:

Jack Abrams, he testified, was owing some two hnudred people when he passed into the employment of the defendant. If his earnings could be subjected to the payment of his debts, he had no appetite to go to work. This was about five years before the time of the trial below.

So the two executed this flank movement on the statutes of Ohio: Abrams was to operate one of the defendant's two saloons in the capacity of head "barkeep," although in one place in the record he is called a "cashier." Each morning the first thing he was to do—even before his devotions, for aught that appears—Abrams was to take out of the cash register of the concern the sum of $5.71, his agreed and liquidated wage for the day then and thus beginning. It was indeed said in the argument—though we can not find it in the record specifically—that the real compensation was $40 a week. But, as this, at the rate of matutinal withdrawal fixed by the bargain, with $5.71 as the dividend, would suggest an hebdomadal divisor of seven days instead of six, and therefore would beget the further suggestion that the saloon was to be kept running on the first day of the week, commonly called Sunday—a thing not to be thought of in this latitude—it must be a slander originating in the committee on arid lands.

At all events, such was the astute deal by which the law of Ohio was to be dispensed with, in the estimation of the parties to it. Some one expressed wonder to Sidney Smith as to how the villagers of his parish had so soon constructed a wooden

pavement. "Why," said the acute parson, "we simply put our heads together and the thing was done."

The invention possibly would merit letters patent for its novelty, were there not some doubts as to its usefulness.

For it is to be said that if the scheme should be permitted to have its way and operate to the effect intended, Burckhauser would be placed in the happy position of always employing Abrams but never owing him anything; that was the pellucid theory of the whole invention. The ancient Greeks were accustomed to figure interest by the month, and the month—as indeed its name indicates—was supposed to be dominated by the moon. So when Strepsiades got badly in debt through the horseracing propensities of his son, the advice for which he paid the manager of the phrontisterion, or thinking-shop at Athens, was to the effect that he should hire a Thessalian witch to capture the moon and put it in hiding. Then, presto! no moon, no months; no months, no interest. It was simplicity itself and may have been the key-word to the plan we are now discussing. And what came to the Greek debtor and the thinking-shop would be interesting matter if one should care to pursue it in the pages of the master satirist of antiquity. We can not pursue it, because it would too surely and too early anticipate the conclusion we have reached, without waiting for its orderly sequence of unfolding. Stated otherwise and in terms of simple arithmetic, the example would stand about thus—Nothing from nothing leaves nothing, and nothing to carry.

We agree with counsel that the parties to this agreement of forever getting service and never owing for it, must reckon with Section 10270, General Code of Ohio, before it can be allowed to have the effect claimed for it, and given to it—apparently—by the judgment we are called upon to review. That section reads as follows:

"When any part of the earnings of the debtor is not exempt under the law relating to exemptions from levy or execution, the garnishee process shall be in force from the time of its service on such garnishee until the trial of the cause to determine the claim, debt or demand of the creditor, and also bind

all such earnings at the time of service and which become due from that time until the trial of such cause."

If words are to go for anything at all, if language means what it says and can not be permitted to be a mere juggle, if what appears to show forth the plain legislative intent is not to give way to a paltering that shall confound shadow and substance, if terms apparently level to the comprehension of lawyer and layman alike are for that reason not open to either enlargement or diminution by judicial construction, if, we say, these things are so, then we must conclude that from the time of the process of garnishment on Burckhauser, he was disabled to sequestrate from the law and withhold from its grasp any part of what Abrams earned in the time between that time and the day the cause against the latter was tried. And the device adopted by the employer and the debtor could not defeat the operation of the statute upon the fund in the intervening time earned. From the time of service the wages of Abrams thereafter accruing, were not unappropriated, or subject to disposition or diversion at the will of the employee and his employer with legal notice and service had. From the time of the trial they were at the disposition of the court. In this case the trial court in that action did dispose of so much of them as is in controversy here by directing payment to be made to the garnishing creditor. To this lawful disposition the defendant gave no heed whatever. He did not take the trouble even to answer to disclose his relations with Abrams. When haled to court to explain his disobedience he sets up what in effect is an agreement between two private men, not members of the Legislature, to repeal a statute of Ohio. This is stretching the doctrine of recall beyond its utmost tension; it is breaking it to pieces.

Upon which we are to observe, that it will take more than two men—no matter if one of them is, as has been urged in argument, indispensable in his line of industry—to make such a contract effectual in this case. It will take at least a majority of this court to work that result in the case at bar; and, as may have been gathered from what has already been said, a majority, or even unanimity is not wanting. It would in our estima-

tion be doing violence to the letter of the English language as crystallized in the statute quoted, and a burlesque on common justice and ordinary honesty, to give effect to such a manifest perversion of law and business morals as is claimed, in effect, by the defense in this cause.

Some decisions from which a different conclusion might, as is said, be reached were brought to our attention in the argument at the bar. We do not feel called upon to discuss the effect of these upon their proper cases, or in any case to which they could under law at the time existing properly be applied, more particularly than to say that under the statute with which we are dealing they appear to us to be totally inapplicable. They were rendered at a time when the controlling and coercive statute did not command the garnishee to withhold from his servant, pending a trial, wages earned between the commencement of the action and the time it is tried. The statute in force when this cause had its inception did so command. Perhaps, probably, it may be said, because of the decisions thus brought to our attention, the statute was made to take the form of so commanding, and courts are to administer the law as it is, and not as it was aforetime.

Another consideration that was commended to us on the argument at the bar was that the case in hand was one of an overpowering necessity. That the services of Abrams in his profession were so invaluable and so bound up in his own personality that on grounds approximating, it should almost seem, to a public necessity—in Cincinnati—any impeccable breaches of the laws made for the collection of his debts should be excused. And the contract to set aside the statute for his benefit—since he admitted he was not going to work if his creditors were going to get the usufruct in the shape of the garnishment plan of 10 per cent. for cash—was hit upon as a sort of emergency measure, so to speak.

We are sorry to think that the privilege of dodging what the new Constitution meant to give the people in the way of referendums is limited to the Legislature; it can not be delegated to saloon keepers. It will have to be denied here. The claim as

of right to dispense with statutes drove one English king from his throne and took the head of another from his shoulders. If it was refused to them, it can not be accorded to the proprietor of even two saloons two centuries and a quarter later. The judgment is not to be upheld on this claimed ground of public policy and necessity.

To reach another conclusion than this in this case, we should, to our own apprehension, stultify our office and come short of clearing the oath taken upon entering on its duties. And we can regard no man so powerful, or so indispensable to one's private concerns, as to shift from ourselves the obligations to be no respectors of persons in declaring the law and giving voice to its always impartial judgments. Were we to sustain the proceedings below we should not, as we conceive, be measuring up to the requirements of this inerrant and necessary standard.

The judgment complained of is without evidence to support it and is against the law of the case. The motion of the defendant for a directed verdict should have been denied and that of the plaintiff for a like verdict should have been allowed.

In these respects we find that manifest error has intervened, for which the judgment under review is reversed.

Each party at the trial asked the action of the court in directing a verdict. This was in law a submission of the cause to that court, and by consequence to this court. And, so finding, we proceed to render the judgment which we also find the court below should have entered, but did not enter, that the plaintiff recover according to the prayer of his petition in that court.

SETTLEMENT OF A LAW PARTNERSHIP.

Court of Appeals for Hamilton County.

ALBERT BETTINGER v. HERMAN P. GOEBEL.

Decided, May 28, 1915.

Absence of One Partner Throws the Work Upon the Other—Adjustment of this Difference Not Conditional Upon a Continuance of the Partnership.

The even course of a profitable law partnership, which had existed between B and G for many years, was interrupted by the election of G to Congress. The campaign prior to his election and the duties of his office thereafter absorbed practically all the time of G and threw the work of the partnership upon B. At the end of a year it was agreed between them that matters should be equalized by G charging himself on the books of the partnership with an amount equal to one-half of his salary received from the Government for the year, but there was nothing said as to a continuance of the partnership, and thereafter it was terminated.

Held: **That the charge which G had permitted to be placed against him on the books of the firm was not in consideration of a continuance of the partnership, but in settlement of partnership affairs up to that time, and he was not entitled to recover back this amount from B.**

Peck, Shaffer & Peck, for plaintiff in error.
Healy, Ferris & McAvoy, contra.

CARPENTER, J.; MEALS, J., and GRANT, J. (sitting in place of Judges Jones, Gorman and Jones), concur.

This case comes into this court on error to the common pleas court of this county, on an action for an accounting growing out of partnership relations between Herman P. Goebel and Albert Bettinger.

The plaintiff and defendant had been partners in the practice of law, under the firm name of Goebel & Bettinger, for many years prior to the first day of December, 1903. It appears that the partnership was begun about 1881, during which time each one drew one-half of the net earnings of said firm.

At the November election of 1902, the defendant in error was elected Congressman from the Second Ohio Congressional Dis-

trict. The partnership up to and during all the time intervening between 1881 and 1903 seemed to have been mutually harmonious. On or about the first day of December, 1903, the defendant in error, Herman P. Goebel, immediately prior to his departing for Washington to continue his duties as Congressman, called upon Mr. Bettinger at their office, when the defendant in error wanted to know of the plaintiff in error whether they were going to continue in partnership, and if so, upon what basis of division. The plaintiff in error, Bettinger, stated that before he discussed that subject there was another subject which he desired to settle. They immediately entered into a conference relating to their partnership matters as they had theretofore existed, when it was agreed that the defendant in error should, on account of his having been absent from the business during the time that he was engaged in his campaign for election, and also during the time he was absent in Washington in the performance of his congressional duties, charge himself on the books with $4,300, the same as though he had devoted himself to the partnership business during the time of his absence.

The evidence tends to show that from the time Judge Goebel became an aspirant for the congressional nomination in the fall of 1902, until the time he went to Washington to take his seat in the fall of 1903, his time, activities, energy and services were largely devoted to matters connected with his congressional campaign and his public work. The evidence shows that Mr. Bettinger during that time was extremely active in the practice of the law; that the firm was doing a large and prosperous business; that Judge Goebel, by reason of his having his attention and principal interest in other channels, was actually producing but a small part of the financial returns which the firm was enjoying, although he was participating equally therein as a partner; that the fees amounting to $22,000 or $23,000 during a period, roughly speaking, of about a year prior, were earned through the exertions of Mr. Bettinger, and that during this same period Judge Goebel was not only receiving credit for his congressional salary and devoting his time largely to the public affairs, but was being credited with a full and equal one-half of the receipts of the firm.

Mr. Goebel assented to the suggestion of Mr. Bettinger, and directed the sum of $4,300 to be charged to him in the partnership books of account, which was afterwards treated as partnership assets and deposited in bank to the credit of said partnership.

Upon the deposit of this amount, the partnership then existing was dissolved; and it is admitted that upon the basis of this settlement each party received his respective amount of the moneys due him.

After the termination of these negotiations of settlement, the two partners considered whether or not they should continue in their partnership relations, and it was finally agreed between them that the partnership name should continue as before, on the basis of distribution of the earnings as follows: Five-sixths thereof should belong to said Bettinger and one-sixth to said Goebel. A few days thereafter said partners agreed to revoke their agreement to continue said partnership as theretofore agreed upon, and that said partnership should be dissolved and discontinued.

It is also admitted that in all said negotiations nothing whatever was said that the settlement in reference to the payment of said $4,300 should be dependent upon the continuance of a future partnership.

The court below found that this agreement was made in consideration of the partnership continuing under the firm name of Goebel & Bettinger, and disallowed the charge of $4,300 as a charge against said Goebel.

We think the court erred in this finding.

Lindley on Partnership, page 512, says:

"To an action for an account of partnership dealings and transactions, an account thereof already stated and settled between the parties affords a good defense. No precise form is necessary to constitute a stated and settled account; but an account stated, unless it be in writing, is no defense to an action for a further account. It is not, however, necessary that the account should be signed by the parties, if it can be shown to have been acquiesced in by them; and an account may be stated and settled, although a few doubtful items are omitted."

It being admitted by both sides in the argument of this case that no testimony whatsoever was given even tending to show that the settlement between these parties was dependent on or had any connection with the future continuance of the partnership, we are at a loss to know how the court could have found the fact to be that it was a settlement dependent upon a future continuance of said partnership. The court appears to have found this fact from the language used in the report of this case in Vol. 58 of the Law Bulletin of September 22, 1913, on page 553:

"In putting the proper construction upon the conversation of November 6, I must take into consideration all the circumstances then existing and the natural and probable attitude of the parties. And after carefully weighing all the surrounding circumstances of this case, I am of the opinion that a conversation did take place on November 6 regarding this dissolution, and I am further of the opinion and do find that this agreement was that in consideration of the partnership continuing under the firm name of Goebel & Bettinger, Judge Goebel to receive one-sixth of the partnership profits and to be allowed to retain all of his congressional salary, he was to consent to be charged on the books of the firm with having received $4,300. * * * It seems to me that this would be the natural conduct of the partners. I can not believe that one partner, who is entitled to an equal share in the firm's business, would willingly consent to relinquish so large an amount in the firm's profits unless there was some consideration by way of continuance of the partnership."

It is settled law that a court or a jury must determine the existence of a fact from presumption of law or from a known fact or facts, or from testimony tending to prove a fact. He may not and should not determine a fact to exist from mere conjecture, or what appears to him would be the natural conduct of the parties.

There is no testimony in connection with the settlement of these two parties to make the payment of it dependent upon a continuance of the partnership relation; the nexus between the two is wholly wanting.

Even assuming that the defendant in error consented to charge himself with $4,300 upon the partnership books, under an agree-

ment with the plaintiff in error that such charge should be dependent upon the continuation of their partnership affairs for another year; and that the plaintiff in error, within a few days thereafter, had renounced such partnership relation, it is quite doubtful whether the defendant in error would have been able to establish a right in this suit to withdraw the charge or receive back that amount of money, all of which, according to the testimony, had been distributed in the final settlement of the affairs of said partnership.

It is admitted that the defendant in error, during the time that he was engaged in his canvass for election to Congress, and from that time to the date of settlement, had contributed but little toward the earnings of the partnership; and that the plaintiff in error had, during that time, earned large sums of money, all of which were treated as partnership property, subject to an equal division between the two parties. It was then suggested by the plaintiff in error that it would be a proper thing for the defendant in error to turn over to the partnership an amount equal to the salary which he had received in the meanwhile. It was readily assented to by the defendant in error. The question naturally arises, what equity exists on the part of Goebel to recover back this amount of money which he had voluntarily consented to turn over into the partnership funds. In order to do so he must establish that it would be inequitable for the plaintiff in error to retain it, and in order to create the inequity it would be incumbent upon him to show that Mr. Bettinger was being unjustly enriched. The mere fact that the plaintiff in error had renounced the continuance of the partnership would not be sufficient. The restoration of the $4,300 to the defendant in error would not only be enriching the defendant in error without any consideration whatever, but at the same time it would be impoverishing the plaintiff in error without justification and without consideration.

This is an equitable suit, and the parties seeking equity must do equity; and it must be apparent to any one that the defendant in error does not support his claim upon any equitable ground.

For the reasons stated, the judgment of the court of common pleas will be reversed.

INJUNCTION AGAINST PLACING RAILWAY TRACK IN STREET.

Court of Appeals for Stark County.

JOHN SOMMER v. THE PENNSYLVANIA COMPANY.

Decided, April 22, 1915.

Abutting Owner—Rights of, in Street—Include the Right to be Compensated—Before Property is Injured by the Laying of a Railway Track.

It is the duty of a court to protect the rights of an abutting owner in the street, and where it is proposed to place a railway track across the street with crossing gates, and the obstruction will be near enough to the property of an abutting owner to materially affect it or depreciate its value, injunction will lie until the property owner has been properly compensated.

Pontius & McDowell, for plaintiff.

Cary & Armstrong, contra.

HOUCK, J.; SHIELDS, J., concurs; POWELL, J., dissents.

This cause is here on appeal from the Common Pleas Court of Stark County, Ohio.

The plaintiff commenced suit against the defendant to enjoin it from constructing its railroad track along the corner of, and within a distance of about nine feet of the lot owned by plaintiff, on which is located a business property; also to enjoin it from constructing crossing-gates across the street, directly in front of the business property of said plaintiff.

The plaintiff in his petition, in part, says:

"That he is the owner of the following described real estate in the city of Canton, county of Stark and state of Ohio, being described as follows: Parts of lots known as Lots No. 796 and 495 in said city of Canton, Ohio, and beginning at the north-east corner of said Lot No. 796; thence westwardly along the north line of Lot No. 796 and No. 495 a distance of 85 feet; thence southwardly and parallel with the east line of Lot No. 796 a distance of 72 feet; thence eastwardly parallel with the north line of said Lot No. 796 a distance of 85 feet; thence northwardly along the eastwardly line of said Lot No. 796, 72 feet to the place of beginning.

"That said lot has a frontage of 72 feet on what is known as Market Avenue South in said city of Canton, Ohio, on the west side of said avenue. That said street has been duly dedicated to the use of the public as a street, the fee thereof beng vested in said city in trust for said public use; that said street along said premises is 60 feet wide, and has been open for travel and public use for more than fifty years; that his said premises and the building thereon are of great value, and which improvements thereon were made with reference to the present location of the tracks of the defendant.

"That said defendant is operating its railroad through said city and that four of its tracks cross said Market Avenue South, and that said tracks are laid side by side and have been in their present location for many years past. That said defendant company is now building a depot or station on the east side of Market Avenue South and northwardly from its present tracks about one hundred and twenty-five feet, and that it is about to and will unless restrained by this court, build one or more tracks for its use, as a main line across said Market Avenue South, and northwardly from where its said tracks are now located, and if permitted to do so that the north line of said tracks will intersect the east line of said Market Avenue South directly opposite on said Market Avenue South, and so that the said tracks will intersect the west line of Market Avenue South at a point about five feet southwardly from the southeastwardly corner of said premises of the plaintiff; and it proposes to build said tracks across said street at grade, and will place crossing-gates in said Market Avenue South, northwardly of said tracks, and plaintiff says that such construction of said tracks and crossing-gates will be an obstruction of the said street along and in front of his entire premises; and that the defendant has no right or authority at law to do same, and has no right to use said street by crossing it with tracks in any other manner or place than it now uses the same; that said proposed construction will constitute a change or alteration of the location of its railroad across said street at grade; that said contemplated change will render the plaintiff's property worthless and will deprive him of his property right in said street and the private rights and easements which he now has by reason of being the owner of the premises hereinbefore described; and that the contemplated use of said street will be a diversion of it to other purposes from which it was dedicated. Plaintiff says that he will be irreparably damaged, for which he has no adequate remedy at law, and prays for an injunction against the defendant and other equitable relief."

The defendant, by its answer, denies all of the material allegations in the petition of the plaintiff and further says that at the time the plaintiff purchased the real estate described in his petition, and made the improvements thereon, that he had full knowledge of the nature and extent of all of the contemplated improvements that were about to be made by the defendants; that said improvements, gates and changes of tracks contemplated by defendant will in no way interfere with or damage the plaintiff; and that he will not suffer irreparable damage, and that he has an adequate remedy at law, and prays that plaintiff's petition be dismissed.

The plaintiff filed a reply to the answer of the defendant, which is, in substance, a general denial of all of the material allegations in the answer of the defendant.

Upon the issue joined, the cause was tried in the common pleas court, and a decree was entered in favor of plaintiff, granting him all of the relief prayed for in his petition, and making the temporary restraining order and injunction heretofore allowed perpetual.

The cause was appealed to this court. The defendant filed a motion, in this court, to suspend or dissolve said injunction for the following reasons, to-wit:

"*First.* For the reason set forth in the answer herein filed in this case.

"*Second.* The ultimate relief, if plaintiff is entitled to any, is compensation and damages, and plaintiff's rights in the premises can be fully secured and enforced without the delay and inconvenience incident to injunction."

The motion was submitted in this court, on the testimony as appears in the record below.

The material facts are not in dispute, and the court is called upon to determine the question of law, which is conceded by counsel upon both sides to be but one, and that is, has the plaintiff pursued the proper remedy?

The plaintiff contends that his remedy is injunction, and the defendant maintains that the plaintiff has an adequate remedy at law, and if he has been damaged he should resort to a court

of law and seek a recovery in damages, and not to a court of equity for injunction.

The question herein submitted is one of importance and vital interest to the parties to this suit.

Upon the one hand we have a private individual who is the owner of a business property, who maintains if the defendant is permitted to lay said tracks and erect said gates in and on said street as set forth in plaintiff's petition, it will result in great damage to him and his property.

Upon the other hand, we have a railway company with large money and property investments, seeking to extend its interests by the laying of tracks, which must be conceded will not only be of value to the defendant company, but of great value to the general public.

The defendant company, by its counsel, argues with much force and contends that under Section 8765 of the General Code of Ohio, that the plaintiff's remedy is one at law.

Counsel insist if a strong judicial interpretation is given this section in question, that the remedy that plaintiff should pursue is an action for damages and not for injunction.

The section referred to provides:

"Every company which lays a track upon or over any such street, alley, road or ground, or part thereof shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner before the proper court, at any time within two years from the completion of the track."

We have examined this statute with some care with a view of ascertaining its true intent and meaning, as applied to the case at bar, and in our opinion we can not find anything that would or could be interpreted to mean or to convey the interpretation claimed by it for counsel for the defendant.

This statute limits the time in which a suit may be brought for damages by persons who are injured by the laying of tracks, but it does not in any way provide or determine the remedy that may be pursued if damages are not sought for injury resulting, or that may result from the laying of railroad tracks upon or near the ground or property of the owner thereof.

We do not understand how it could be properly claimed that under this statute that a person owning property abutting on a street, and who claimed to be injured by the laying of railroad tracks and placing crossing-gates on said street and in front of the business property thereon, could not invoke the remedy offered by injunction.

It is contended by counsel for defendant, that an abutting property owner on a street has not such property right and interest in and to the street as would entitle him to relief by injunction, in a suit like the one at bar; but we do not think this claim is well founded.

At this time we do not deem it necessary to discuss at great length, the character, nature, right and extent of the owner in and to lands abutting on a street, and his interest by reason of such ownership in and to the street upon which said lands abut.

It is certainly a right which attaches to the abutting owner's land, and he certainly has a property right therein, and it matters not whether the fee to the street be in the municipality in trust for public uses, or whether the fee be in the abutting property owner, he nevertheless has a property right, and if he has a property right in and to said street, then under the Constitution of our state, such property right can not be taken, by the defendant, unless the plaintiff is first compensated for same.

As we view it, it is the duty of a court of equity, in cases like the one at bar, to protect the property and rights of the owner in and to the street on which said property abuts, and to see to it that the private property owned by such person is not taken unless he is first compensated for same.

If the placing of a railroad track across the street in question, and the placing of crossing-gates on said street and in front of the property of plaintiff, is near enough to the property to materially affect it, or depreciate its value, then, in our opinion, the plaintiff has a right to be compensated before the street is so obstructed, and he may properly invoke the remedy offered by injunction.

It has been established by a long line of authorities not only in this but in other states, that if the owner's right in and to the street be property (referring to abutting property owners), that

the same can not be taken from such property owner, except in time of war or other public exigency, unless compensation therefor shall be first made in money or first secured by a deposit of money; and if it were not so, then a person's property would not be safe at any time, and it inevitably follows that the attempt to take the property of the plaintiff in question is an invasion of the constitutional rights of the plaintiff, that private property shall not be taken without compensation be first made therefor.

It is an invasion of the rights of plaintiff to place in a street in front of his lot and business property a railroad track and crossing-gates, which will impair the owner's access to his property, and otherwise interfere with him in his full enjoyment of his property for all purposes to which it is adapted, and of the street itself, and such is an invasion and an attempted taking; it is a diversion of the use of the street from the purposes originally designed for it, and if it can be taken at all against the will of the owner, it must be upon the terms prescribed by the Constitution.

We feel that the law in this case is well established and that the theory of this court of the law as indicated herein is fully determined and well established in a long line of cases, and especially by our Supreme Court in this state, and we need but cite the case of *Railway Company* v. *Lawrence*, 38 Ohio State, page 41, the syllabus being as follows:

"1. Where the construction of a railroad in a street of a city will work material injury to the abutting property owners, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners as required by law for the appropriation of private property.

"2. In such case it is immaterial whether the fee is vested in the city or in the abutting owners, so long as it is held upon the same defined uses."

Quoting from the above case as appears in the opinion of Judge White on page 45, the learned judge says:

"It seems to us it can make no material difference where the fee is vested, so long as it is held to the same defined uses.

"The established doctrine in this state is, that the abutting lot owners 'have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be of little value. This easement, appendant to the lots, unlike any right of one lot owner in the lot of another, *is as much property as the lot itself.*"

We find the same doctrine in the case of *Kinnear Manufacturing Co. et al* v. *Beatty*, 65th Ohio State, page 282, Judge Minshall says:

"The decisions in this state have clearly established that an abutting lot owner has such an interest in the portion of the street on which he abuts, that the closing of it up, or the impairment of its use as a means of access, or the addition of a burden, which is new and increased, is a taking of private property for a public use, and can not be done without compensation."

The evidence offered in the case at bar, and which is undisputed, is clear and conclusive and of such a nature and character that we have no doubt that the proposed track and crossing-gates, if permitted to be placed on the street in question and in front of the lot and business property of the plaintiff, would materially damage his property, and impair his right to the use of said street.

In view of these facts and applying the well established principles of law to them as hereinbefore stated and set forth, a majority of this court is of the opinion that the plaintiff is entitled to the relief prayed for in his petition, and therefore the motion filed by the defendant herein to dissolve the permanent injunction allowed by the common pleas court in this case, is not well taken, and said motion to dissolve said injunction is hereby overruled.

WOMAN THROWN FROM INTERURBAN CAR.

Court of Appeals for Hamilton County.

AMY LOUIS HENRY v. THE CINCINNATI, LAWRENCEBURG & AURORA ELECTRIC STREET RAILROAD COMPANY.

Decided, May 28, 1915.

Negligence—Woman Carried Past Her Station—Thrown off by a Lurch of the Car—After Protesting to the Conductor on Back Platform.

A woman on an interurben car told the conductor she wished to get off at Stone's crossing, a regular stop. The car ran past that stop at a very high rate of speed. The woman rose and went out on the back platform to protest to the conductor for carrying her past her station. He replied, "I did," or "I have," and went forward in the car. The woman released her hold on the rail to turn and go back to her seat. As she did so a lurch of the car threw her off and she was badly injured. Her action for damages was based on non-performance of an alleged legal duty arising from the fact that the conductor deserted her while in a place of peril and in extricating herself she received the injuries complained of.

Held: That the testimony failed to tend to fasten upon the railway company an unperformed legal duty, and there was therefore no error on the part of the court below in arresting the case from the jury and giving judgment for the defendant.

Horstman & Horstman, for plaintiff in error.
Peck, Shaffer & Peck, contra.

GRANT, J.; MEALS, J., and CARPENTER, J. (sitting in place of Judges Jones, Gorman and Jones), concur.

By this petition in error we are asked to reverse the judgment of the court of common pleas in the cause thus entitled.

We adopt as our own the statement of the issues sought to be raised by the pleadings, made in the brief of the plaintiff in error, as follows:

"The amended petition says that on May 9th, 1912, at about 7:45 A. M., plaintiff was a passenger on a car operated by defendant; that she informed the conductor that she wished to get off the car at Stone's Crossing, which was a regular stopping place for the cars of that line; that the conductor neglected to

stop the car at that crossing, whereupon plaintiff, after attempting to attract the attention of the conductor, but being unable to do so, left her seat in the car and went on to the rear platform where the conductor was stationed, for the purpose of reminding the conductor that she wanted to get off the car at that station; that the conructor, when she told him he had carried her past the station, merely remarked 'I did' and immediately went forward into the car, leaving her standing alone on the rear platform of the car, which was then moving at an extremely high rate of speed, and as plaintiff was in the act of turning around to re-enter the car, she was thrown off the platform to the ground and very severely injured.

"The answer denies negligence on the part of defendant and avers that plaintiff was injured through her own negligence.

"The reply denies negligence on plaintiff's part."

At the conclusion of the evidence for plaintiff the court on motion arrested the testimony from the jury, and rendered judgment in favor of the defendant below.

Nor shall we be doing an injustice to the plaintiff by stating, as being substantially correct, her version of the evidence brought forward at the trial in support of her contention. It is as follows:

The plaintiff testified that she was 49 years of age and lived in Harrison, Ohio, at the time of the accident, May 9th, 1912; that on that day at about 7:30 A. M., she entered the car which was going eastwardly at Harrison, and sat in the back end of the car on the first seat from the rear. "It was a side seat. As the car was coming towards the city I was on the right hand side. There was nobody on that side between me and the rear platform. I had been in the habit for two years last past of going on this car to Mr. Simonson's to clean house twice a year. When I paid my fare I said to the conductor 'I want to go to Mr. Zad. Simonson's. Put me off at Stone's Crossing.' When I got to the crossing he didn't stop the car, and when I saw those signs on the fence, after I passed those, I got up and I could not draw his attention, he was standing against this wheel looking off at a distance and I went out on the platform.

"Q. How did you try to attract his attention? A. Well, I stamped my foot and that is all the way, and he didn't look around and of course I didn't holler.

"Q. Which way was he looking? A. That way, looking across. I tried to attract his attention and could not. Before I got up he was a few steps from me. I suppose about the length of this crutch, maybe a little farther. When I failed to attract his attention I got up and I stepped out just like stepping off of this step. I says 'you have carried me by my stop.' Then he says 'I have' and that is all he did say.

"Q. What did he do? A. He just deliberately left me and went to the other end of the car and I supposed he was going to stop the car.

"Q. And what did you do then? A. Well, I turned to go back to my seat and I fell.

"Q. And did you try to get off the car? A. No, sir, I did not.

"Q. How fast was the car going just prior to your falling? A. Well, I suppose it was going at the rate of 60 miles an hour. It was going awful fast.

"Q. Did he say anything except 'I did' or 'I have'? A. That is all he said.

"Q. How soon after that did he leave you? A. Just as quick as he could walk away.

"Q. And how quick did you turn to go into the car? A. Just as quick as I could turn around. Stone's Crossing is a regular stop on that road.

"Cross-examination.—When he came to me to collect my fare I paid him a nickel and I said 'I am going to Zad Simonson's to clean house and put me off at Stone's Crossing.' He didn't say anything. Instead of stopping the car though as I had asked him, he carried me past.

"I didn't get up while the conductor was in front of the car. I am sure of that. He had collected all the fares and gone back to his post on the back platform. There was a step from the aisle of the car down on to this platform, a step of 6 or 8 inches. The door leading from the aisle to the platform was open. I tried to attract the conductor's attention. I stamped my foot. I could not attract his attention. He was standing with his back against the wheel, but looking off, not in my direction though. I got up out of my seat. I got hold of the door as I went out. The car was going at the rate of 60 miles an hour. It was going so fast, that is how I judged it. and I heard several say it was going that way. It was going an unusual speed. It usually runs very fast there.

"Q. And you stepped out on the platform? A. Yes, sir.

"Q. And didn't hold on to the door? A. No, I let go of the door. Of course I had to let go of the door to turn around and go back to my seat.

"Q. And when you stepped down on the platform there, you were right next to the conductor, were you not? A. I was, well in a distance of a foot, I suppose, about a foot.

"Q. And then, what did you say to the conductor then? A. I said to him 'you have carried me by my stop,' and he just looked up and says 'I have,' and deliberately left me and went to the other end of the car. He left me standing where I was talking to him, never answered, only said 'I have.' He didn't ring the bell to stop the car.

"Q. How far in the car did he go? A. I don't know, when I turned around enough to go back to my seat, I turned around as quick as I could, he was standing there some place in the car.

"Q. You had turned around then after he left you? A. Of course I turned around to go back to my seat when he left me.

"Q. There are handles on the door on each side? A. Yes.

"Q. You didn't have hold of those? A. You think I could hold to those, turn around and go back to my seat?

"Q. After you turned around? A. Didn't have time. It threw me over. The switch of the car threw me over.

"Q. You said you saw the conductor? A. When I turned around before I fell I looked for the conductor, supposed he would stop the car and he was standing back there and that is the last I remember.

"Q. Standing where? A. Well, in the rear of the car, I don't know where.

"Q. Looking at you? A. No sir, he was not looking at me because he had his back to me. There were no push buttons on that car by which to attract the attention of the conductor. If the conductor had been looking into the car he could have seen me without looking through any window pane."

Mr. George W. Bowlby, of Harrison, Ohio, was a passenger on the car. He did not see the accident happen, but assisted in picking up the plaintiff after the car came to a stop. He says the place where she fell was 300 yards distant from the Stone's Crossing stop.

Several other passengers on that car testified that as they were all facing forward none of them saw how the accident happened.

In the light of the issue thus tendered by the pleadings and the testimony addressed to it, what duty did the defendant owe to the plaintiff? That is, to our apprehension, the single question to be answered in this inquiry, as a matter of first instance.

That would be a question of law upon which the court must pass without aid from a jury. If no duty was owing, then the matter was rightly resolved by the trial judge directing the verdict that was returned in the case. If the testimony produced tended to establish a legal duty, owing by the defendant to the plaintiff, then the resulting question of whether the duty was performed and the obligation discharged, would have presented an issue of fact which it was the exclusive province of the jury to determine, upon such proper instructions as to the law of the case as the court should deem proper to give in charge.

There can be no impropriety in addressing our consideration to this inquiry of duty or no duty owing—at least so far as the plaintiff is concerned—in presenting, *in haec verba,* her precise claim in this respect, as the same is contained in the brief of her counsel.

It proceeds thus—up to the point where cases are cited in maintenance of the position taken:

"Plaintiff, by reason of the conductor's failure to stop where he had been directed to stop, was compelled to act quickly. When Mrs. Henry noticed that she was being carried past Stone's Crossing, she stamped her foot and otherwise tried to attract the conductor's attention, but he was looking in another direction, so that Mrs. Henry was compelled to go towards him. The car was running at a high rate of speed and necessarily making noise. She was obliged either to step out on the platform to him or wait an indefinite length of time until he should look in her direction. We submit that under those circumstances almost any man or woman passenger would have stepped on to the platform to talk to the conductor. Did she under these circumstances exercise ordinary care on her part? We contend that circumstances were such that it presented a question of law for the court. This is not analogous to a case where a passenger deliberately rides on the rear platform when there is accommodation inside the car. The conductor's neglect caused Mrs. Henry to be on the platform and he was negligent in abruptly leaving her there unprotected. Considering the duty of the company to exercise the highest degree of care towards passengers and the fact that this passenger was a woman and that the car was going at such a very high rate of speed, the conductor surely was not acting humanely in leaving her exposed to that danger which she suffered. If he had remained on the platform she probably would not have fallen, and if she had lost her footing, he probably would have saved her from

serious injury. Answering her abruptly and immediately going into the car without signalling for the car to stop or giving her any assurance that it would stop, he made it necessary for her to loosen her hold of whatever she had hold of and to turn around to go into the car again, and while in the act of so turning around she was thrown off the car. Any ordinary man seeing an aged woman on the rear platform of an interurban car going at such speed, would almost involuntarily assist the woman to a place of safety and yet this conductor deliberately hurried away from her. Can it be said that that is in law the exercise of the highest degree of care towards a passenger? And can it be said as a matter of law that because a woman who is carried beyond her destination and who can not otherwise attract the attention of the conductor, steps out on the platform to talk to him briefly, is guilty of negligence? She was called upon to act very quickly, by reason of the failure of the conductor to do his duty, and she could not be expected to weigh the question of how best to act as if she had had time to reflect and consider. Being a working woman she could not be expected to sit in the car patiently and be carried an indefinite distance beyond her destination, perhaps without means to get back, or at least not able to get back in time to do her day's labor. It seems to us a very harsh judgment to accuse her of negligence in doing the only thing she could do to remedy the mistake of the conductor. As long as the conductor was within a foot of her on the platform there was not much danger to her because she had her protection and also the hand-hold of the door post, but when he left her abruptly he deprived her of both of those protections and made it necessary for her to let go in order to turn around to get into the car again. A passenger going to the conductor on the platform under those circumstances would naturally expect him to forthwith pull the bell rope and slow up and stop the car. If he had done that she would have been safe. He did not do that, but on the contrary acted in a way which naturally added to her embarrassment and doubt as to what he was going to do next. She had a right to wait a few moments to learn what he would do and then to turn around and see what he would do when he entered the car."

We must give, of course, and *do* give, credence to whatsoever the evidence in terms states, so far as it bears upon the issue to which it is addressed, and we are also to deduce all proper inferences flowing from the facts thus brought to bear.

Allowing these, and still how stands the case? Whatever may have been the obligation of the defendant—whether contractual or imposed by law—not to carry its passenger beyond the desig-

nated stopping place, it is certain in this case that, after that default was complete, the plaintiff—for whatever reason—left a place of safety within the car and voluntarily went to a place which, or in leaving which, turned out to be, under the circumstances, a place of danger, where she came to her injuries sued for.

It is quite possible, we think, to give too much importance to the alleged abruptness of the conductor when the plaintiff told him her stopping place had been passed, or to put an unnecessarily unfavorable construction on what he then said to her. His tone of voice can not be reproduced on the record; that is certain. But we are inclined to think—under the circumstances—that his words—"I did," or "I have,"—were interrogatively meant. If this is so—and as a conjecture it is as good a one as one that would impute a want of feeling and derision of a poor woman's just claim to considerate treatment at a conductor's hands—then it is not unreasonable to conjecture further that he in going forward in the car at that time, did so from a purpose of seeing whether the motorman still could not do something to allow the passenger to alight as near to her point of destination as was then practicable, and so save her day's work to her. We rather think this may have been the fact of the matter. But even so, or even otherwise, we can not regard this point as decisive of the breach of any legal obligation of duty from the defendant to the plaintiff, at that exact moment of time, or on account of that matter, in any light in which we may look at the conductor's act or conduct. Certain it is that when the conductor left the plaintiff and went forward, she—having theretofore left a place of safety—was still in a place of safety, so far as appears, and which, had she not left that place of safety, for aught that is shown, would have continued to be a place of safety for her. When she changed that—when she abandoned her hold upon the door jamb of the car, and turned to resume her seat and place of safety, which she had in the first instance abandoned, and in so doing came to her hurts, the conductor was no longer where he could render to her the duty of humanity to safeguard her from an impending peril, and the absence of which seems to be imputed to him, and through him to his employing company, as a possibly actionable fault.

It is to be remembered that this is not an action to recover for the breach of a contract to carry a passenger to her point of destination and to deliver her there safely, the violation of which resulted in her bodily harm. Something, perhaps, might be said for that kind of a claim. But this is not a suit so founded. It is an action for the non-performance of an alleged legal duty, arising, so far as we can gather from the averments of the petition, from the charged fact that the conductor deserted the plaintiff while she was in a place of peril, and in extricating herself from which she received her injuries, as she says. The excessive speed of the car, acting in conjunction with the abandonment of her by the conductor, is not pressed in argument, and seems to have been pretty much non-existent, so far as to being a contributing factor in the injury is concerned.

The consideration of humanity alone, as such, however commendable in ethics and fireside law, is a matter of no significance in a case where obligations imposed by positive law are alone to be dealt with and enforced.

The most, we think, that can be said—if so much—is that perhaps the fact that the conductor saw his already wronged passenger—that is, wronged by being carried by her contractual point of stopping—in a place which might by her leaving it, as she afterwards did leave it, become a place of danger, nevertheless left her there without warning, safeguard or precaution—this, we say, might, possibly, be assimilated to the *rationale* underlying the doctrine of last chance, so as to make the defendant amenable to the remedy which in such a case—*properly*, such a case—the law undertakes to advance and administer to effect, in accordance with the rights of the parties, issuably presented and proved.

We are not saying that this case, upon its own facts, is within the purview of the principle of the last chance rule. We say only that at most it could amount to no more in any view and when properly invoking the aid of that remedy. We are not called upon to say more.

The doctrine of last chance is not to be applied unless it is pleaded (*Drown* v. *Traction Co.*, 76 O. S. 234). It was not pleaded in this case.

The authorities cited in the plaintiff's brief, are marshalled under two heads. The first is "Province of the Jury." Upon that we have said all that we care to say.

The second is "Duty of Conductor to Protect and Assist."

These terms suggest the considerations upon which we have been remarking. No authority, it is supposed, can be brought forward to support the claim that it was the conductor's duty to prevent a passenger from leaving a place of safety of his own will, and going to one which may prove to be dangerous, the passenger being of full age, *compos mentis*, and not disguised by drink. A conductor is not charged with the duty of being the advisor of the passengers riding in his car, at his peril for giving bad advice, or for giving none at all in case it turns out through the act of the passenger alone that advice should have been given. Nor, under what we conceive to have been the circumstances of this case, do we think he was charged with a duty of protection to the plaintiff, unless, as we already have intimated, seeing her in peril his duty was not to recklessly or wantonly allow it to be visited upon her, he having it within his power to prevent the foreseen and impending danger. In this case, if that duty was violated, it was because the conductor deserted his passenger when he saw her in a place of danger. But it is at least questionable whether she was in a place of danger when the conductor left her, although the place in which she afterwards exposed herself became so, but not to his then knowledge. If, on the other hand, the fact were unquestioned, as we have found already, the debt of duty, if due and unperformed in this case—which we do not say—the consideration is not before us or to be regarded, because the issue is not raised by the pleadings.

Upon a painstaking review of the record and all that has been said or printed by way of argument in the case, we can not say that there was any testimony fit to go to the jury upon the trial, because none of it tended to fasten upon the defendant an unperformed legal duty toward the plaintiff.

So finding, we find also that no error appears to have intervened in the case, and the judgment complained of is, therefore, affirmed.

DISMISSAL FOR DEFAULT IN FILING PETITION.

Circuit Court of Cuyahoga County.

E. TALAMINI v. SOLOMON ULMER.

Decided, November 6, 1907.

Practice—Court May Dismiss Case Appealed from a Justice by Defendant When Plaintiff is in Default for Petition.

Where a defendant has appealed from a judgment rendered by a justice of the peace, and the plaintiff has failed to file his petition within the time prescribed by law after the filing of the transcript from the justice, the court may enter a judgment of dismissal.

H. Koblitz, for plaintiff in error.
Fred. Desberg, contra.

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

Talamini recovered judgment before a justice of the peace against Ulmer. Ulmer appealed to the court of common pleas perfecting such appeal by doing all things necessary for that purpose.

By Section 6583, Revised Statutes, it is provided that the justice, in case of an appeal to the court of common pleas from a judgment rendered by him, shall deliver a transcript and all original papers used on the trial before him, on or before the thirtieth day after the rendition of such judgment, and that the appellant shall, on or before such day file a transcript of the proceedings had before the justice.

The judgment in this case was rendered on the 4th day of February, 1907.

The transcript and original papers were filed within the thirty days.

Section 6592, Revised Statutes, provides that:

"If the defendant appeal from any judgment rendered in favor of the plaintiff, and after having filed his transcript and caused such appeal to be docketed, the plaintiff shall fail to file a petition, or otherwise fail to prosecute the same to final judgment, the defendant in such action may file his answer setting

up whatever claim or demand he may have against such plaintiff, and prosecute the same to final judgment, in which case, if the defendant shall recover judgment against the plaintiff, all costs which have accrued before the justice and in the appellate court, shall be adjudged against such plaintiff, or he may, on motion to the court, suffer judgment to be entered against him for the amount of judgment below, in which case all costs which have accrued before the justice and in the appellate court, shall be adjudged against such defendant."

Section 6598, Revised Statutes, provides that:

"The rule day for filing petition in the court of common pleas in a case appealed from a justice of the peace shall be the third Saturday after the expiration of the time limited for filing the transcript; and the subsequent pleadings shall be filed within such times thereafter as is provided for the filing thereof in cases commenced in that court after the return day of the summons."

The time for perfecting the appeal upon a judgment rendered by the justice of the peace February 4, 1907, was March 6, 1907, and the third Saturday thereafter would be the 23d day of March. On the 25th day of March, which was the Monday next after the time for filing the petition the court entered the following order:

"The defendant comes and the plaintiff is in default of a petition and has failed in any manner to further prosecute this suit, it is therefore considered that said defendant go hence without day and recover of said plaintiff his costs herein. Judgment is rendered against the plaintiff for his costs herein."

On the 19th of April, 1907, plaintiff filed a motion to vacate said judgment of dismissal. This was heard on the 14th day of May, 1907, and refused, and it is this order of refusal to which error is here prosecuted.

The contention on the part of plaintiff in error is that the court should not have dismissed the original action without notice to the adverse party. It is said that there is some rule of the court of common pleas which requires notice to the adverse party before such cases be dismissed for want of prosecution. As we can not take judicial notice of such rules we can not say

whether or not any rule of the court was violated. Certainly no statute was violated in entering the judgment which was entered.

Section 6592, Revised Statutes, provides for the case where the defendant having appealed, if plaintiff fails to file a petition within the time fixed by law, the defendant may file his answer, setting up any claim or demand which he may have against the plaintiff, and prosecute the same to final judgment.

Surely it would be most unsound reasoning to hold that there is any suggestion in this statute that, where the defendant has no claim against the plaintiff, he may not as well take advantage of the default of the plaintiff as he could where he had an affirmative claim against the plaintiff. The course pursued by the court in entering judgment of dismissal was in violation of no statutory or other right of the plaintiff. He had his right to file a petition; he neglected to take advantage of it.

It is not claimed that if the court was warranted in entering the judgment of dismissal, the motion to set it aside could be insisted upon as matter of right, but that it would be addressed to the discretion of the court. A bill of exceptions is here, from which nothing appears showing any abuse of discretion, and the judgment of the court below is affirmed.

SUFFICIENCY OF AFFIDAVIT TO SET ASIDE A DEFAULT JUDGMENT.

Circuit Court of Cuyahoga County.

A. B. KATZ v. J. FRIEDMAN.

Decided, October 21, 1907.

Justice Court Practice—Affidavit to Support Motion to Set Aside Default Judgment, When Sufficient.

An affidavit, filed with a justice of the peace in support of a motion to set aside a judgment rendered in the absence of the defendant, which states that the defendant could not be present at the time set for trial and had instructed his attorney to be present and attend to the matter and that the attorney was actually engaged in the trial of a case in another court at that hour and could not be present, is sufficient to support an order setting aside said judgment.

Feniger & Kastriner, for plaintiff in error.
C. W. Noble, contra.

MARVIN, J.; WINCH, J., concurs; HENRY, J., not sitting.

Katz brought a suit against Friedman before a justice of the peace—summons made returnable at 2 P. M., October 11, 1905. On that day the defendant failed to appear, and the justice proceeding to act under authority of Section 6577, Revised Statutes, took the testimony of one witness on behalf of the plaintiff and rendered judgment in his favor.

On the 13th of October, 1905, the defendant filed a petition to set aside the judgment thus rendered in his absence and in support of said motion filed the affidavit of defendant's attorney. The hearing of this motion was continued once or twice, and finally the plaintiff filed a motion with the justice to overrule the said motion of the defendant. This was of course unnecessary. The defendant's motion was on file and the court had it to rule upon, and if error was committed in this case it would have been committed in the same way without the filing

of this last motion of the plaintiff. The result of the hearing of the two motions was that the judgment taken by the plaintiff against the defendant on the 11th of October, 1905, was set aside and the case set down by the justice for hearing at a later day. The case is still pending before the justice.

The plaintiff prosecuted error to the court of common pleas from the order of the justice setting aside the judgment of October 11. The court affirmed the action of the justice, and the plaintiff has now prosecuted error here to this judgment of affirmance.

The authority for the setting aside of a judgment by a justice of the peace taken before him in the absence of the defendant against whom the judgment is rendered, is found in Section 6578, Revised Statutes. By this section all the steps to be taken and things to be done in order to have such judgment set aside, are specifically pointed out, and it is conceded that all these things were done, except the provision that the motion shall show under oath of the defendant, his agent or attorney, a good and sufficient reason for the absence of the defendant at the time of the trial.

The only affidavit filed in support of the motion in this case reads as follows:

"THE STATE OF OHIO, CUYAHOGA COUNTY, SS.

"Conway W. Noble being duly sworn says that he is the attorney of J. Friedman, the defendant in the above case, and was such attorney at the return day in said case and on the day and at the time the same was set for trial, and was instructed by said J. Friedman to attend to the cause for him, as he could not be present; that at the hour set for trial, to-wit, 2 o'clock P. M., October 11, 1905, he was actually engaged in the trial of a criminal case in the police court of the city Cleveland, and could not be present before said justice.

"CONWAY W. NOBLE.

"Sworn to and subscribed before me October 12th, 1905.

"VERNON L. SANFORD,

"(Seal.) *Notary Public.*"

A fair construction of this affidavit is that the defendant was absent because he had entrusted the matter to his attorney, with

information that he could not be present. He relied upon his attorney, who gives the reason for his absence, and, if we have fairly construed the affidavit, gives a reason for the defendant's absence.

The justice held the reason for the absence good and sufficient. We are not prepared to say that he erred in reaching this conclusion; the result is that the judgment of affirmance by the court of common pleas is affirmed.

At the hearing of this case it was suggested from the bench that there might be doubt as to the right to prosecute error in a case like this, and this judgment does not commit us on this question. Had we found that the justice erred in setting aside the judgment, we should have felt bound to determine this question, but, as the plaintiff loses his case whichever way we might decide that question, we do not care to consider it.

DETERMINATION AS TO APPEALABILITY.

Circuit Court of Cuyahoga County.

C. F. DREHER v. THE W. M. PATTISON SUPPLY CO. ET AL.

Decided, October 21, 1907.

Appeals—Action to Cancel Stock Appealable.

An action by a stockholder in a corporation against the corporation, its officers and other stockholders, wherein one relief asked is the cancellation of stock alleged to have been wrongfully issued, is not an action for money only and is appealable.

Frank Higley, for plaintiff in error.
Smith, Taft & Arter, contra.

MARVIN, J.; WINCH, J., concurs; HENRY, J., not sitting.

This case is here on appeal from the judgment of the court of common pleas, and a motion is made by the defendants to dismiss the appeal on the ground that the case is not appealable.

The statute fixing what cases may be appealed from the court of common pleas to the circuit court is Section 5226, and reads, so far as it need here be considered, as follows:

"* * * an appeal may be taken to the circuit court by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court and of which it had original jurisdiction, if the right to demand a jury therein did not exist."

The section which provides what cases may be tried to a jury is No. 5130, and reads in part, 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."

Section 5131 reads:

"All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by jury, or referred."

It is clear from these sections that unless there is an issue of fact in the case now under consideration wherein a recovery for money only, or specific real or personal property is sought, neither party was entitled of right to a trial by jury. There was in this case no claim for the recovery of specific real or personal property, so that the question to be considered is whether any part of the case was for the recovery of money only. The case was tried upon a second amended petition and answer to such petition and a reply. The petition upon which the case was tried was very lengthy, and sets out many facts, which, taken by themselves, would require the exercise of equity powers on the part of the court, and which would raise such issues as are not of right triable to a jury. It is urged, however, on the part of the defendants, in support of their motion to dismiss the appeal, that there are issues of fact involving the right to recover a judgment for the payment of money only, and that by reason of that fact the case is not appealable.

The plaintiff in his second amended petition alleges that he is a stockholder of the defendant corporation and complains that the defendant, W. M. Pattison, and the other defendants who

are natural persons, are the officers of the defendant corporation; that these natural persons, having the control of a large majority of the stock of the corporation, have so managed the affairs of the corporation as to pay to themselves salaries much in excess of such salaries as should have been paid; that they have so used the property of the corporation as to prevent the payment of dividends to the stockholders; that they have borrowed money from the corporation and used it for the purchase of other property, for which they have not accounted, and various other matters are set up in this petition, one of which is:

"That on January 2d, 1898, certificate number four for seventy-five shares of stock in the W. M. Pattison Supply Company was issued to defendant, Pattison; that on the same day certificate number 11 for twenty-five shares of said stock was also issued to said Pattison; that is all the stock that was ever issued to said defendant, Pattison. That said Pattison on January 4th, 1898, paid $5,000 in money to the company, and on December 31st, 1898, gave his note to said company, for $4,785.76 and charged his personal account with $214.24. That on said date, to-wit, December 31st, 1898, said Pattison charged his personal account with $5,000. That said note for $4,785.76 has never been paid, and no interest has ever been paid or charged thereon since 1900, the year the dividend was passed as hereinafter set forth. That said defendant, Pattison, was paid a dividend of six per cent. on stock standing in his name for the years 1898 and 1899, and interest was charged against his note of $4,785.76 at the rate of six per cent. for the year of 1898 and at the rate of five per cent. for the years 1899 and 1900."

Similar allegations are made as to the other natural persons who are defendants in the action, and then follows this allegation:

"Plaintiff says that the stock issued to these different defendants without payment therefor, as hereinbefore set forth, was thus issued for the purpose of giving them the control of said the W. M. Pattison Supply Company, and for the purpose of obtaining the dividends thereon and to cheat and defraud this plaintiff and deprive him of his interest in said treasury stock."

Later this allegation appears in the petition:

"That fifty shares of stock now standing in the name of the defendant, W. M. Pattison, has never been paid for, and was

and is treasury stock, and no authority was ever granted by the board of directors of said the W. M. Pattison Supply Company, to dispose of any of said treasury stock, but was issued by said defendants to themselves to obtain and control a majority of the stock of said defendant company and for other reasons hereinabove set forth."

It is urged on behalf of the motion to dismiss the appeal that these allegations about treasury stock relate only to stock issued to the defendants Smith and Jones, but it will be noticed that the allegations are made directly as to all the defendants, including W. M. Pattison.

It is urged that with these allegations in the petition all that could be recovered under this claim would be recovery against Pattison for the amount due upon his said promissory note. If that be true, then there would be here in this branch of the case, a straight suit for the recovery of money only; but if the allegations of the petition are true, that is not what the plaintiff, suing for himself and other stockholders, is entitled to, but to give him the relief which his allegations would seem to entitle him to and for which he prays, would require the cancellation of 50 shares of the stock which now stand in the name of Pattison, and hence, this part of the case is not a suit for the recovery of money only, and therefore, it is not a suit in which either party would have a right to a trial by jury, but a suit in which an appeal may be taken from the judgment of the court of common pleas to the circuit court.

The allegations in reference to the other natural persons, defendants, are similar to those in reference to the defendant Pattison, and unless the defendant Pattison, under the allegations to which attention has been called, was entitled to have his case tried to a jury, then none of the defendants were entitled to have theirs tried to a jury.

Holding as we do, the relief to which plaintiff would be entitled, would be the cancelling of this stock.

Without taking up in detail the other allegations of the petition, it being conceded that the allegations are such as that the issues would not be of right triable to a jury, the result is that the motion to dismiss the appeal is overruled.

EVIDENCE IN AN APPROPRIATION CASE.

Circuit Court of Medina County.

THE WADSWORTH & WESTERN TRACTION CO. v. JOHN HUTCHINSON, SR., ET AL.

Decided, September 28, 1907.

Practice—Appropriation Cases—Where View of Premises is Treated as Evidence Reviewing Court Can Not Pass Upon Weight of Evidence.

Where all parties acquiesce in a court's instructions that the view of the premises is evidence in an appropriation case, it is impossible to include all the evidence in a bill of exceptions and a reviewing court can not therefore pass upon the weight of the evidence.

Rogers, Rowley & Rockwell, for plaintiff in error.
Andrew & Woods, contra.

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

The action below was an appropriation proceeding in probate court, which resulted in an award and judgment of $600 for one-half acre taken and $1,250 damages to the residue of a mining leasehold estate. This award is complained of as excessive, but the point is made that we can not weigh the evidence on this or any other issue herein, because the bill of exceptions fails to exhibit all the evidence which was submitted to the jury's consideration.

A view was had under the statute; and, following a former decision of this court, all parties acquiesced in the court's instruction to the jury to consider such view as evidence in making their award. The Supreme Court has since overturned this doctrine, in *Zanesville, M. & P. R. R. Co.* v. *Bolen et al,* 76 O. S., 376, declaring in the opinion that—

"Counsel is surely right in assuming that if the impressions obtained by the jury from the view are themselves evidence in the case, there is no way by which that evidence can be carried into a bill of exceptions, and hence it inevitably follows, as he insists, that there is not power in a reviewing court to pass upon the weight of the evidence."

Here, where the view was expressly made evidence, not indeed by force of the statute, but by what is equivalent to an express stipulation of the parties, it is manifest that the evidence before us in the bill of exceptions is incomplete and hence incapable of review.

The witnesses of the plaintiff railroad company should have been permitted to answer the questions put to them on direct examination, at pages 158 and 159, asking what was the fair value of the acre of land taken, and for error in sustaining objections to said questions (and for no other error, for we find no other in the record), the judgment of the courts below are reversed, and the cause remanded to the court of common pleas for a new trial.

DIVISION OF PROPERTY UNDER A WILL.

Circuit Court of Cuyahoga County.

THE BAILEY COMPANY v. MORRIS A. BRADLEY ET AL.

Decided, June 11, 1907.

Testamentary Powers—Executors Can Not Contract to Sell Land Except in Manner Provided in Will.

Where a will directs the executors to have an appraisal made of all the property belonging to the estate at a certain date and gives to any devisee the right to take any one parcel of property, not exceeding his share in the estate, at its appraised value, the executors can not at a date subsequent to that fixed in the will contract to sell a certain parcel to a third person, without first having the appraisal made and offering the property to the devisees.

Wm. R. Hopkins and *White, Johnson, McCaslin & Cannon*, for plaintiff.

E. J. Blandin, T. H. Hogsett and *H. D. Goulder*, contra.

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

In this case a petition and an amendment and supplement to such petition were filed. To these petitions a demurrer is filed

by several of the defendants and the question, therefore, here presented is whether under said petition with the amendment and supplemental petition the plaintiff is entitled to any relief which a court of equity can give.

The facts set out in these petitions are substantially as follows: The plaintiff is a corporation. One Alva Bradley, formerly a resident of this county, died on the 28th day of November, 1885, leaving a large amount of both personal and real estate. He left a will which was duly admitted to probate, by the terms of which all the property of the said Bradley was bequeathed to the executors named therein, and their successors.

The defendants, Morris A. Bradley, George H. Warrington, Norman S. Keller and Lester A. Cobb, are now the executors and trustees under said will; the other defendants in the action are beneficiaries under said will, and three of said beneficiaries are minors.

Item No. 20 of said will reads as follows:

"It is my will, and my executors are directed at the end of twenty (20) years from and after my decease, or as soon thereafter as may be possible, to make a final distribution of my estate, of every kind and description, by causing an appraisal of each and every parcel of real and personal property to be made by three disinterested freeholders to be selected by my executors, and to cause the same to be sold at public or private sale in such reasonable time after said twenty years have expired, and on such terms as they shall deem best for my heirs, and so far as necessary and practicable to reduce all choses in action to cash, and to make a final distribution as follows:

"To pay each of my children who shall then be alive at such final distribution, one-tenth (1-10) of the total net proceeds of such estate; and that the residue of my said estate be divided beween the children then living of my children Elizabeth M. Keller, Eleanor F. Grover, Minetta Morehouse and Morris A. Bradley, said grandchildren sharing equally in said division.

"And I direct that my said executors shall, before offering any part of my estate for sale to others, give to my own children then living, and to my grandchildren then living, the privilege of purchasing any part of said real estate at the appraisal, to an amount not exceeding the share that they may be entitled to respectively receive, and to have the same charged to such devisee as part of his or her share; but, if the same piece of property is desired by two or more of them, then the same shall be sold and

disposed of at public auction, and all public sales shall be upon public notice in a newspaper published in the city of Cleveland, for not less than thirty (30) days, and for not less than two-thirds (2-3) of its value as so appraised. And I authorize my executors, as such trustees, to make to the purchasers and to my children and grandchildren respectively, all proper conveyances in fee simple of the real estate so sold and taken by them as fully as may be deemed necessary to carry out this will and without order or intervention of any court."

One of the parcels of real estate left by the testator is described in the petition, and it is averred that this described parcel is much less in value than the share of any one of the several beneficiaries, and on the 4th day of December, 1905, the trustees and executors under the will (there having been a change of one of the trustees since the date last named, which, however, in no wise affects the question here under consideration), entered into a contract of sale of said described parcel of real estate with one V. C. Taylor for the sum of $230,000, of which $5,000 was paid in hand; and that thereafter said Taylor assigned his interest in the contract to this plaintiff; the terms of the contract of sale are not set out in the petition, and it is averred that the plaintiff is now ready and willing to perform on its part all the stipulations of said contract to be performed by the vendee, and has demanded of the executors and trustees that they carry out such contract of sale, which they refuse to do.

By a fair construction of the petition it appears that there had been no appraisement of this parcel at the time said contract of sale was entered into, but said parcel has since been appraised at the sum of $225,000. It is further averred in the petition that this contract of sale was made under and in pursuance of authority and approval of all of said defendants, except said minors. We think a fair construction of this allegation is that the parties whose authority and approval is spoken of, simply consented and agreed that so far as they were individually interested in said property, such sale might be made by the executors.

Prior to entering into the contract of sale set out in the peti-

tion no opportunity had been given to any one of the beneficiaries to make an election, as is provided in the twentieth item of the will, whether to take said parcel at its appraised value or not. Indeed, no such election could have been made until after an appraisement.

It appears, however, from the supplemental petition, that Alva B. Keller, one of the beneficiaries, has elected to take the real estate described in the petition, to apply on his share of the estate, at its appraised value, and that Alva Bradley and Charles L. Bradley have together elected to take the same parcel at its appraised value, under the provisions of the item already quoted from the will. This election necessitates the sale of this parcel at public auction, and it is manifest that the executors and trustees as such, can not carry out the provisions of the contract of sale. Their authority is fixed by this will, and under it they could make no sale as trustees without first having an appraisement, and next an opportunity on the part of the beneficiaries to elect, and when two or more beneficiaries have elected to take the same parcel their only course, so far as they derive their authority from the will, is to sell each parcel at public auction. It is said, however, that in the making of this sale they acted as the agents of those who assented to and authorized the sale. We have already said in this opinion how far we think that consent and authority made these trustees the agents of the parties authorizing and consenting. We hold that the allegation does not show that the parties thus assenting undertook to have a sale made which should be binding upon them, beyond a consent to have their several interests thus sold. It did not put upon them the obligation of securing a title such as would enable them to convey a complete title to the vendee. It may be conceded that if they had bound themselves, through their agents, or otherwise, to convey to the vendee a complete title, the obligation might have been put upon them to obtain at the public sale which must be made of this property, such complete title, and so enable them to carry out the contract, but construing the allegation as we do, no such obligation was put upon them. It is certain that the executors and trustees can not purchase this property at their own sale when it shall be

made, as it must be, because of the election which has been made. They, therefore, can not obtain a good title which they can convey to the plaintiff.

If it should be claimed that since seven-tenths of this entire property is represented by the defendants who authorized the sale, they can be required to convey an undivided seven-tenths interest in this property to the vendee for a like fractional part of the agreed purchase price, the answer to this is that thereby great injustice might be done and probably would be done to the minors. They are entitled, under the will, to have this parcel sold as a whole and can not be compelled to have it sold in undivided fractional parts. It may well be said, if this plaintiff should have a complete title to seven-tenths of this property, that the remaining three-tenths would sell at public auction for much less than three-tenths of what could be obtained at public sale of the entire property.

The result of this reasoning is that the several demurrers are sustained.

APPLICATION OF THE RULE OF LAST CHANCE.

Circuit Court of Cuyahoga County.

FRANCISCI GALATI v. THE ERIE RAILROAD.

Decided, June 11, 1907.

Negligence—Facts Establishing "Last Chance" Must be Pleaded—Plaintiff Must Remove Suggestion of Contributory Negligence—Noise Caused by Passing Train May Require More Care in Maintaining Lookout for Trains on Another Track.

1. Plaintiff can not recover for negligence which warrants the application of the rule of "last chance" without alleging it in his petition.
2. In an action for wrongful death, if the evidence of the plaintiff suggests contributory negligence on the part of the deceased, then it becomes the duty of the plaintiff, before he can recover, to remove that suggestion of contributory negligence.
3. Where one is engaged in labor upon a railroad track, the fact that a long noisy freight train is passing upon an adjoining track would make it necessary for him to be more careful in keeping a lookout for trains approaching on the track upon which he is working.

J. M. Shallenberger and *Harry F. Payer*, for plaintiff in error.

Cushing & Siddall, contra.

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

Salvatore Galati was a laborer working on the line of the Erie Railroad near Hiram, Portage county, in this state. On the 25th of May, 1905, he was working with a gang of laborers near the place specified, when he was directed by his foreman to leave the gang with which he was working and go to work on a ditch a few hundred feet away from the rest of the gang. This ditch came up very near to the railroad track and was some four feet in width and about a foot deep. Shortly before five o'clock, which was quitting time for the gang, a passenger train going east on the line of the road struck and killed Galati, and it is to recover for this death that the action below was brought. The result in the court below was a verdict and judgment for the defendant; to reverse the judgment the present proceedings are prosecuted.

There was a double track along this part of the railroad, trains going east taking the south track and those going west, the north track. At the time of the accident which killed Galati, a long freight train was moving noisily along the north track to the west. The allegations of negligence in the petition are that the defendant was negligent in failing to warn Galati of the approach of the passenger train, and was negligent in the operation of this freight train, and in failing to warn or caution him of the danger of working between and near said tracks; that the defendant was grossly careless in omitting to maintain a lookout to warn Galati and other workmen working upon said tracks of the approach of the passenger train, and in neglecting to furnish Galati with a safe place in which to work and in failing to apprise the said decedent of all the dangers of the then existing situation; that it was negligent in operating its passenger train at a high and dangerous speed and in failing to give a sound or warning or give a signal of its approach.

The place where Galati was working was in a cut, and the banks on either side were so high that one looking to the west

from his place of work could see a train at a distance of not more than 350 feet, there being a curve at this point in the road. It is claimed that these allegations of negligence are such as to authorize the plaintiff to show that the engineer saw Galati and that after he saw him he could have prevented the train from striking him, and that if this were shown, then, even though Galati was wanting in proper care on his part, still a recovery might have been had.

An effort was made on the part of the plaintiff to introduce evidence on this subject, and though, perhaps, no inquiry was made of any witness which exactly raised the question, still the court held substantially, as appears at page 85 and following of the record, that this line of inquiry could not be gone into. In this, the court committed no error. In the case of *Drown* v. *Northern Ohio Traction Co.*, 76 O. S., 234, it is held:

"Since the plaintiff can recover only upon the allegations of his petition, he can not recover upon negligence which warrants the application of the rule of 'last chance' without alleging it in his petition."

So that one can not recover on the last chance doctrine, that is where the plaintiff has negligently put himself in peril and that peril becomes known to the defendant in time to save him, and it fails to do so, unless the fact be distinctly pleaded that the defendant, after knowing of the plaintiff's peril, neglected an opportunity to save him.

Complaint is made of the charge of the court in which this language is used:

"The fact that a freight train was passing on a west bound track and making a loud noise at the time Galati was killed, would not excuse him from looking and listening for approaching trains, but on the contrary, since the noise of the freight train would to a certain extent prevent his hearing the noises of the bell or the whistle of the passenger train, it became Galati's duty to be all the more careful in looking for trains, which might approach on the track near or upon which he was killed."

It is said that this ought not to have been given, because the very nature of the work in which Galati was engaged would prevent him from keeping a look-out for approaching trains, and

to a degree, this is true. He could not keep a constant look-out for approaching trains and successfully perform his work in the ditch, and only such look-out as he might be able, without failing to perform his work properly, could be required of him. But this did not relieve him from caring for his own safety; he was near to the railroad track; he knew that the purpose of the railroad track was to afford a place for trains to travel upon, and that a train was liable to pass at that point, and if he knew nothing of the times of trains, he knew that such train was liable to pass at any moment, and the ditch being four feet wide, it would seem that he might have worked in the ditch and been at a safe distance from the track to have avoided the injury, and since knew that a train was passing which made so much more noise than a passenger train would be likely to make, it was certainly not requiring too much of him that he should have taken greater precautions at such time than when no such extraordinary noise was about him.

Complaint is further made that the court erred in the use of the following language to the jury, when treating on the subject of contributory negligence:

"If the evidence of the plaintiff suggests contributory negligence on the part of the deceased in this case, then it would be the duty of the plaintiff, before he could recover, to remove that suggestion of contributory negligence."

It is said that no burden is properly placed upon the plaintiff to overcome any suggestion of contributory negligence, unless such suggestion goes to the extent of raising the presumption of negligence on the part of the party injured, and the language used in most of the cases is that where a presumption of negligence is raised by the evidence offered on behalf of the injured party the burden is put upon him to overcome it. But we find in the case of *Robison & Weaver* v. *John Gary*, 28 Ohio St., 241, this language used in the syllabus:

"3. It is only when the injury is shown by the plaintiff and there is nothing that implies that his own negligence contributed to it, that the burden of proving contributory negligence can properly be said to be cast on the defendant; for when the defendant's own case raises the suspicion that his own negligence

contributed to the injury, the presumption of due care on his part is so far removed that he can not properly be relieved from disproving his own contributory negligence by casting the burden of proving it on the defendant, the same as if the presumption in favor of the plaintiff was unquestioned in his case."

This fully justifies the language in the charge complained of, providing there were facts in the case which justified the application of the principle. We think there were facts which justified it. The decedent in broad daylight was struck by a passenger train. This, of itself, without some explanation suggests to the ordinary mind that there must have been negligence, until some explanation of how he came to be thus struck is made. It is not here intimated that explanation was not made that tended to overcome the suggestion, but we think there was enough to raise the suggestion by the evidence, and therefore the charge was not erroneous in that regard.

It is urged that the evidence in the case is such that the verdict is clearly against its weight. We are not prepared to say this is so. On the evidence the case was perhaps very close, but the jury under proper instructions, found for the defendant and we are not prepared to say that such finding was clearly against the weight of the evidence.

The result is that the judgment of the court of common pleas is affirmed.

PROCEDURE ON A COUNTER-CLAIM.

Circuit Court of Cuyahoga County.

ALFRED G. THOMPSON v. EDWIN TREAT.

Decided, May 27, 1907.

Actions—Counter-Claims—Defendant May Maintain Independent Action on Subject for Counter-Claim.

Where a defendant has a counter-claim against the plaintiff, he is not obliged to set it up in that action as a defense, but may institute an independent action upon it.

Farquharson & Huggett and *Foster & Foster,* for plaintiff in error.

J. A. Fogle and *J. C. Heald,* contra.

MARVIN, J.; HENRY, J., concurs.

Suit was brought in the court of common pleas by Thompson against Treat, setting out that the plaintiff had employed the defendant as his agent to negotiate the sale of a farm owned by the plaintiff in Summit county; that the defendant acting as such agent represented to the plaintiff that he could exchange said farm for a certain residence property in the city of Cleveland, and could obtain for the farm, which the plaintiff says he had authorized the defendant to sell for the sum of $10,000, in addition to such residence property, the sum of $5,000 in money. The plaintiff says that he authorized the defendant to make such exchange, providing some good judge of the value of the residence property, residing in the vicinity, would pronounce it worth $5,000; that the defendant reported to the plaintiff that a man residing in the vicinity of the residence propery, and well qualified to know its value, pronounced it to be worth $5,000, by reason of which the plaintiff was induced to convey his farm to the owner of the residence property and accept in payment said residence property and said sum of $5,000. Plaintiff says, as a matter of fact, the representation made by the defendant that a person residing in the vicinity of the property and competent to judge of its value had pronounced it to be worth $5,000, was not true, nor had any such person been called upon to fix any value upon this residence property, and that as a matter of fact the residence property was worth not more than $3,500, and so he says that he was damaged in the sum of $1,500 by the wrongful conduct of the defendant and he prays to recover judgment for that amount.

To this petition the defendant answered, admitting that he had acted as agent for the plaintiff in the sale of his farm and that through his agency the exchange of properties, that is, the farm and residence property and the money consideration of $5,000 was made; he denies all other allegations in the petition.

For the second defense he says that he (the defendant in

this action) brought a suit against the plaintiff for money, and that one of the items claimed in that suit by him was commissions for the sale of this farm; that he recovered a judgment against the plaintiff in that action, and so he says plaintiff is barred from prosecuting this action, because the validity of the claim made by the plaintiff here was involved in the action brought by this defendant against the plaintiff.

To this answer the plaintiff replied, denying that the matter involved in this action was litigated in the former action.

On this state of the pleadings the court of common pleas, on motion of the defendant, entered judgment in his favor on the pleadings, and to reverse that judgment this proceeding in error is brought.

On the part of the plaintiff in error it is urged that whether the matters involved in this action were in fact litigated in the former action, they could have been there litigated, and that being so the defendant in that action, if he had any claim against the defendant in this action growing out of this transaction, was bound to have pleaded it.

On the part of the defendant in error it is admitted that this would be true, but for the fact that the claim set out in the present action constitutes a counter-claim against the plaintiff in the former action, and that the rule which requires a defendant to set up all the defenses which he has to a claim made in an action against him does not apply where such defense consists of a counter-claim. That the claim set out in this action would have been a counter-claim to that set up in the former action seems clear, from the definition of a counter-claim, as given in Section 5069 of the Revised Statutes, which reads:

"A counter-claim is a cause of action, existing in favor of a defendant, and against a plaintiff, or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

Surely the claim set up in this action grows out of the same transaction and is connected with this same subject-matter as

that involved in the original action, and it remains, therefore, only to consider whether, where a defendant has a counter-claim against the plaintiff, he is bound to set it up as a defense, when suit is brought against him by the party against whom he has such counter-claim.

This seems to be settled in this state in *Witte* v. *Lockwood,* 39 Ohio St., 141, the first clause of the syllabus reading:

"The general rule is that a defendant is bound to set up every defense, legal or equitable or both, which he may have to the action, and waives those not pleaded, but where the facts claimed to afford a defense are sufficient to constitute a counter-claim, there is an exception to such general rule."

This proposition is sustained by the case of *Bridge Company* v. *Sargent,* 27 Ohio St., 233, and by *Swanson* v. *Cresop,* 28 Ohio St., 68.

That this was the intention of the statute seems plain from the provisions of Section 5089, Revised Statutes, which reads:

"The court, at any time before the final submission of the cause, may, on motion of the defendant, allow a counter-claim or set-off to be withdrawn and the same may become the subject-matter of another action; and on motion of either party, to be made at the time such counter-claim or set-off is withdrawn, an action on the same shall be docketed and proceeded in without process, and the court shall direct the time and manner of pleading therein; and if an action be not so docketed, suit may be brought as in other cases."

We reach the conclusion, therefore, that the court of common pleas erred in rendering judgment for the defendant upon the pleadings, and for this error the judgment is reversed and the cause remanded.

RELATION TO PROMISSORY NOTE OF ENDORSER ON BACK.

Circuit Court of Cuyahoga County.

PETER F. MCGUIRE v. THE KENNEDY COMPANY.

Decided, May 27, 1907.

Negotiable Instruments Act—Liability of Irregular Indorser.

Under Sections 3173*h*, 3173*i* and 3173*k*, Revised Statutes, of the uniform negotiable instruments law, the liability of an irregular indorser is the same as that of a regular indorser, and he can not be held without demand having been made upon the maker and notice of dishonor given.

J. F. Herrick and *Frank Higley*, for plaintiff in error.
Smith, Taft & Arter, contra.

MARVIN, J.; HENRY, J., concurs.

But one question is necessary to be considered in this case and that is, the relation to a promissory note of one who is not the payee, who endorses the note upon the back while it is in the hands of the maker, the note being thereafter delivered to the payee.

Without question, before the recent legislation upon the subject, such endorser would be liable as a maker of the note.

In 1902, however, the Legislature of this state enacted a statute in reference to negotiable paper, consisting of several sections, one of which, 3173*h*, reads:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Section 3173*i* reads:

"Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"1. If the instrument is payable to the order of a third party, he is liable to the payee and to all subsequent parties.

"2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Section 3173*k* provides:

"Every endorser who indorses without qualification * * * engages that on due presentment, it shall be accepted or paid or both as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

This legislation has been enacted in a considerable number of states, and the manifest purpose of it is that the rule governing commercial paper shall be uniform in the several states in which this legislation is enacted.

The Circuit Court of Clark County, in this state, in a case reported in the Ohio Law Bulletin, December 24, 1906, has held that this statute made no change in the law as to the relation sustained by the irregular endorser to commercial paper. The court of common pleas in the present case held in accordance with this holding of the Circuit Court of Clark County. In this we think there was error.

One of the states which has adopted the legislation such as ours, is Massachusetts, as will be found in Volume 1 of the Revised Statutes of Massachusetts, published in 1902, at page 637. Sections 80 and 81 of the Massachusetts Statutes are in the exact words of our Sections 3173*h* and 3173 *i*, and their Section 83 is in the exact words of our Section 3117*k*.

Under this Massachusetts legislation it is held in the case of *Thorpe* v. *White et al*, 74 Northeastern, 592:

"But after the negotiable instruments act became operative this distinction was abolished, and the effect of her signature was to make her an indorser as to all parties."

The word "she," as used in the opinion, refers to one who endorses a note, not being otherwise a party to it before delivery.

The state of New York has adopted the same legislation, and

in the case of *Moran* v. *Lange,* 25 App. Div., 11, the court say that the new legislation has changed the rule of such an endorser to the instrument.

It seems to us clear that the intention of the Legislature was to so change the relation of an irregular endorser as that he should be treated exactly as any other endorser, and that such being the case no recovery could be had against him except upon demand being first made of the maker and notice of dishonor served upon the endorser.

Entertaining these views the judgment of the court of common pleas is reversed, and the case remanded.

VALIDITY OF WARRANT ISSUED BY MAYOR.

Circuit Court of Cuyahoga County.

JOHN LENARCIE v. STATE OF OHIO; AND FRANK PARK v. STATE OF OHIO.

Decided, May 27, 1907.

Writs—Mayor's Seal Necessary to Validate Warrant for Arrest.

A warrant for arrest issued by the mayor of a municipality without affixing to it his official seal, as provided in Section 1536-773*a*, Revised Statutes, is invalid.

Glenn E. Griswold and *O. H. L. Castle,* for plaintiff in error.

W. B. Wheeler, contra.

MARVIN, J.; HENRY, J., concurs.

The conclusion reached in these cases depends upon a proposition applicable alike to each, hence the result is here announced in both. The judgment of the court of common pleas affirming the judgment of conviction rendered by the mayor of Nottingham must be reversed, as well as the judgment of the mayor. The result reached is in conflict with the views entertained by me at the hearing, but an examination of the authorities has convinced both me and my associate that the mayor in each of these

cases should have discharged the prisoner, upon the motion to discharge made before him, and this because his seal was not attached to the warrant issued for the arrest.

I am disposed to criticize counsel for plaintiff in error in not having taken pains to cite the statutes upon which he relies by their present numbers. He cites Sections 1745 and 1837; both of those sections are repealed, and it would not be asking too much of counsel, as we think, to require them to cite the sections of the statute as they now are. The sections as they now are, however, upon which the plaintiffs in error rely, are Section 1536-774, which requires that the council shall furnish to the mayor the corporate seal of the corporation, describing the seal, and Section 1536-773*a*, speaking of the duties of the mayor, which provides that "he shall subscribe his name and affix the official seal to all writs, processes, transcripts and other official papers."

Among the authorities which have been examined and which convince us of the necessity of the affixing of the seal, to make any writ, including a warrant for arrest, valid, which is issued by an officer having a seal, we call attention to *Boal, Lessee, etc.*, v. *King et al*, 6 Ohio Reports, 11. In this case it is said in the opinion by Lane, J.:

"No principle is more definitely settled than that the process of a court having a seal can only be evidenced by its seal, which is the appointed mode of showing its authenticity. Without it, a majority of the court hold such process void."

The first clause of the head-note reads:

"An execution issued without a seal from a court having and using a seal is void and of course all proceedings under it are void too."

In *Rankin* v. *Sanderson*, 35 Ohio State, 482, it is held that the statute which provides that a bill of exceptions must be signed and sealed is to be strictly construed, and that no bill can be considered except it is sealed, in case it is taken from a court having a seal.

There is an old English case found in Willes Reports, at page 411, *Padfield* v. *Cabell et al*, in which it is held that a warrant

of distress without a seal is valid, but only because no seal is required by the terms of the statute.

In *State* v. *Goyette,* 11 Rhode Island, 592, the question under consideration was whether a warrant issued by an officer having a seal and returnable to a court having another and different seal, should have upon it the seal of the officer issuing the writ or the seal of the court to which it was made returnable, and at page 593 this language is used:

"Under the statute, criminal complaints are to be made to a trial justice or his clerk, and the warrants are to be issued by such justice or clerk. A warrant, therefore, should be under the seal of the justice or clerk who issues it. It should not, as the defendant contends, be under the seal of the court to which it is returnable."

In *Tackett* v. *State,* 24 American Decisions, 582 (this is a case in the Supreme Court of Tennessee), the syllabus reads:

"Warrant of arrest in a criminal case not having the magistrate's seal is void."

In *Bell* v. *Farnsworth,* 30 Tenn., 608, this language is used in the opinion at page 611:

"But it appears on production of the warrant, although it had been obtained at the instance and on the oath of the plaintiff, that yet it was defective in legal formality deemed in law to be indispensable. Giving effect to this objection to the full extent of this proof, it goes no further than to vitiate the warrant, and any proceedings which occurred subsequent to the warrant and predicated upon it."

In *Bishop's New Criminal Procedure,* Volume 1, Section 227, this language is used:

"Opinions are divided as to whether the warrant of a justice of the peace must be under seal, where the statute is silent on the question. Chitty deems that though a seal is commonly looked upon as necessary, still in the absence of a statutory requirement, the warrant seems to suffice if in writing and signed by the magistrate. It has been adjudged valid without seal in South Carolina, New Hampshire and New York; but in some of the other states the seal is held to be essential."

By an examination of these cases it will be found that wherever it has been held that a seal is not necessary to the validity

of a warrant there was *no* statute requiring a seal to be affixed. In this state, as appears by the statutes to which attention has already been called, the mayor is provided with a seal, and is required to attest all writs issued by him by using his seal. The want of this seal was not waived by the prisoner in either of the cases under consideration, but in each case the motion was made to discharge because of the invalidity of the warrant for want of such seal, which motions were overruled.

The fact that the mayor later on affixed his seal does not cure this defect. The result is the reversal of these cases as already stated, and the order here is that both of the plaintiffs in error be discharged.

Notwithstanding this holding, which entirely disposes of the cases, we have examined the other proceedings complained of as erroneous and find that if the warrants had been valid, the other proceedings were without error.

DETERMINATION AS TO WHETHER TERRITORY IS "WET" OR "DRY."

Circuit Court of Cuyahoga County.

EDWARD MILLER v. STATE OF OHIO.

Decided, May 20, 1907.

Error—Court Will Not Refuse to Allow Petition in Error Because Not Filed Within Thirty Days When Court Has Not Been in Session During that Time—Intoxicating Liquors—Judge Who Issues Warrant for Alleged Violator of Beal Option Law, May Try the Case—Status of Territory as "Wet" or "Dry" Fixed by Earliest Legal Finding.

1. When a motion for leave to file a petition in error is presented to the clerk of the circuit court, within the time prescribed by law, the court will not refuse to allow the petition to be filed on the ground that leave was not obtained within thirty days, when the court was not in session during that time.

2. The judge who has issued a warrant for one accused of violating any local option law is not thereby disqualified to try the accused under the provisions of Section 4364-30, Revised Statutes.
3. Where a petition to declare a certain residence district "dry" territory has been properly filed, with a common pleas judge, a hearing had, and a finding made that the territory is "dry," the status of the territory will not be changed by a later finding by a mayor of the municipality that the territory is "wet," even though the petition upon which the mayor acted was filed at an earlier date than that upon which the judge acted.

George W. Shaw, for plaintiff in error.
A. W. Lamson and *F. D. Morrow,* contra.

MARVIN, J.; HENRY, J., concurs.

Miller was brought before the Hon. George L. Phillips, a judge of the court of common pleas of this county, and found guilty upon an affidavit charging him with violating the second section of an act passed by the Legislature on the 22d day of February, 1906 (98 Ohio Laws, 12), entitled "An act to provide for the enforcement of local option laws and to prohibit the sale of intoxicating liquors as a beverage." This section is now Section 4364-30*o*, Revised Statutes, and to reverse the judgment of conviction, a motion is now made for leave to file a petition in error in this court.

As to this petition the facts are, that at the time the motion was filed, which was within the time prescribed by law for the filing of such petition in error, this court was not in session, nor was it in session for several weeks thereafter, nor until the time within which petition in error could, under the terms of the statute, be filed.

On the same day that this motion was filed the plaintiff in error delivered to the clerk of this court a petition in error, and had the same filed as of that date.

On the part of the defendant in error, it is urged that this motion should not be granted for the reason that it is provided by statute that such petition must be filed within thirty days after the rendition of the judgment complained of. This court has already held, that where the court is not in session at the time when the petition in error should be filed, so that there is

no opportunity to file a petition in error, if such motion is filed within the proper time the motion will be heard after the thirty days, providing the court has not been in session before that time. We think the Legislature could not have intended a perfectly vain thing in providing for proceedings in error under this statute. The contention made by the defendant in error would make it possible for those wanting prohibition within a given territory, to file their petition (and it would be equally true that those desiring to prevent prohibition within a given territory could file their petition) at such time that it would be certain the circuit court would not be in session within the thirty days after the hearing of such petition, and so either side desiring to prevent a proceeding in error could, by filing the petition within a specifiel time, make it practically certain that no proceeding in error could ever be had. This would practically nullify the provision of the statute with reference to proceedings in error. This could not have been the intention of the Legislature, and we hold that where the motion is filed within the time and the petition is presented to the clerk for filing at the same time, the court will not refuse to allow the petition to be filed simply on the ground that leave was not obtained within the thirty days, when the court was not in session during that prescribed time.

We come, then, to consider the question whether any error is shown upon the record which would justify the granting of leave to file the petition in error.

On the part of the plaintiff in error a motion was made before the trial court to dismiss the accused upon the ground that the affidavit upon which the prosecution was based purports, by language used in the beginning of such affidavit, to have been made before Judge Phillips, whereas it is certified to have been sworn to before a deputy clerk of the common pleas court. This motion was overruled, and we think properly overruled. The affidavit might have been made before any officer authorized to administer oaths, as this deputy clerk was. It is said, however, that the prisoner should have been discharged on the ground that the warrant upon which he was arrested was issued by the judge of the court. A motion to that effect was made

and overruled. There was no error in this action of the court. The warrant was issued by an officer authorized under the act to try the case, and necessarily this officer must have had some means of getting the prisoner before him.

The section which provides for the trial is numbered 18 and reads:

"Any common pleas or probate judge with whom an affidavit is filed, charging the violation of any of the local option laws of the state, prohibiting the sale of intoxicating liquors as a beverage, when the offense is alleged to have been committed in the county in which such judge may sit, shall have final jurisdiction to try such case upon such affidavit without a jury, unless imprisonment is a part of the penalty, and in any case under this act, it should not be necessary that any information be filed by the prosecuting attorney or that any indictment shall be found by the grand jury."

It is said that there was error in the trial in that the location of the place of business of Miller, which it is admitted was a saloon where intoxicating liquors were sold, was not within the territory in which such sales were prohibited. If this place of business is within territory in which the sale of intoxicating liquors, or the keeping of a place for the sale of intoxicating liquors was prohibited by law, confessedly Miller was guilty.

The facts are: That a petition was filed, under the statute authorizing the filing of same, with Judge Ford, a judge of the court of common pleas. That petition before Judge Ford was heard, and upon the hearing it was found that all the proceedings were regular and proper and that the sale of intoxicating liquors was prohibited by law in the territory described in said petition.

Another petition, however, was filed with the mayor of the city of Cleveland, praying that in the territory described in said petition the sale of intoxicating liquors should not be prohibited. That the sale of intoxicating liquors should not be prohibited within that territory was found by the mayor and these proceedings were regular.

The petition filed with the mayor was filed before the petition filed with Judge Ford, above referred to, but the petition filed

with the mayor was not heard until after Judge Ford had decided that in the territory included in the petition filed before him, the selling of intoxicating liquors was prohibited, so that when the hearing was held before the mayor it had already been found and decided by Judge Ford, under the statute authorizing such proceedings, that the territory described in the petition was what is ordinarily denominated as "dry" territory.

We know of no provisions of law nor of any reason why the fact that a petition was on file with the mayor to have this territory declared "wet," should in anywise interfere with Judge Ford's jurisdiction to find that it should be "dry," and he having so found, no subsequent action of the mayor, upon the petition filed with him, could take away the prohibition resulting from the hearing before Judge Ford, and the motion for leave to file petition in error is overruled.

VALIDITY OF TITLE ACQUIRED BY SHERIFF'S WIFE SUBSEQUENT TO SALE BY SHERIFF.

Circuit Court of Cuyahoga County.

MINNIE MARCELLUS BRUCE v. KATE T. RYAN ET AL.

Decided, March 18, 1907.

Fraud—Purchase by Wife of Sheriff of Property Formerly Sold at Sheriff's Sale Not Per Se Fraudulent.

The mere fact that the wife of a sheriff, has at some subsequent time purchased property sold at a sheriff's sale does not establish the existence of fraud in the sale.

Carr, Stearns & Chamberlain and *A. H. Martin*, for plaintiff in error.

Smith, Taft & Arter, contra.

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

This is an appeal by the defendants to this court from the court of common pleas. The facts are that in 1893, William R.

Ryan was the sheriff of this county, and Kate T. Ryan was his wife. An action was pending in the court of common pleas brought by the Citizens Savings & Loan Association against one Marcellus, to foreclose a mortgage, and there were several lienholders who answered in the case, which proceeded in said court of common pleas so that an order of sale of the premises described in the mortgage was made on the 18th day of May, 1893; the property was appraised at $5,000, and after due advertisement the property was sold by the sheriff on the 23d day of June, 1903, to S. L. Halle for $3,334, being two-thirds of the appraised value. On the 24th of June of the same year the order of sale was returned, and on the 27th day of June the sale was confirmed, and a deed was made on that day to Halle. On the 1st of July, 1893, Halle paid the money to the sheriff, and the deed was on the same day delivered to him. The books of the sheriff, particularly one called "Order and Sale Book," show that the money was paid by Halle to the sheriff on the 30th day of June; the sheriff entered on his book the receipt of the entire purchase money, and by his book called "Cash Execution Docket" it is shown that on the 31st day of July he paid the avails of the sale, less the taxes and his costs, to the clerk of the court, and it was receipted for by Charles A. Kuzell, deputy clerk, as shown on page 31 of that book. On the 20th day of October, 1893, Halle deeded this property to Kate T. Ryan, the wife of the sheriff, and Mrs. Ryan filed her deed for record in February, 1894.

Suit is brought here to have the sale set aside and the property declared to remain in the ownership of those to whom it belonged before the sale was made, subject to the liens thereon, of course. The evidence shows such facts as have so far been detailed, and the evidence further shows, if Mrs. Ryan is to be believed and Mr. Ryan is to be believed, that at the time of the sale of the property to Halle there was no understanding or arrangement at all that Mrs. Ryan or Mr. Ryan was to be the purchaser of the property or that it was ever to become their property. But it is said that the sale having been made by Halle to Mrs. Ryan, the consideration in the deed was $5,000, whereas, as a matter of fact nothing more was paid by Mrs. Ryan than

$3,500. It is said that this fact is a suspicious circumstance and that we ought to hold that the sheriff was the trustee of the property, and continued to be the trustee; that it was a sale made indirectly to himself, because the evidence shows that the money was really furnished by Ryan. It is true, however, that there was an arrangement between Ryan and his wife, at the time he was the sheriff, that she was to act as matron of the jail during his time as sheriff, and was to receive $1,000 per year for her services. It appears that she was not on any pay roll and that no book account of her services was kept. She received money from her husband during this time for clothing and her other necessary expenses. But we regard this as of slight consequence, as the sale was practically a sale to Ryan. We are not satisfied that there was any arrangement between Halle and the sheriff, that the sheriff should receive the property from Halle. We think that the circumstances and the evidence are such as to justify the conclusion that the purchase by Ryan from Halle was made in good faith; that the sale to Halle was made in good faith; that it was a *bona fide* sale, that Halle bought the property and thereafter not wanting it, for Mrs. Ryan says that he stated to her where there was another party who wanted to buy it from him, sold the property to the Ryans. He had paid for it and got his deed for it, and then kept it for some little time. Mrs. Ryan says that she and her husband wanted a home. They had several children.

When Mr. Ryan got this office of sheriff one of the things he thought of was that they should purchase a home. But it is said that it is hardly to be supposed that he contemplated that he would use this property as a home, as it was not well adapted for that purpose; that they certainly could have found something more desirable. In any event they used it as a home and they lived in it more than ten years as their home.

A good many authorities have been cited to us, or rather our attention has been called to a good many authorities, including the case of *Barrington, Admr.*, v. *Alexander*, 6 O. S., 189. In that case the administrator, under order of court, for the payment of debts, made a sale to parties who failed to pay for the property. They did not pay and the administrator arranged

with the appraiser that he should charge himself with the money as though he had received it, and he should take a deed of the property, instead of putting the property up again for sale, as he should have done, because there was no completed sale. In that case it is said in the syllabus:

"3. The fiduciary relation of an administrator to the land of his intestate is not terminated when it is struck off and declared sold at public auction, but continues until the title of the vendee becomes perfect, by the payment of the purchase money and the delivery of the proper deed of conveyance, whereby the title passes from the heirs of the estate, unincumbered by any charge in favor of the administrator or the estate arising out of the sale."

But in the case now under consideration the purchase money had been paid, the title had passed, the sale was perfected, and there remained nothing more for the sheriff to do in connection with it.

Attention is called also to the case of *Piatt et al* v. *Longworth,* found in 27 Ohio State Reports, 159.

In that case it is shown that an arrangement was made between the executor and certain others, that the property should be sold, that he would furnish money for the purchasers and charge himself with it, as though he had received it in good faith. He took the property which was deeded to him later by these purchasers. It was held that he held it as a trustee; that it was not a perfected sale.

The case which seems to us to be the nearest to that which is now before us for consideration is that of *Charles Rammelsburg et al* v. *Robert Mitchell and William Lupe,* 29 O. S., 22. In that case Robert Mitchell and another, as trustees under the will of Frederick Rammelsburg, deceased, sold the interest of Rammelsburg in a St. Louis business. Rammelsburg and Mitchell were large manufacturers of furniture in Cincinnati; they established stores in quite a number of cities, including a store in St. Louis, and Mitchell, one of the trustees under the will of Rammelsburg, sold the interest of the said Rammelsburg in the St. Louis business to one William Mitchell. It does not appear whether there was any relationship between the trustee and the purchaser.

The sale was made in January, 1904. In February, 1904, one month later, Robert Mitchell, one of the trustees, purchased a one-sixth interest from William Mitchell in the property sold at St. Louis. The property sold at St. Louis was an undivided interest of Rammelsburg, deceased, sold to Robert Mitchell, partner of the William Mitchell, who made the purchase of Rammelsburg's interest. Robert bought from William a one-sixth interest, so that each then owned one-half of the business at St. Louis. The court found no actual fraud and no constructive fraud and upheld the sale to Robert. Robert was still, however, a trustee under the will of Rammelsburg, not for this property, but for the other property still in his hands.

We reach the conclusion here, therefore, that judgment should be rendered for the defendants, and the petition dismissed at the costs of the plaintiff.

EXTENT OF LIABILITY OF BONDSMEN IN ATTACHMENT.

Circuit Court of Cuyahoga County.

THE WILLIAMS EDWARDS COMPANY v. MAX GOLSTEIN.*

Decided, May 20, 1907.

Attachment—Bondsmen Liable Only for Value of Property Taken.

The signers of a bond given in an attachment proceeding under the provisions of Section 6513, Revised Statutes, are liable only for the value of the property attached and not to the extent of the judgment which may be secured in the case.

Klein & Harris, for plaintiff in error.
Peskind & Perris, contra.

MARVIN, J.; HENRY, J., concurs.

The only question in this case is whether a bond given in an attachment proceeding under Section 6513, Revised Statutes, binds the obligors in the bond for the payment of whatever

*Affirmed, *Edwards Co. v. Goldstein*, 80 Ohio State, 303.

judgment may be recovered in the action, or whether it simply binds the obligors to the extent of the property attached. The court of common pleas held the obligation to be the latter.

On the part of the plaintiff in error attention is called to a decision of the Court of Common Pleas of Hamilton County, rendered by Judge Pfleger in the case of *Margaret McCartney* v. *Ed. H. Williams,* 3 O. L. R., 692, in which, in a well considered opinion the contrary doctrine is held. That opinion with the authorities cited in it, impresses us as having much merit, and but for the fact that the circuit court of the second circuit has held otherwise, in the absence of any direct holding by the Supreme Court, we should be inclined to follow the reasoning in that case. In the circuit court last referred to, in the case of *Saxton* v. *Clymire,* 3 C. C., 209, Judge Shauck, of the Supreme Court, distinctly holds the contrary; and the same court sitting in Franklin county in the case of *Ross* v. *The Miller Merchant Tailoring Company,* reported in 7 C. C., 51, also holds that the bond simply binds the obligors to the extent of the property taken in attachment.

In view of these two decisions, and as has already been stated, in the absence of any decision directly in point, of the Supreme Court, we affirm the judgment of the court of common pleas.

ACTION FOR RECOVERY OF A REAL ESTATE COMMISSION.

Circuit Court of Cuyahoga County.

LOUIS KOBLITZ ET AL. v. HARRY KOBLITZ.

Decided, July 1, 1912.

Equitable Assignment Can Only be Made of an Existing Fund.

A fund, to be the subject of equitable assignment, must have an actual or potential existence; hence, a promise in writing to divide with the promisee a commission thereafter to be earned, can not be treated as an equitable assignment of such commission, which may not be revoked by the promisor at any time before actual payment.

J. H. Hogg and *R. M. Morgan*, for plaintiffs in error.
F. J. Wing, contra.

NIMAN, J.; METCALFE, J., and JONES, J. (sitting in place of Judges Marvin and Winch), concur.

The defendant in error was plaintiff, and the plaintiffs in error were defendants, in the court of common pleas.

The plaintiff instituted his action in that court to recover of the defendants a real estate commission of $1,500 for negotiating a sale of property belonging to said defendants. By written instrument, dated April 8, 1911, the plaintiff became entitled to receive from the defendants a commission of $1,500 in the event a certain option given by the defendants to one J. L. Free on a tract of land on Noble road, in Cuyahoga county should result in a sale, and the purchase price be paid according to the terms of the option.

There was no controversy on the trial of the case about the commission having been earned. The defense was, that the plaintiff had assigned to the said J. L. Free one-half of his commission, and that the defendants had paid the same to Free. Before the action was started the defendants had tendered $750 to the plaintiff and in the course of the trial he accepted this amount over which there was no dispute, and the trial continued as to the other $750.

The verdict was for the plaintiff and judgment was entered on the verdict after the overruling of the defendant's motion for a new trial.

The payment of $750 to J. L. Free, relied upon to defeat the plaintiff's claim, was made by the defendants in reliance, as they claim, upon a written order from the plaintiff to J. L. Free, which reads as follows:

"CLEVELAND, OHIO, February 23d, 1911.

"MR. J. L. FREE,
City.

"*Dear Sir*: As per my agreement with you, I am making a contract with Messrs. Wilkoff and Koblitz Brothers to pay me a cash commission of fifteen hundred dollars ($1,500), in case you buy the fifty (50) acres of land on Cleveland Heights, upon which you have taken an option, and in consideration of our

agreement and your having taken said option I hereby agree to divide the said commission with you, and this letter shall constitute your order to Messrs, Wilkoff and Koblitz Brothers to pay you seven hundred and fifty dollars ($750) of the commission at the time that you finish the ten thousand dollars ($10,000) payment upon the land.

"HARRY KOBLITZ.

"Accepted
"J. L. FREE."

It was claimed by the plaintiff that before this order was accepted by the defendants he had revoked it and had given notice to them of his revocation. The defendants, on the other hand, deny that they had notice of such revocation until after they had accepted the order, and thereby obliged themselves to pay $750 to J. L. Free.

The issue of fact thus raised was submitted to the jury. There was a conflict of evidence concerning this question of fact and the jury found for the plaintiff.

There is nothing to indicate that the verdict is so manifestly against the weight of the evidence as to justify any interference on this ground by this court.

The question remains, however, whether the plaintiff had any power of revocation over the order given by him to J. L. Free.

It is contended for the plaintiffs in error that the order operated as an equitable assignment to Free of one-half of the commission mentioned, and that the instrument created an equitable property right which could not be disturbed by any subsequent act of the defendant in error. If this contention be accepted, the necessary inference is that Harry Koblitz was not the real party in interest as to the claim asserted by him in the action below.

Pomeroy's Equity Jurisprudence, Section 1280, contains the following statement:

"It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund. If, therefore, A has a specific fund in the hands of B, or in other words B, as a depository or otherwise, holds a specific sum of money which he is bound to pay to A, and if A agrees with C that the money shall be paid to C, or assigns it to C, or gives to C an order upon B for the

money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee, C, and it is not necessary that B should consent or promise to hold it for or pay it to such assignee. In order that the doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt, actually existing, or to become so in future, upon which the assignment may operate, and the agreement, direction for payment or order must be, in effect, an assignment of that fund or of some definite portion of it."

Again in Section 1282 of the same work, it is said:

"What shall amount to the present appropriation which constitutes an equitable assignment is a question of intention, to be gathered from all the language, construed in the light of surrounding circumstances; for example, while it is not essential to the existence of an equitable assignment of a fund that the debtor, agent or depository should be *expressly* directed to pay over the money to the assignee, the absence of such a direction may tend to show an intention not to transfer a present interest in the fund, but that the arrangement is wholly executory and prospective."

Looking to the language of the instrument which is claimed to have effected an equitable assignment of a half interest in the commission sued for, and an equitable property therein in J. L. Free, it will be seen that there was no fund actually in existence and none potentially in existence. The creation of the fund depended upon the contract that Harry Koblitz, in his communication to Free, says he is making with Mr. Wilkoff and Koblitz Brothers being actually entered into and also upon the consummation of the sale to Free in accordance with the terms of the option held by him. If it should be considered, however, that the commission sought to be recovered in the action below had a potential existence at the time the instrument claimed to operate as an assignment was executed, there is another thing to be taken into account.

It will be noticed that the instrument makes no present transfer of the interest which Harry Koblitz may subsequently acquire in a commission. The words are merely promissory in their nature. "I hereby agree to divide the said commission

with you, and this letter shall constitute your order," etc., is the language of the instrument.

The order on a future fund which constitutes an equitable assignment is to be distinguished from a mere promise to appropriate such a fund or to give an order thereon. A promise or agreement to divide does not make the division an accomplished fact.

We think, therefore, that it was within the power of the plaintiff below to revoke the order or authority given in the instrument addressed to J. L. Free, and by him accepted, before the defendants accepted the same. The liability of the plaintiff to Free for such a proceeding, is, of course, a question not before us in this case.

Error is claimed to have been committed by the trial court in certain rulings on evidence which have been called to our attention.

The defendant, in the course of the trial, sought to introduce evidence to prove that at the time of the option being given to J. L. Free and before the execution of the writing under the claimed authority of which the defendants paid $750 to Free, there was an agreement and contract between the plaintiff and defendants by which he was to get $1,500 for selling the property, and that the written agreement for a commission on which the plaintiff founded his action was simply the result of putting into writing the agreement previously existing.

The court excluded this evidence and the defendants, having duly excepted, complain of the exclusion.

The ruling of the trial court was correct. Previous understandings and negotiations were merged in the written agreement. It would have been a clear violation of one of the recognized rules of evidence to have admitted the evidence offered.

The court also refused to admit evidence offered by the defendants to prove that the plaintiff had stated to J. L. Free that he, Free, owned half of the commission, and requested him to buy the other half.

It is claimed for this evidence offered that it was competent as an aid to the construction of the contract between the plaintiff and Free. The contract, however, is not ambiguous and re-

quires the aid of no extrinsic evidence to make it clear. In our opinion the evidence concerning the construction placed upon the agreement by the plaintiff and Free was properly excluded.

Judgment affirmed.

LIABILITY FOR INJURY RESULTING FROM BLASTING.

Circuit Court of Lorain County.

THOMAS G. CHAPMAN AND THE CITY OF LORAIN v. STEVE LEPOTSKY.

Decided, June, 1912.

Negligence—Independent Contractor, When Liable—Contributory Negligence Not a Defense in Cases of Gross or Willful Negligence.

1. One who causes work to be done is liable for injuries that result from negligence and carelessness in its performance by the employees of an independent contractor to whom he has let the work, when the resulting injury, instead of being collateral and flowing from the negligence of the act of the employee alone, is one that might have been anticipated as a direct and probable consequence of the performance of the work contracted for if reasonable care is omitted in the course of its performance.
2. Where a city has given to a contractor the privilege of using high explosives in excavating for a sewer, it is the duty of the contractor to use reasonable care to know the conditions in the locality where he uses explosives, and if through failure to exercise such care, he explodes a blast in such proximity to a gas main as to break it and destroy adjoining property, both he and the city are liable for the resulting damage.
3. It is error to refuse to instruct a jury that if plaintiff's negligence contributed in any degree to his own injury he can not recover even though the defendant be guilty of gross negligence.

MARVIN, J.; NIMAN, J., and METCALFE, J. (sitting in place of Winch, J.), concur.

Lepotsky brought suit against the two plaintiffs in error to recover damages growing out of an explosion of dynalite and the

igniting of gas and a gas explosion, whereby said Lepotsky's building was substantially destroyed and causing, also, great personal injury to him.

The facts are substantially these:

For the purpose of constructing a sewer along Pearl avenue in said city of Lorain, the city entered into a contract with said Thomas G. Chapman, whereby Chapman was to construct said sewer for the city, and in the contract entered into between the city and Chapman it was provided that:

"When rock is encountered in excavating the sewer trench and it becomes necessary to use explosives to remove it, the following precautions must be taken by the contractor: First, the sewer trench where the blast is to be made, and for fifteen feet on either side of it, must be covered with a suitable covering of timber and plank. Second, barricades must be maintained across the street at least 200 feet in either direction from the place where the blast is to be made. There shall be at least two men employed by the contractor to patrol the street and warn all persons in the vicinity immediately previous to the firing of the blast."

The plaintiff's building fronted on said Pearl avenue. Crossing said Pearl avenue, and not far from the building of said Lepotsky, was a main gas pipe through which gas was conveyed under high pressure by the gas company acting under franchises granted by said city. This gas pipe was about two and one-half feet below the surface of the ground. The bottom of the excavation for the sewer was much deeper.

In the prosecution of his work Chapman caused to be exploded immediately under or near to this gas main a charge of dynalite, which is very explosive. It is shown by the evidence that it is certainly not less explosive than dynamite, and it is claimed to be much more explosive.

This explosion of the dynalite caused a rupture of the gas main from which large quantities of gas escaped and was ignited, causing a fire and explosion of gas which partly destroyed the building, and the explosion itself, together with such fire, resulted in the injuries already mentioned.

On the part of Chapman it was claimed in his answer that Lepotsky was negligent in allowing gas to escape from pipes in

and about his premises, and that the gas explosion and fire was the result of such negligence on his part, but the jury found otherwise, and we are content with the finding of the jury in that regard, and indeed it is not claimed that that defense was proven, so that the facts, briefly stated, are subsantially as hereinbefore set out.

Under these facts the jury found a verdict for Lepotsky against both Chapman and the city. It can hardly be doubted that Lepotsky was entitled to recover from somebody on account of the injury both to his person and to his property. It is urged, however, on the part of the city, that as the work was being done by an independent contractor, it was not responsible, and it is said that this is especially true because the provision in the contract is that the explosives were to be used only "when rock is encountered in excavating the sewer trench," and it is urged that this explosive was used where rock was not encountered, but that only shale and earth, packed solidly, had to be removed at the place where this explosive was used.

The word "rock" is somewhat indefinite. The noun is defined by Webster as "A large mass of stony matter; the stony matter of the earth's crust; in geology, any natural deposit or portion of the earth's crust, whatever be its hardness or softness."

We are not prepared to say that the material in which this explosive was placed did not come within the permission granted to Chapman, but whether it did or not, the city, by its contract, gave to him the right to use this dangerous explosive in his work. Of course that did not relieve him from liability in case he so used it as to injure others than the city, nor would it relieve the city, in the case of an independent contractor, from liability where it permitted such independent contractor, in the execution of his contract, to make use of those things which are inherently dangerous. This is settled by numerous cases in Ohio and elsewhere. Counsel are familiar with the cases; they are cited and quoted from in the briefs and seem to us to fully justify the proposition just made.

The facts claimed by the several parties are so admirably stated in the charge given at the trial that it is thought profitless to state them more fully in this opinion than has already been

done, and the law as stated by the court meets our full approval, where this language is used:

"It is the law that one who causes work to be done is liable for injuries that result from negligence and carelessness in its performance by the employees of an independent contractor to whom he has let the work when the resulting injury, instead of being collateral and flowing from the negligence of the act of the employee alone, is one that might have been anticipated as a direct and probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case the person causing the work to be done will be liable for the negligence, even though of an employee of an independent contractor.

"In this case I say to you, that the city of Lorain would be liable for the negligence of the defendant, Chapman, or his employees, if from such negligence damages proximately resulted to the plaintiff. If you find under the instructions I gave you, that damage might have been anticipated as a direct and probable consequence of the performance of the work contracted for, if reasonable care was omitted in the course of its performance, owing to the character of the work to be done, or instrumentalities to be used and the location where the work was to be done, I say to you as a matter of law, that a common duty rested upon both defendants in this case to use ordinary care, as above defined, during the progress of such sewer work in the use of explosives.

"If the defendant, Chapman, through his servants, was negligent as charged by the plaintiff in this case, then both the defendant Chapman and the city of Lorain, under the law applicable to this case, would be liable, if by reason of such negligence damage proximately resulted to the plaintiff. But if Chapman, through his servants, was not negligent under the instructions I have given you, then neither of the defendants would be liable in this action."

We think this admirably stated the law and was wholly applicable to the case and we find no error in the charge of the court as given.

Certain requests made by Chapman were given to the jury before argument; others which were properly requested before argument, were refused. One refused, which is marked Request "No. 2," reads:

"The lack of knowledge on the part of the defendant, Thomas G. Chapman, of the location of the high pressure main, is a defense to said action even though the city had actual or constructive notice of the location of said main."

This request was properly refused for at least two reasons. If it had been given exactly as written, it would have been, in effect, saying to the jury that there could be no recovery on the part of the plaintiff against either defendant. Of course what was meant by the request was that it was a defense to the action as against Chapman. The language, however, is that it is a defense to said action, and if it was a defense to the action, a complete defense, then no recovery could have been had. This by itself would have justified the refusal to give the request without modification, but there is another reason, and that is, that a part of the duty of the defendant Chapman was to exercise at least reasonable care to know what the surroundings of the place were where the explosive was to be used. If this request had been given, then Chapman would have been relieved even though he failed to exercise ordinary care to know whether there was a gas main near to the place where the explosive was used.

Another request made by Chapman reads:

"If the jury find that the negligence of the plaintiff in any degree proximately contributed to the injuries complained of to his person and property, as set out in his amended petition, then your verdict must be for the defendants, even though you should as a matter of fact find the defendants had been guilty of gross negligence."

This request was properly refused. To have given this might have relieved the defendants of the result of the grossest negligence, even of willful negligence, where the negligence of Lepotsky was barely appreciable. On this proposition see *Cooley on Torts*, page 810, where he says:

"Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others which may be justly criticized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury."

Also *Beach on Contributory Negligence,* Section 64, quoted with approval in the case of *Krause et al* v. *Morgan,* 53 O. S., at page 37. The quotation is in these words:

"In order to constitute contributory negligence on the part of the plaintiff, there must be negligence on the part of the defendant. It is accordingly the well settled rule, that when the defendant's conduct amounts to willfulness, and when the mischief is occasioned by his intention and wanton wrongdoing, the plaintiff's negligence is no defense."

The term "gross negligence" is scarcely susceptible of legal definition, say our Supreme Court in the case of *Griffith* v. *Zipperwick,* 28 O. S., 388.

In the case of *Railroad Co.* v. *Kelley,* 12 O. C. C., 341, affirmed in 53 O. S., 667, it is said:

"Where the crew of a railroad train receive notice of an impending danger and have the ability to stop the train and avoid the danger, they must do so, and failing to do this, they are guilty of gross negligence amounting to willfulness."

Attention is called to this case upon the proposition that "gross negligence," though it may exist without willful negligence, still includes willful negligence. So that to say that the defendants would not be liable even though their negligence was gross, would relieve the defendants from responsibility if that gross negligence were willful. This was sufficient reason for refusing to give the charge as requested.

In the case of *Schweinfurth* v. *Railroad Co.,* 60 O. S., 215, it is said in the syllabus:

"In an action for negligence, it is not error to refuse an instruction that the defendant can not be held liable, though guilty of the negligence charged, if the negligence of the person injured contributed in any degree, or in any way, to the injury of which he complains. Unless the negligence of the person injured contributed directly to, or was a proximate cause of the injury, it does not preclude a recovery."

The charge requested in this case, it is true, used the word "proximately" as qualifying the word "contributed," but we think that the reasoning of the case last mentioned would justify

a refusal on the part of the court to give the charge requested.

Another request of Chapman which was refused, is number 11.

Without stopping to quote this, we justify the refusal to give it. If this had been given it would have relieved Chapman of any obligation to use ordinary care to ascertain what the surroundings were at the place where he was to explode dynalite, unless he had direct instructions from the city of Lorain as to the location of the gas main in Pearl avenue. Clearly this takes from him an obligation which he owed to every one liable to be injured by the explosion, which could have been avoided by the use of ordinary care on his part in ascertaining the surroundings.

The city also made a request for propositions to be given before argument, some of which were refused. The first was refused, it being a charge that the city was not liable and could not be held in the action. This was properly refused.

The second is practically the same.

The third was properly refused, because it undertook to limit the meaning of the word "rock" as used in the contract, and because it relieved the city from all liability in a case where, by its contract, with Chapman, it had permitted him to make use of this highly explosive material.

For like reason the fourth was properly refused.

The court refused to give request No. 6, which reads:

"The jury can, if the evidence warrants it, find a verdict against the defendant, Chapman, and not against the defendant, the city of Lorain."

We think this was properly refused; in any event, that under the facts in the case it worked no prejudice to the city, but we think it was properly refused, because no verdict could have been returned against Chapman unless there was negligence on his part in the use of this explosive, and since he was, by his contract with the city, permitted to use the explosive, we think, if injury resulted to the plaintiff from the negligent use of it in the prosecution of the work of the contractor, the city as well as the contractor would be liable.

The court was asked by Chapman to submit to the jury certain interrogatories. These were not submitted, and the failure to

submit them is complained of and assigned as error. The first reads:

"Do you find, as a matter of fact, that the defendant, the city of Lorain, knew of the existence of the high-pressure gas main at the point in Pearl avenue, Lorain, Ohio, where said explosion occurred previous to said explosion?"

Whatever answer had been given to this question would not have determined what verdict should be rendered on the issues between the plaintiff and either of the defendants. If it had been answered in the affirmative, it would have tended to show that the city was liable, but it would not have tended to show that Chapman was not liable. If it had been answered in the negative, it would not necessarily result in relieving either of the defendants, because if, in the exercise of ordinary care, either the city or Chapman would have known of the location of this main, their liability would be the same as though the city actually knew.

The next two interrogatories are based upon whatever answer should be given to the first, and since nobody would be prejudiced by the refusal to submit the first, it follows that neither of the others should have been, or indeed could have been, submitted.

As to the fourth, the same reason which justified the court in refusing to submit the first justified it in refusing to submit the last.

The result is that we find no error in the record, and the judgment is affirmed.

VALIDITY OF A RESIGNATION BY A PUBLIC OFFICER.

Circuit Court of Cuyahoga County.

STATE OF OHIO, ON THE RELATION OF CHARLES ORR, v. THE BOARD OF EDUCATION OF THE CITY OF CLEVELAND DISTRICT ET AL.*

Decided, July 2, 1912.

Public Officers—Resignation from Office Need Not be in Any Particular Form—Accepted Resignation Can Not be Withdrawn.

1. It is not necessary that a resignation from a public office be couched in any particular words; it is only necessary that the incumbent evince a purpose to relinquish the office; that this purpose be communicated to the proper authority; and that this resignation be accepted, either in terms, or something tanamount thereto.
2. A resignation from office, to become effective at some future time, can not be withdrawn without the consent of the accepting party.

NIMAN, J.; MARVIN, J., and METCALFE, J. (sitting in place of Winch, J.), concur.

On the 10th day of December, 1910, the relator was elected director of schools by the board of education of the city of Cleveland for a term of two years, beginning January 11th, 1911. He duly qualified and entered upon the discharge of his duties.

On the 16th day of January, 1912, he wrote and delivered to Dr. G. C. Ashmun a communication which reads as follows:

"JANUARY 16, 1912.

"DR. G. C. ASHMUN, Pres.,
"Board of Education.

"Referring to the present contention as to the office of director, it is my intention to retire from the work at an early date after confidence and quiet are restored. The limit of my services will be June 15, 1912.

"Very truly yours,
"CHAS. ORR."

When this writing was delivered to Dr. Ashmun and read by him, he put the question to Mr. Orr: "May I show this to the

*Affirmed without opinion, *State, ex rel, v. Board of Education*, 87 Ohio State, 529.

other members of the board?" The answer, as testified to by Mr. Orr, was: "Make any use of it that you see fit. That is exactly my view; that is my wish; that is my feeling."

At a meeting of the board of education held on the afternoon of January 16, this communication was presented to the board. A discussion followed and Mr. Orr was called before the board. He was made aware of the fact that the letter he had addressed to Dr. Ashmun earlier in the day was before the board and was under consideration.

While the testimony given by the various witnesses as to what was said by him to the board, and by the members of the board to him, is not without conflict, the fact is established that the intention of the director of schools, as expressed in his communication, then before the board, was discussed, and the concluding paragraph of the communication was declared by him to mean that he intended to retire from the office of director by June 15, 1912.

The letter of January 16th was on motion made a part of the records of the meeting of the board of education. At the time this meeting of the board was held there was pending before the board a report of the committee on business management relative to an investigation which had been requested by Mr. Orr, which dealt extensively with matters in the department of the director of schools and reported against the request of the director for an investigation of his office. The report concluded with a recommendation that the director be advised of the conclusions set forth in the report, and requested to tender his resignation.

Immediately following the consideration of the letter of January 16th and the discussion between the members of the board and Mr. Orr, a resolution was adopted by the board approving the report of the committee on business management with the exception of the last paragraph, to-wit, "and be requested to tender his resignation."

On May 20, 1912, the relator addressed a letter to the president of the board of education, which said:

"Urged by a sense of duty, I withdraw my communication to you written under date of January 16th, 1912."

This letter was presented to the board of education by the president, but the board declined to receive it and instructed the president to return it to the director of schools.

On May 27, 1912, the board of education adopted the following resolution:

"WHEREAS, at a meeting of this board on January 16, 1912, Mr. Chas. Orr, director of schools, filed with the board a written communication terminating his services as director on June 15th, 1912, and which communication was accepted by the board at that time and became the basis for its action in amending and adopting a report then pending from the committee on business management, therefore, be it

"*Resolved*: That the committee on business management be and hereby it is requested to consider and report at the next regular meeting of the board what action in the opinion of the committee, the board should take in regard to the situation thus created."

Following this, on the 3d day of June, 1912, the board passed a resolution adopting a report of said committee on business management which recommended that the board proceed to elect a director of schools for the unexpired term and which expressed the opinion that a vacancy would exist in the office of director of schools from and after the 15th day of June, 1912.

On June 3d, 1912, the board adopted another resolution declaring its determination to elect a school director to fill the vacancy declared to exist for the unexpired term beginning June 16, 1912, and ending January 10, 1913.

Following the adoption of the resolution, the director of schools addressed a letter to the board of education, the closing paragraph of which reads:

"That there may be no misunderstanding either to the effect of my letter of January 16th, 1912, or of my present intention, you are hereby notified that I do not intend to resign my office as director of schools on June 15th, 1912, or at any other time: that I intend to serve for the full period of my election, and that insofar as my letter of January 16th last to your president could or might be construed as a resignation on my part, it is hereby withdrawn."

The board refused to accept this communication, and on the 7th day of June, 1912, proceeded to elect Frank G. Hogan as director of schools to fill the vacancy theretofore declared by it to exist in that office.

By this action the relator seeks a writ of mandamus against the board of education and the members thereof, to compel them to restore him to the office of director of schools of the city school district of Cleveland and to recognize him as the lawful school director of said school district, notwithstanding any finding or claim of said board or its members that he has heretofore resigned from said office.

It was held in *State, ex rel Moyer,* v. *Baldwin,* 77 O. S., 533, that "mandamus is the proper remedy to restore a party to the possession of an office from which he has been illegally removed." If, therefore, the relator's contention that he has been illegally removed from his office is sound, he has chosen the proper form of action to secure restoration to that office.

To decide the relator's right to the relief sought requires a determination first, of the question whether the communication of June 16th, which the board of education treated as a resignation by the director of schools, was in fact a resignation.

The authorities are uniform to the effect that, in the absence of statutory requirement, no particular form of resignation is necessary. It need not be in writing and no special words are required. In the language of Macfarlane, J., in *State, ex rel Kirtley,* v. *Augustine,* 113 Mo., 25:

> "It is only necessary that the incumbent evince a purpose to relinquish the office; that this purpose be communicated to the proper authority, and that this resignation be accepted, either in terms, or something tantamount thereto, such as appointing a successor," etc.

When the director of schools wrote the letter of January 16th to the president of the board stating that it was his intention to retire from the work at an early date after confidence and quiet were restored, and setting the limit of his service as June 15, 1912, he clearly evinced a purpose to relinquish his office. By his consent the letter was presented to the board, although

It follows from the conclusions announced that the writ of mandamus prayed for by the relator must be denied and the petition dismissed.

DAMAGES RESULTING FROM NEGLECT OF ATTORNEY.

Circuit Court of Cuyahoga County.

THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY v. CHARLES L. SELZER.

Decided, July 2, 1912.

Attorney and Client—Burden of Proving Damages in Action for Neglect of Attorney—Attorney Not Liable for Neglect to File Answer When Not Informed of the Defense to be Made—Attorney Can Not Recover for Service Where he Disregards Instructions.

1. In an action brought by a client against his attorney for damages caused by neglect of the attorney to defend an action against the client, the burden is upon the client to prove the extent of his damages, and before he will be entitled to anything more than nominal damages he must affirmatively show what defense he proposed to make and that it would have availed.
2. If an attorney employed to defend a suit fails to do so, and as a result judgment is rendered against his client, before he can be made liable for the whole amount of the judgment thus recovered, he must have been informed by his client what was the nature of the defense he was expected to make.
3. Where an attorney has been directed to appeal a case to a higher court, but before the appeal had been perfected he was discharged, he is not liable in damages to his client for failure to file an appeal bond, if the time for filing the bond had not expired at the date he was discharged.
4. When an attorney under specific instructions from a client appeals a case from a justice court to the court of common pleas and then consents to the entry of a judgment against his client, he can not recover for services rendered in the case.

White, Johnson & Cannon, for plaintiff in error.

Ong & Mansfield, contra.

MARVIN, J.; NIMAN, J., and METCALFE, J. (sitting in place of Winch, J.), concur.

The parties stand in the reverse order from that occupied by them in the court of common pleas. The terms "plaintiff" and "defendant," used in this opinion, refer to the parties as they were in the court below.

The plaintiff is an attorney-at-law; he sued to recover compensation for services claimed to have been rendered by him to the defendant, which is a corporation, in his professional capacity.

The home office of the defendant is in Cincinnati, Ohio. Some twelve or fifteen different suits were brought against it in the county of Cuyahoga, where plaintiff resides and was practicing his profession. He was employed by the defendant in each of these cases to defend.

It is claimed by the defendant, and the contention seems to be sustained, that as to each of these cases there was a separate employment, that is, the employment was not general, but in each case he was employed for that particular case.

It is clear that in each case the plaintiff rendered some service for the defendant, for which he would be entitled to recover but for the defense set up that he neglected his duty and failed to do the things that it was his duty to do under his employment. The defendant claims that there was such negligence in each case, and it sets up as a cross-petition that in a case brought by John F. Doreen and Elizabeth Doreen, the plaintiff failed to make any defense for the defendant; that by reason of such failure on the part of the plaintiff the said Doreens recovered a judgment against the defendant for $2,097 damages and $18.18 costs of suit, which it was obliged to pay, and so the defendant prays for judgment against the plaintiff for that amount.

On the trial the court took from the consideration of the jury all claim of the defendant under said cross-petition. The result of the trial was a verdict and judgment for plaintiff for the full amount of his claim.

All things necessary to be done to bring the case to this court for review on error were done, including a bill of exceptions containing all the evidence and the charge of the court.

One of the errors complained of is the action of the court in taking from the jury the consideration of the defendant's cross-petition. The reply of the plaintiff to the answer contained also an answer to the cross-petition, and in such pleading it is alleged, and the allegation is fully sustained by the evidence, that the plaintiff did file an answer to the petition filed against the defendant by the Doreens; that such answer was prepared by the general counsel for the defendant in Cincinnati. The plaintiff was acting for the defendant under the authority and direction of such general counsel.

This answer contains all the information, so far as appears, of any facts relied upon as a defense in such action. To this answer a demurrer was filed and after argument it was sustained, on the ground that the allegations of such answer constituted no defense to the petition.

So far as anything appears in the evidence, plaintiff had no knowledge that there were any other facts on which the defense could be based, and so judgment was taken in the case against the defendant. He did not, however, prosecute error to this judgment, nor report the judgment until it was too late to prosecute such error. He had no direct instructions to prosecute error if the decision in the common pleas court should be adverse to his client. It was the judgment of plaintiff that error could not successfully be prosecuted but it is here urged on behalf of plaintiff in error that if there were failure to do all that should have been done in the case, the presumption arises that the defendant lost all that it was required to pay on the judgment taken against it, and that in the absence of evidence on the part of the plaintiff that no defense could have been made which would have defeated the claim of the Doreens, the defendant should have recovered the full amount claimed in its cross-petition.

In support of this contention our attention is called to the case of *Grayson* v. *Wilkinson*, 13 Miss., 268. The second paragraph of the syllabus in the case reads:

"If an attorney be employed to defend a suit and fails to do so, he is liable to the party injured to the extent of damages actually suffered; if, however, the attorney can show that the

defense he was employed to make was not a good one, he would be liable at most only to nominal damages."

In the opinion in the case, at page 288, the court refers to the only other cases to which our attention is called on this question, and in so referring uses this language:

"The case of *Godfrey* v. *Jay*, 7 Bingham, 413, settles this principle, that if an attorney is retained and suffers a judgment to go by default he is liable for damages, and it is for him to show that the party has suffered no actual damages. It is not for the plaintiff to show that he had a good defense; and the case cited from 2 Chit. R., 311, is to the same effect."

The court, however, later on in the opinion uses this language:

"Comyn, in his treatise on Contracts, says that if an attorney is guilty of gross neglect, or conducts his business unskillfully, he is liable for any damages his client may sustain in consequence thereof. According to this rule the client would have to show what damages he had sustained. If the attorney employed to defend did fail to file a plea, that is a breach of contract and entitled the plaintiff to recover something; but if he wishes to recover damages to the amount of the judgment against him, then he must show that he has sustained damages to that amount."

The court then calls attention to a case referred to in *2 Comyn on Contracts*, 384, *Russell* v. *Palmer*, where Lord Camden was reversed for misdirecting the jury to the effect that the measure of damages, where counsel failed to make a defense, was the amount of the recovery.

This case in Mississippi was decided in 1845 and does not decide the question as to who had the burden of showing the amount of damages in a case where the attorney fails to defend in a case where he is employed to defend. Authorities are quoted from, as already shown, some holding that the burden is on the attorney, some that it is on his employer; it was not necessary to determine the question in that case.

The English case of *Godfrey* v. *Jay*, 7 Bingham, 413, was decided in 1831. That of *Bourne* v. *Diggles et al*, 2 Chitty, 311, was decided in 1814. These are the latest and indeed the only

authorities cited to us by either party in the case on this point. We have, however, found later authorities. See *Pennington's Exec'rs* v. *Yell,* 11 Ark., 212, decided in 1850, where it is said in the syllabus:

"Extent of damage resulting from attorney's negligence must be affirmatively shown."

In *Fitch* v. *Scott,* 3 Howard, 314, the first paragraph of the syllabus reads:

"To subject an attorney to an action by his client two things are necessary to be done: Gross or unreasonable neglect or ignorance and consequent loss to his client."

Without further examination of the authorities we are of the opinion that the contention of the plaintiff in error on the proposition that the burden of showing whether or not the defendant suffered loss by the negligence, if there was negligence, of the attorney in the case of Doreens against the defendant, was upon the plaintiff, and that the presumption was in favor of the defendant, is unsound. Before the defendant should recover more than nominal damages, if it could recover anything on its cross-petition, it must have affirmatively shown that the defense which it proposed to make would have availed. This it did not show. Indeed, so far as the question was litigated, the defense was found not to be tenable.

There is another proposition held in the case of *Grayson* v. *Wilkinson, supra,* which is found in the last clause of the syllabus, and reads:

"If an attorney be employed to defend a suit and fail to do so, by which judgment is rendered against his client, before he can be made liable for the whole amount of the judgment thus recovered it seems that he must have been informed by his client what was the nature of the defense he was expected to make."

Attention has already been called in this opinion to the fact that the only information given to the plaintiff here as to the defense which could be made in the Doreen case was contained in the answer, which was filed and which the court found to be

insufficient. In the state of the proof, then, as the case stood when the court directed the jury to disregard the cross-petition, there could have been no recovery upon it for more, in any event, than nominal damages. The recovery of such damages would have been of no avail to the defendant except on the question of costs. If there had been nothing in the suit except the cross-petition and the issues made on that, this question of costs would have been of some importance to the defendant, but as the jury found on the other issues against the defendant, costs were necessarily carried with the judgment entered on such finding of the jury, and therefore there was no prejudice to the defendant in not submitting the question which, as the case was determined by the jury, would have been of no importance even on the question of costs. We reach the conclusion, then, as to the cross-petition, that there was no error in the ruling of the court which would justify a reversal of the judgment.

After the judgment was entered against the defendant in the Doreen case, the plaintiff was employed by the defendant to file a petition in the court of common pleas and seek to have the judgment set aside. He rendered certain services in that regard, he filed such petition; the case was tried in the court of common pleas and judgment rendered against the defendant in that action. The plaintiff in this action, as attorney for the defendant in the other action, gave notice of appeal to the circuit court. No bond for such appeal was given. The plaintiff says that before the time had elapsed within which the bond could have been given, the defendant discharged him as attorney in the case, and directed him to turn over the papers in the case to another firm of attorneys. It is agreed that he received such an order and did turn over the papers to the other firm of attorneys. The plaintiff testified that this turning over of the papers in the case to the other firm was before the expiration of the time within which a bond for appeal could have been filed. A witness connected with the firm to whom the papers were turned over testified that they received the papers a day or two after the time expired within which such bond could have been filed.

The court charged the jury that if the plaintiff turned the case over to the other counsel before the time limited for the filing of the bond, and notified such other counsel of the situation, then he would be entitled to recover for the services he rendered in this suit, but the court told the jury that any services he rendered which became necessary to be rendered because of his negligence in attending to the business of his client, he would not be entitled to recover for it. There was no error in this.

Without stopping to go over each item of error complained of, we reach the conclusion that except as to two of the items for which plaintiff was allowed to recover, there was no reversible error. Those two items refer to the cases of *George Doniak* v. *The Western & Southern Life Insurance Co.* and the case of W. Bilkowski. In each of these cases the plaintiff was directed by a letter from the general counsel of the defendant to its business manager in Cleveland, who brought the letter to the plaintiff, to make a defense. The cases were originally brought before a justice of the peace. The plaintiff tried the cases for the defendant and lost in each case. Each case was then appealed to the court of common pleas; the plaintiff in each of those cases failed within the proper time to file his petition and the plaintiff in this action made a motion to the court in each case to have the judgment entered for the defendant. He was unsuccessful, and a petition in each case was filed and the plaintiff in this action, without consulting his client, the defendant, consented to the taking of a judgment in each of those cases.

He having been directed to make the defense and to defend the actions on appeal, indeed having himself perfected the appeals, it was his duty to have made the defense, or to have filed an answer setting up such defense, or he should have communicated with his client before consenting to a judgment in either of these cases. For each of these cases he charged $45; and his recovery includes these two items of $45 each, aggregating $90, with interest.

We think he should not have been permitted to recover on either of these items, and that unless he consents to remit from

the judgment recovered by him the sum of $90 with whatever the interest on that sum would be for the time on which interest was allowed in the judgment, the case must be remanded to the court of common pleas. If such remittitur is made, judgment for the amount remaining after deducting such remittitur will be affirmed.

CONTRACTS EXPRESS AND IMPLIED.

Circuit Court of Cuyahoga County.

HUBERT J. TURNEY, ADMINISTRATOR, v. ROSE L. WOOLEY.

Decided, June, 1912.

Implied Contract—Meeting of Minds Essential.

The only difference between an express and an implied contract is as to the mode of proof, and it is as essential that there be a meeting of the minds of the contracting parties in one as in the other.

Wing, Myler & Turney, for plaintiff in error.
S. Doerfler, contra.

POLLOCK, J. (sitting in place of Winch, J.): NIMAN, J., concurs: MARVIN J., not sitting.

This is an action in error seeking to reverse the judgment of the court of common pleas of this county.

The defendant in error, Rose L. Wooley, brought suit against the plaintiff in error in the court below on an account which was claimed to be due her from defendant's intestate. The petition was the short form of petition on an account, and the account consisted of one item, as follows:

"To board, room, washing, care, nursing and attention rendered to Thomas C. Lavin, deceased, from July 19, 1904, to November 4, 1907, 171 weeks at $10 per week, $1,710.

"By cash received, $495. Balance due, $1,215."

The petition recited that the claim had been presented to defendant, administrator, and rejected. To this petition the de-

fendant below filed an answer admitting his appointment as administrator,, admitting that the claim was presented and rejected, and denying each and every other allegation in the petition.

After the jury was impanneled, and before any testimony was offered, the defendant objected to the offering of any testimony on the ground that the action was brought on an account, as if the person were alive, under the short form, and claiming that to support such claim as the one sued on, it should be founded upon contract.

Whether this position was well taken or not need not be determined in this action, for the reason that the court below allowed the plaintiff to amend her petition, which she did, setting out the facts, and no further objection was made by the defendant.

At the close of plaintiff's testimony there was a motion made to direct a verdict, which was renewed at the close of all the testimony. These motions were overruled by the court. The overruling of these motions is urged as error, and included in the argument is the fact that the verdict is against the great weight of the testimony.

It is urged that when a stranger comes into the home of a husband and wife and there receives boarding and lodging, that the presumption is that the contract is made with the husband, and for that reason the plaintiff below, at least, could not recover for the board and lodging of defendant's intestate.

We are not disposed to deny this proposition of law, but equally true is the proposition that if there are facts which show that the contract was made, whether it be an express contract or an implied one, with the wife, that she would have a right to recover upon the contract for boarding and lodging. The testimony in this case shows, in short, the intestate was an uncle of this plaintiff below; that he came to the home of the husband and wife about the time stated in the petition and remained there about that time. Witnesses testify to the fact that he required a great amount of attention, took his meals frequently in his room. This is testified to by other witnesses than the husband Then the husband is a witness and testifies that

Mrs. Wooley took care of him and as to the amount of care required by him. He also testifies to repeated conversations between his wife and the deceased in regard to paying her for what he was receiving in their home. This witness further testifies that when the deceased came to their home, his wife showed him over the house and arranged for the room that he occupied. In fact, the husband's testimony is all concerning the services of his wife and conversations that he heard between his wife and the deceased and which he had with the deceased in regard to the payment of his wife for his accommodation in their house.

We think that under the facts stated here it was a question of fact for the jury to determine whether or not this contract was made with the wife, and especially when the husband, the only other party who could recover for such services, is testifying in favor of his wife's claim.

The only other error complained of is in the charge of the court. The part complained of commences on page 55 of the record. The court said to the jury:

"In this case the plaintiff is suing upon an implied contract. An implied contract differs from an express contract merely in the proving of it. In general the difference between an express contract and an implied contract is the mode of proof. An implied contract is established by proof of circumstances showing that either in justice, honesty and good faith a contract ought to be implied, or that the parties intended to contract. Whether the contract is established by evidence direct or circumstantial, the consequences must be the same. The inference of an implied contract would then be practically a matter for the sound sense and judgment of you, gentlemen of the jury; however, to be guided in that respect by the instructions the court may give you.

"In other words, gentlemen, a contract is implied where one renders services to another and that other receives the benefit of the services, and the services are of such a character and are rendered under such circumstances that it may be fairly said that in justice and equity the services ought to be paid for. In such case the minds of the parties need not meet; for if the party for whom the services are rendered in justice and equity ought to pay for them, the law implies the contract that he should pay for them."

And further during the charge he repeats, in substance, this definition of the contract; and on page 56 he further says:

"If, however, on that proposition their minds did not meet, and the circumstances were such at the time that the plaintiff could not very well have turned this man out of her house or her husband's house, considering the character of their relationship and all the circumstances, and that she did not agree to take care of him and furnish him lodging and shelter for $3 a week, but that he remained there, then, if you find that in justice and equity and good faith he ought to pay, or the estate ought to pay, a fair value for the services rendered, you will find there was an implied contract that they should be paid for."

In short, the court says to the jury that this being an implied contract, that even if the jury find that the minds of the parties never met to make a contract, yet if in justice, honesty and good faith a contract ought to be implied, the plaintiff would have a right to recover. Is this a correct definition of an implied contract?

When the court told the jury that there was no difference between an implied contract and an express contract, except in the mode of proof, he was stating a correct legal proposition. An express contract is one that is proven by the express words of the parties; an implied contract differs from an express contract only in proof of such facts and circumstances surrounding the parties that make it reasonably certain that a contract existed between the parties.

Now under the charge of the court the jury might have found that whatever services and boarding and lodging the plaintiff did furnish the deceased, she did it gratuitously, without any intention whatever of charging therefor, and that it was accepted as such and without any intention of paying for it by the deceased, and yet, if they found that either in justice, honesty or good faith he should have paid therefor, they would have been required to return a verdict for the plaintiff. They might have found, and in fact the court said in so many words, that they could find, that although the minds of the parties to this contract never met, yet they could return a verdict in favor of the plaintiff.

"The meeting of the minds of the parties upon its terms is necessary to the making of a contract; and this is so whether it be an express contract or an implied one, if, in the latter case, the contract to be proved is an actual one as distinguished from a constructive contract." *Ry. Co.* v. *Gaffney*, 65 O. S., 104.

In the opinion in this case, on page 116, they quote from Swan, and this treatise uses practically the same language as the learned trial court in this case used in its charge, and criticize it.

Further on, on the same page, they quote from *Abbott's Trial Evidence*, with approval, and in the quotation from that work say:

"Second. Circumstances justifying the inference that plaintiff in rendering the services, expected to be paid, and defendant supposed, or had reason to suppose and ought to have supposed that he was expected to pay, and still allowed him to go on in the services without doing anything to disabuse him of this expectation."

It seems clear from the holding of the Supreme Court in this case that the charge of the court was clearly erroneous and prejudicial to the defendant below, and for this reason the case will have to be reversed and remanded for a new trial.

We regret very much to be compelled to arrive at this conclusion. The services rendered by the plaintiff below were such, and rendered under such circumstances, that it seems at least in good faith she ought to be paid. But whether or not the facts proven are sufficient to show a contract to that effect, is a question that we feel should be passed upon by a jury under proper instructions from the court.

SERVICE OF SUMMONS IN ANOTHER COUNTY.

Circuit Court of Cuyahoga County.

LOUIS N. GROSS v. J. H. WIENER, THE WIENER BROS. CO. AND THE INTERVALE FRUIT COMPANY.

Decided, July 9, 1912.

Parties—Service—When Joint Defendants May be Served in Other Counties.

Where one by false and fraudulent representations has induced another to purchase of a third party stock in a certain corporation, in an action whereby it is sought to annul the entire transaction and recover the money paid from the party making the representations and the party to whom it was paid, the party making the representations is a proper party within the meaning of Section 11255, General Code, and when service has been had upon him, summons may issue to another county for the party to whom the money was paid and the corporation whose stock was purchased.

White, Johnson & Cannon, for plaintiff.
Kline, Tolles & Morley, contra.

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

We are proceeding to dispose of the question submitted to us in this case although the transcript from the court below, now in our hands, does not show that a judgment was ever rendered in the court below. We assume, however, that such judgment was rendered and that counsel will have the transcript completed.

The plaintiff's petition was filed in Cuyahoga county, and personal service was had upon the defendant, J. H. Wiener, in said county. The two corporations which are made defendants have no residence or officer in this county but each has its place of business and home office at Akron, in Summit county.

The service of summons upon each of these two last named defendants was made by the sheriff of Summit county in Summit county.

The question presented to us is whether or not they are properly before us.

It is alleged that the relation of J. H. Wiener to the other defendants is such that a service upon him in this county does not warrant service upon the other defendants outside of this county. The petition alleges that by fraudulent representations made to the plaintiff by J. H. Wiener, he was induced to and did pay to the defendant, the Wiener Bros. Company, a large amount of money for stock which said last named company owned in the Intervale Fruit Company. The prayer of the petition is that the plaintiff be declared not to be a stockholder in the last named company, and that his name be taken from the books of such company as a stockholder; that the Wiener Company and J. H. Wiener be required to repay to the plaintiff what he has paid for the stock, and that he be relieved from the payment of a note given by him, now held and owned by the Wiener Bros. Company.

This is a brief statement of what practically the plaintiff seeks in the action.

On the part of the plaintiff it is urged that the service made upon the defendant corporations in Summit county is good by reason of Section 11282 of the General Code, which reads:

"When the action is rightly brought in any county, according to the provisions of the next preceding chapter, a summons may be issued to any other county against one or more of the defendants at the plaintiff's request."

If, then, this action was properly brought against the defendant, J. H. Wiener, who was served with summons in this county, and if he is a proper party to be joined with the other defendants in the action, it would seem clear that the service in Summit county was proper.

Section 11255 of the General Code provides:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein."

It is said that the primary object of this action is to have the entire transaction by which the plaintiff became the purchaser of the stock of the fruit company nullified. and that he

be restored to the situation in which he was before that transaction took place, and that the defendant, J. H. Wiener, not being now and never having been the owner of the stock which the plaintiff purchased, can do nothing toward restoring the plaintiff to the relation in which he stood to the Intervale Fruit Company before the purchase was made, and that since this is true, the action was not properly brought against him because it is said the action is an equitable action. But conceding that this is in substance true, it is still true that the plaintiff seeks to recover money from both the Wiener Bros. Company and J. H. Wiener. J. H. Wiener has answered in the case, and denies the allegations of the petition in the matter of any false representations made by him, or any fraud perpetrated by him in the transaction in any wise, and therefore denies that the plaintiff is entitled to recover anything against him.

We think he comes within those named in Section 11255; that he is a person "who has or claims an interest in the controversy adverse to the plaintiff." If he has not any claim or interest adverse to the plaintiff, there was no occasion for him to file an answer nor make any defense. He makes answer because his claim is adverse to the plaintiff. He says it isn't true that he induced the plaintiff to part with his money; he makes that issue; it is directly adverse to the claim of the plaintiff.

We think this is borne out by what is said by our Supreme Court in the case of *Osborn* v. *McClelland,* 43 O. S., 284. The language of the sixth clause of the syllabus is:

"In this respect the civil code adopts the former rule in equity, which allows all parties interested in the controversy adversely to the *prima facie* owner, or who are necessary to a complete determination or settlement of the question involved, to be made defendants."

The case of *Mack* v. *Latta,* 178 N. Y., 525, was decided under a statute in effect the same as our Section 11255 and we think that bears out the proposition that J. H. Wiener was a proper party to be joined with the other defendants in this action. The court below thought otherwise, and thought, too, that J. H. Wiener was not a necessary party to this controversy, and in the opinion which we have seen, prepared by the court below, Sec-

tion 11255, is quoted as reading:

"Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, *and* who is a necessary party," etc.

Whether this is a mistake of the typewriter, we are not advised, but if the statute read as so quoted, it would be necessary in determining the case before us to determine the question of whether J. H. Wiener was a necessary party to this proceeding; but as the conjunction "or" is used in the statute and not the conjunction "and" we deem it sufficient to warrant us in saying, without an examination of the question of what result we reach on the question of whether J. H. Wiener is a necessary party, we find here that he is a proper party because he has an interest or claims one adverse to the claim of the plaintiff.

We reach the conclusion, therefore, that the parties are all properly before the court, and that therefore the case is properly here for trial.

CONSTRUCTION OF THE VERDICT OF A JURY.

Circuit Court of Cuyahoga County.

SARAFINO CAPRETTA v. THE J. H. HASKINS ROOFING COMPANY AND J. H. HASKINS.

Decided, May 10, 1912.

Trials—Verdicts to be Construed Liberally.

In construing the verdict of a jury the utmost favor should be extended to it by giving it a liberal construction, and where, in a case in which there were two defendants, the jury returns a verdict in favor of *the defendant*, the court properly may enter judgment in favor of both defendants.

B. D. Nicola, for plaintiff in error.
Treadway & Marlatt, contra.

POLLOCK, J. (sitting in place of Marvin, J.); DUSTIN, J. (sitting in place of Winch, J.), and NIMAN J., concur.

The plaintiff in this action is seeking to have a judgment of the court of common pleas of the county against him and in favor of the defendants, reversed for an error that he claims was committed by the court below against him in the trial of that case. The only error complained of is that the verdict rendered by the jury was so indefinite and uncertain that no judgment could be properly entered upon it, and that the court erred in overruling his motion for a new trial on this ground and in entering judgment on the verdict.

The only record we have of the case below are the pleadings and the verdict of the jury.

The plaintiff in error brought suit against the defendants in error in the court below to recover damages for personal injury which he claims to have sustained by reason of the negligent acts of the defendants. He says in his petition that at the time he received his injuries he was engaged in digging a trench from the sidewalk to a house on one of the streets of this city; that at the same time the defendants were engaged in roofing this house; that in hoisting a bucket filled with pitch from the ground to the roof of the building, the bucket and its contents fell and struck plaintiff, inflicting the injuries of which he complains. He says that the fall of said bucket was caused by the negligent and careless acts of the defendants.

The defendants answered separately to this petition. The defendant, the J. H. Haskins Roofing Company, said that it was a corporation, and then denied each and every allegation of the petition, and further said that at the time of the happening of the occurrence complained of this corporation was not in existence, and that it had no connection with the occurrence alleged in the petition.

The defendant, J. H. Haskins, answered denying the negligent acts charged in the petition and the injury complained of by the plaintiff, and alleged contributory negligence. The plaintiff replied denying the contributory negligence. The case went to trial to a jury, and the jury returned a verdict as follows:

"Sarafino Capretta, plaintiff, vs The J. H. Haskins Roofing Co. et al, defendants.

"We the jury in this case, being duly impanneled and sworn do find for the defendant."

The claim is made that here is a finding in favor of one of the defendants, and it was impossible for the court to determine, from the issues and this verdict, which of the defendants the jury intended to find in favor of, by its verdict.

The verdict of the jury must pass upon all the issues in the case and be free from ambiguity. The issues in this case, raised by both defendants, were submitted to the jury, and the question is whether or not this verdict responds to the issues and is so certain that the court can enter judgment on the verdict in favor of both defendants.

The verdict must be certain and positive, and free from ambiguity; it must convey on its face a definite and precise meaning, and must show just what the jury intended. But in construing a verdict, *Graham and Waterman on New Trials,* Vol. 3, 1377, say:

"The utmost favor has always been extended to verdicts, and they are not construed strictly, as pleadings are. Though the verdict may not conclude formally and punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the court shall work the verdict into form and make it serve."

And our Supreme Court, in the case of *Fries* v. *Mack,* 33 O. S., 52, in the opinion on page 59, lays down practically the same rule to guide the court in the construction of the verdict of the jury. Quoting from a Kentucky case, they say:

"In considering the verdict itself, with a view to its sufficiency, the first object is to ascertain what the jury intended to find, and this is to be done by construing the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings. And it has been said that every reasonable construction is to be adopted in support of a verdict."

Now, applying this rule to this verdict, what did this jury mean, looking at and construing the verdict itself? Did they intend only to pass upon the issues in favor of one of these defendants, and that the issues as to the other defendant would go without a determination? We hardly think that that can be the construction drawn from this verdict. Construing it liber-

ally, as required by this rule laid down by our Supreme Court, we think that the true construction is that they found the issues in favor of each of these defendants and against the plaintiff; and that the verdict means that the issues raised by each of the answers of the defendants were thus found in favor of the defendants, and that the court committed no error in overruling the motion for a new trial and rendering judgment in favor of each of the defendants and against the plaintiff.

Our attention has been called by the plaintiff in error to a number of cases in the courts of other states, where two defendants were sued jointly and issues raised in the action, and a verdict returned in favor of the plaintiff and against one of the defendants; that it was so indefinite and uncertain which one of the defendants the jury intended to render the verdict against that the court could not determine, and therefore the verdict should be set aside and a new trial granted.

There is much difference in construing a verdict of that kind, where there is affirmative relief found against one defendant, and no designation of that defendant, and where the verdict is in favor of the defendant. In the first case, there is an affirmative action against one, the court can not determine which it is, and for that reason it is set aside; but in the case at bar, where the verdict is in favor of the defendant, there is no judgment to be rendered against that defendant, and for that reason the presumption is, granting a liberal construction, that it was intended to be in favor of both defendants.

The judgment of the court below is affirmed.

PASSENGER ENTITLED TO REASONABLE TIME TO PAY HIS FARE.

Circuit Court of Cuyahoga County.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY v. JOSEPH WIELAND.

Decided, July 1, 1912.

Carriers—Passenger Entitled to Reasonable Time to Produce Ticket or Pay Fare.

1. A passenger on a street car or railway train is entitled to a reasonable time in which to pay his fare or produce his ticket, and, if he is acting in good faith, the conductor has no right to eject him without affording him such reasonable time to pay his fare or find his ticket, if it is mislaid.
2. Where a passenger has left his ticket in the custody of another passenger in a remote part of a crowded street car, and the conductor forcibly ejects him within a minute or two after having first demanded his fare, he has not been given a reasonable opportunity to secure and present his ticket and the carrier is liable in damages.

Kline, Tolles & Morley, for plaintiff in error.
A. M. Klein, contra.

NIMAN, J.; METCALFE, J. (sitting in place of Winch, J.), concurs; MARVIN, J., not sitting.

Joseph Wieland, the defendant in error, sued the Northern Ohio Traction & Light Company, the plaintiff in error, in the municipal court of the city of Cleveland, and recovered a judgment in that court for $200. On error proceedings prosecuted in the court of common pleas, the judgment of the municipal court was affirmed, and this proceeding is brought to secure a reversal of the judgment of the court of common pleas affirming the judgment of the municipal court.

The plaintiff in the original action by his amended statement of claim charged, in substance, that on or about the 29th day of October, 1911, he was a passenger on a car of the defendant,

and that he was wrongfully ejected from the car by the conductor and motorman, and by reason thereof was seriously injured. The recovery sought was for damages for his alleged injuries.

It appears from the evidence that on the 29th of October, 1911, the plaintiff in the original action, with his two sons-in-law, boarded a car of the defendant for the purpose of going to Bedford. Three tickets were bought before the party got on the car. These tickets were retained by one of the plaintiff's sons-in-law. When the three men got on the car it was crowded, and the plaintiff went forward into the smoking compartment while the other two men remained in the back part of the car.

When the conductor collected the fares of the passengers he began at the rear end of the car and worked forward, and when he came to the two sons-in-law of the plaintiff he was given two tickets. According to the testimony of the sons-in-law, the third ticket which had been purchased for the plaintiff had fallen into a basket, and while the men were looking for this ticket the conductor passed on forward. When the conductor came to the plaintiff he was told, according to the plaintiff's testimony, that the plaintiff did not have the ticket but that his son-in-law had it. The plaintiff was told by the conductor to get the ticket, but he did not do so, and as soon as the conductor had finished his work of taking up tickets from the rest of the passengers, he returned to the plaintiff and made demand upon him for his ticket or his fare, and not receiving it, he forcibly ejected the plaintiff through the front door and in so doing inflicted some injuries upon him.

The conductor testified that when he came to the plaintiff and asked him for his fare, the plaintiff said the two men in the other part of the car had his ticket; that he told the plaintiff that he would have to get the ticket or he, the conductor, would have to put him off; that the plaintiff did not make a move to go back to get the ticket, and as soon as the car came to a stop at a telephone house on the line of the road, he put the plaintiff off the car.

The time that intervened from the first request made by the conductor for the plaintiff's ticket until the second demand was,

according to the conductor's testimony, about a minute or two.

It is contended on behalf of the plaintiff in error that it was the duty of the plaintiff to either produce his ticket or pay cash fare upon the demand of the conductor, and that the conductor had the legal right to eject him from the car, using such force as was necessary to accomplish that purpose.

It is undoubtedly the law that a railway company may rightfully eject from its car a passenger who, upon demand of the conductor, refused to produce his ticket or pay his fare, but the passenger is entitled to a reasonable time within which to comply with such demand. This is particularly true if the passenger has mislaid his ticket or lost his money, or from any other cause is in such a position that immediate compliance with the conductor's demand is not possible.

In *Nellis on Street Railways*, Section 263, the law is said to be as follows:

"A passenger is entitled to a reasonable time to produce his ticket or pay his fare before being ejected from the train or car, and if acting in good faith, the conductor has no right to eject him from the train or car without affording him a reasonable opportunity to make payment or to find and present his ticket, if lost or mislaid, or to provide other means of payment, if his pocketbook is lost or mislaid." See also *Clark* v. *Wilmington & Welvon R. R. Co.*, 91 N. C., 506; *Chicago & Alton R. R. Co.* v. *Willard*, 31 Ill. App. Ct., 435; *Maples* v. *N. Y. & New Haven R. R. Co.*, 38 Conn., 557.

The evidence before us in the bill of exceptions is such that the trial court might well have found that the conductor did not afford the plaintiff below reasonable opportunity to obtain his ticket. The car was crowded; the plaintiff was in the forward compartment while his companions who had the ticket were farther back in the car. The plaintiff did not understand English well, and there is nothing in the evidence to indicate that he was not acting in good faith. It was the duty of the conductor to afford the plaintiff a reasonable opportunity to get his ticket, and a finding that the conductor did not observe his duty in this respect would be amply sustained by the evidence.

There is also enough in the evidence to sustain a recovery on the ground that the conductor used excessive force, or at least did not employ proper means in ejecting the plaintiff from the car. The front door of the car out of which he was forcibly pushed, or thrown, was a considerable distance from the ground. There were no steps there and the plaintiff landed on his face and hands. We have no means of knowing on which theory the trial court based his judgment, but the evidence being sufficient to sustain the recovery on either theory, or on both combined, we find no error in the action of the municipal court in rendering judgment for the plaintiff there. The judgment of the common pleas court, affirming the judgment of the municipal court, is therefore affirmed.

AS TO VALIDITY OF AN ANCIENT DEDICATION.

Circuit Court of Medina County.

EDITH P. MINTON ET AL v. THE VILLAGE OF SEVILLE.

Decided, October 14, 1912.

Roads and Streets—No Dedication Under Act of March 3, 1831, Without Acknowledgment by Owners.

No dedication of a parcel of land for street purposes can be established under the act of March 3, 1831, providing for the recording of town plats, where the records do not show any acknowledgment by the owners of the plat as made by the county surveyor.

Frank Heath and *Lee Elliott*, for plaintiffs in error.
John C. Welty, contra

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

The aid of the court is invoked in this case to restrain the village of Seville from moving back the sidewalks in front of plaintiff's premises on Center street in the village and thus widening the traveled portion of the street.

To adjudicate the issues here involved it is necessary to determine the title to a strip of land about ten feet wide along the

east side of said street between the present sidewalk and the east line of Center street, as shown on a plat recorded in the office of the recorder of Medina county and purporting to be a plat of town lots in the town of Seville in the township of Guilford, county of Medina, and state of Ohio, made by the surveyor of said county in August, 1836, and acknowledged by certain individuals whose names are given on the plat.

The evidence satisfies us that plaintiffs have been in adverse possession of the strip of land in question long enough to obtain title thereto by prescription, under the rules of law, unless during all their possession this land has been part of a legally dedicated street.

The village claims a dedication for street purposes and offers the plat referred to as evidence thereof. We must therefore examine its evidences of title. If its title fails, the plaintiffs are entitled to the relief they seek.

The act of March 3, 1831, to provide for the recording of town plats (3 Chase's Statutes, 1846) was in force when the "town" of Seville was platted.

In the case of *Mitchell* v. *Treasurer,* 25 O. S., 143, the Supreme Court held, on page 154, that the first five sections of said act prescribe the mode of laying out towns on lands not embraced within the limits of cities or incorporated villages, and the sixth section of the act prescribes the mode of *laying out* lands within the corporate limits of cities and villages into lots, streets, etc., and of platting the same.

There is no evidence that Seville was incorporated as a village before 1853. The plat made in 1836 must, therefore, be governed by the first five sections of the act of 1831.

Section 1 of that act provides:

"That whenever any person wishes to lay out a town within this state, they shall cause the same to be surveyed, and a plat or map thereof made by the county surveyor, if any there be, of the county in which said town is situated; which plat or map shall particularly describe and set forth all the streets, alleys, commons or public grounds, and all in and out-lots, or fractional lots, within, adjoining or adjacent to said town, describing the same by courses, boundaries and extent."

The word "town" as used here, means a collection of habitations, its popular meaning, and not a municipal corporation, for we have never had a corporation under the name of "town" in the state of Ohio. That conclusion follows from a reading of Section 6 which *does* apply to plats in municipal corporations.

Section 2 of the act provides that the lots shall be numbered progressively and that dimensions be stated on the plat.

Section 3 provides for the planting of stones.

Section 4 provides:

"That the plat or map, after having been completed, shall be certified by the surveyor and acknowledged by the owner or owners of the town and recorded in the recorder's office of the county in which said town is situated."

Section 8 provides:

"That the map, when recorded, as required by this act, shall be deemed and considered in law a sufficient conveyance to vest the fee simple of all such parcels of land as are therein expressed, named or intended for public use, in the county in which the town is situated, for the uses and purposes therein named, expressed, or intended and for no other use or purpose whatever."

The plat of 1836 complies with all requirements of the act of 1831, if it was acknowledged "by the owner or owners of the town."

What is the evidence on that subject?

The deeds before us show that when the plat was made, one Chester Horner was the owner of three-fourths undivided interest in common in part of the land here in dispute, shown as part of Center street, and Elijah W. Harris was the owner of part of it, *and neither of them acknowledged the plat.*

The plat, then, was not acknowledged by all the "owners of the town" as required by Section 4 of the act of 1831, and was ineffectual to dedicate the streets shown thereon for street purposes.

Plaintiffs are not barred from claiming title by prescription under the rule that title to lands dedicated for street purposes can not be acquired by adverse possession, for these lands were never so dedicated.

It follows that plaintiffs are entitled to the relief they pray for and decree may be drawn accordingly.

IMPLIED WARRANTY OF A SELLER OF FOOD PRODUCTS.

Court of Appeals for Morgan County.

BOYD KEAN v. DELBERT BACHELOR.

Decided, May 14, 1915.

Sale of Unwholesome Food—Civil Action for Damages—Rules of Evidence Not Affected by the Criminal Statute—Eggs Not Inspected Until Four Days After Delivery.

1. The criminal statute relating to the sale of unwholesome provisions in no way changes the established rules of evidence or the proof required in cases where damages are sought on account of the sale and delivery of food products in a condition unfit for use.
2. The implied warranty of the seller, in the case of the sale of eggs, is not available as the basis of an action by the purchaser who received and shipped the eggs without inspection and which were found upon inspection four days later to be unfit for use.

M. E. Danford, for plaintiff in error.
C. C. Middleswart, contra.

HOUCK, J.; SHIELDS, J., and POWELL, J., concur.

This cause was originally commenced in the court of a justice of the peace in and for Windsor township, Morgan county, Ohio, tried and judgment rendered and appealed to the common pleas court of this county.

The cause was submitted to a jury in the common pleas court and a verdict rendered and judgment thereon in the sum of $90.34, in favor of the defendant in error, the plaintiff below. and to reverse this judgment the plaintiff in error prosecutes error to this court.

The plaintiff below, Delbert Bachelor, in his amended petition says, that on the 13th day of August, 1913, he sold and delivered to the defendant below, the plaintiff in error, and at his special instance and request, chickens and butter for the agreed price of $84.52, and which sum the said Kean agreed to pay to him for same, but that he has neglected, failed and refused so to do.

Plaintiff prays for a judgment against defendant for said sum of $84.52, with interest at six per cent. from August 13, 1913.

The defendant filed an amended answer, being in substance as follows:

That on and long prior to June 3d, 1913, he was engaged in the produce business, buying and shipping eggs to Pittsburg; that on said day the plaintiff sold and delivered to him, as and for good and wholesome eggs, and for the agreed price then paid for same, a large lot of eggs packed by plaintiff in cases, for shipment by defendant to Pittsburg, and with the knowledge on the part of plaintiff that they would be so shipped, without inspection or examination by defendant, and they were shipped by him without inspection; that 401½ dozens of said lot of eggs were unhealthy, decayed and spoiled; but said condition of said eggs was not made known at said time to defendant by plaintiff, nor did defendant know of their condition; that by reason of the premises defendant has been damaged in the sum of $74.28, for which amount he prays judgment against the plaintiff.

The plaintiff's reply admits that he sold and delivered the eggs to defendant at an agreed price, which was paid; that they were packed in cases, but denies each, all and every other statement and allegation in the amended answer of defendant.

The plaintiff in error seeks to reverse the judgment below for two reasons:

1. He relies upon the provisions of Section 12760 of the General Code of Ohio.

2. That the court erred in its charge to the jury.

Section 12760 of the General Code is as follows:

"Whoever sells, offers for sale or has in possession with intent to sell, diseased corrupted, adulterated or unwholesome provisions without making the condition thereof known to the buyer, shall be fined not more than fifty dollars or imprisoned twenty days, or both."

Counsel for plaintiff in error contends, that by the provisions of the above penal statute, decayed and unwholesome eggs must

not be placed upon the market; that they are not the legitimate subject of sale and traffic, unless their condition is made known to the buyer; that no express warranty is necessary, nor is any false representation or deceit requisite, nor is knowledge upon the part of the seller necessary to be alleged or proved by the defendant below.

The action at bar is a civil one and not of a criminal nature, and we think it is a well established principle in law that one who pursues a civil remedy can not claim favor under the provisions of a criminal or penal statute to make out his case. The criminal statute in question does not change in any way the well established rules of evidence, or the proof required in cases growing out of the sale and delivery of merchandise where damages are sought, nor does it change the rule of law governing express or implied warranties, as relates to the seller and buyer of merchandise.

Then, we are led to inquire, what is the law governing the case at bar?

In the absence of any express affirmation or statement to such effect, certain warranties are always implied in every contract, relating to the sale and purchase of merchandise.

There is an implied warranty that the seller is the owner of the goods which he offers for sale, and that he has the right to sell same; that at the time and place of delivery the buyer shall have and enjoy quiet possession of the goods, and that the same will be free from any charge or claim of any third person.

And we are of the opinion that from the usages of trade that where eggs were sold, as in this case, to a shipper when the opportunity for inspection is slight, if at all, that there is an implied warranty from the seller to the buyer, that the eggs are fit for the purpose for which they are sold, *i. e.*, shipping purposes, and that they are merchantable and not spoiled or decayed at the time of their delivery to the purchaser.

We are now led to inquire—what was the condition of the eggs, involved in this case, at the time of their delivery to the plaintiff in error?

The record discloses that the eggs were purchased by Bachelor of farmers in his community, during the week prior to June 3d, 1913, and they were packed in egg cases and delivered on that day to Kean, the purchaser; that the fillers were dry, but the cases a little wet; that Kean saw the damp cases but did not open any of them or inspect any of the eggs, but accepted them and shipped them the same day to Pittsburg; that four days later he was informed, by consignee in Pittsburg, that a large part of the eggs he purchased of Bachelor were spoiled and decayed.

Can it be inferred from these facts that the eggs were spoiled, decayed and unmerchantabe, on the 3d day of June, when Bachelor delivered them to Kean, because four days later they were in that condition in Pittsburg?

The purchaser had an opportunity to examine the eggs when they were delivered to him, but he did not elect so to do; he saw that the cases were damp, but made no complaint to the seller; if the dampness of the cases would have a tendency to cause the eggs to decay or spoil more rapidly, by reason of that fact, the purchaser was placed upon inquiry and should have applied the test, or made an inspection of the eggs, and if he had done so and found them decayed or spoiled he would have been under no legal obligation to have accepted them.

Speaking from the record, the evidence does not show that at the time of the delivery of the eggs, on June 3d, 1913, that they were spoiled, decayed or unmerchantable and we can not assume from the facts and circumstances, as disclosed by the evidence, that they were spoiled or decayed at said time.

All the law required of the seller in this case was that the eggs should be merchantable, and not in an unwholesome condition, at the time of the delivery, and that there could be no implied warranty that they would be merchantable, or free from decay four days later, and after the purchaser had shipped them to Pittsburg.

The question to be determined here is not the condition of the eggs at Pittsburg, but what was the condition of the eggs on the 3d day of June, 1913, when Kean accepted them from Bachelor?

Answering this inquiry from the evidence as disclosed by the record, they were merchantable and not decayed or spoiled and that is all that the law requires of the defendant in error in the premises.

We have examined the charge of the court, and we are of the opinion that it is a clear and concise statement of the law governing the facts in this case, and therefore we find no error in the charge of the court.

As we view this case, we find no error in the record, which is prejudicial to the rights of the plaintiff in error, and, therefore, we are of the opinion that the judgment below is right and should be affirmed. The judgment of the common pleas court is affirmed at the costs of the plaintiff in error.

WRONGFUL SUSPENSION OF A RETIRED POLICEMAN FROM THE PENSION ROLL.

Court of Appeals for Hamilton County.

STATE OF OHIO, EX REL JEREMIAH DELANEY, v. JOHN R. HOLMES, AS PRESIDENT OF THE BOARD OF TRUSTEES OF THE POLICE RELIEF FUND OF THE CITY OF CINCINNATI ET AL.

Decided, May 17, 1915.

Pensions to Retired Police Officers—Discontinuance of Payment by a Board Without Authority to Act—Proper Remedy of the Officer to Enforce Payment—Application of the Statute of Limitations.

1. Acquiescence in the action of a person or official board can not be charged where the person or board taking such action was without power or jurisdiction to act.
2. Where a member of the police force has been retired for disability and placed on the pension roll, and is thereafter suspended from said roll by a board acting without authority, his right of action

for a writ of mandamus to compel the issuance of a warrant for the pension of which he was thus deprived is by analogy limited to the six years from the time when his right of action accrued.

3. A pension being in the nature of a gratuity there is no legal liability for its payment which can be enforced in an action for money, but the remedy for recovery of a pension, payment of which has been wrongfully discontinued, is by mandamus.

Denis F. Cash and *Henry T. Hunt,* for relator.

Walter M. Schoenle and *Saul Zielonka,* City Solicitors, contra.

GORMAN, J.; JONES (E. H.), J., and JONES (Oliver B.), J., concur.

The relator brings this action in mandamus to require the defendants, Trustees of the Police Relief Fund of the City of Cincinnati, to draw their order on the treasurer of the city for the sum of $6,800 with interest, the amount of back pensions at the rate of $50 per month which he claims to be due him since September, 1903.

The pleadings, admissions and proof disclose that in 1887 the relator became a member of the police force of said city and continued actively in the service until 1898 when he was obliged to discontinue active service on account of two injuries received while in the service in the line of his duty; that on February 13, 1900, while a patrolman in good standing in said force, upon the recommendation of the mayor of said city and the approval of the police commissioners he was duly retired from active service by reason of physical disability, and placed on the pension rolls of said city, as provided by law; that at that time, under the rules and regulations of the trustees of the police relief fund, duly and legally adopted and approved, he was entitled to a pension of $50 per month for life to be paid monthly on the orders of said trustees, drawn on the treasurer of said city, payable out of said fund; that said trustees thereupon duly and legally granted and allowed said pension of $50 per month pursuant to the rules of said trustees, and thereupon said pension was duly and

regularly paid him, each and every month up to September, 1903, when said trustees of said fund refused, omitted and failed to pay him any further sums on account of said pension, and has since failed, refused and neglected to pay him anything whatsoever as and by way of a pension; that at the time of the retirement of Delaney and the granting of his pension he was in the state of Florida, and this fact was known to the mayor of the city and the police commissioner and trustees of said fund; and thereafter and up to the present time he has continued to be a resident and elector of the state of Florida. In August, 1903, the trustees of said fund adopted a resolution requesting each pensioner retired on account of physical disability to be examined by a physician as to his physical condition and furnish a certificate of such examination and that the committee to be appointed by September 1, 1903, ascertain what the pensioners are doing and if they are still entitled to pensions.

On September 8th, relator was cited to appear before the board of trustees on September 11, and show good cause why his pension should not be discontinued. At that time Delaney was in Florida, and he testified that he received no notice to appear, and that he could not have reached Cincinnati on the 11th of September if he had in due course received the notice. The minutes state that attorney Thomas Darby, claiming to represent Delaney, was present on September 11th, but Delaney testified and his testimony is uncontradicted, that he never authorized Darby to appear for him.

Certain communications were received from Florida officials concerning Delaney's alleged misconduct and violation of the laws of Florida which were ordered filed, and the trustees of said fund on that day suspended the payment of Delaney's pension, and ordered an investigation to be made as to whether or not his pension should be discontinued. On October 9, 1903, the payment of Delaney's pension was further suspended and a committee was appointed to confer with the mayor and chief of police, with a view to filing charges against him to cause his dismissal from the force and a revocation of his pension.

A committee was appointed, and on November 16, 1903, reported that they had requested an opinion from the city solicitor as to the proper method of procedure. The opinion of the solicitor is not in evidence. The committee recommended that inasmuch as Delaney failed to answer summons to appear before the board of trustees and show good cause why his pension should not be revoked, that his name be dropped from the pension roll. The committee's recommendation was not adopted, but on that date further payment of his pension was again suspended until such time as he shows good cause why his pension should not be permanently discontinued.

On December 7, 1903, the trustees directed a communication to be addressed to County Solicitor Bryan, of Duval county, Florida, stating that Delaney's pension was suspended because he had forfeited his residence in Cincinnati by becoming a resident of Florida, thereby removing himself from the control of the board of trustees; and that his alleged criminal act had nothing to do with the action of the board in the matter.

Nothing further occurred, as shown by the minutes of the trustees, until June 3, 1913, when Delaney made application for reinstatement as a pensioner, and his application was then and there rejected. On October 1, 1914, he again applied to the trustees for reinstatement, and on January 7, 1915, the trustees refused to reverse the action of the former board of trustees. Thereupon this action was brought.

The law governing the police relief fund and the granting of pensions is found in Sections 4616 to 4631, inclusive, of the General Code. A copy of the rules of the trustees in force when Delaney was placed on the retired list and still in force and unchanged down to 1905, were attached to the reply, and were offered in evidence ("Ex. A," Bill of Exceptions). The amount of pension to be granted is not fixed by statute but by the rules of the trustees.

The police relief fund is raised and maintained by a tax levy not to exceed three-tenths of a mill, by donations, fines imposed on the members of the force in disciplining them, contribu-

tions from members of the force, and the proceeds of the sales of unclaimed property and money in the police department.

The board of trustees had no power or authority, under the law or their rules, to suspend Delaney's pension or to revoke the same. Their duties are and were purely ministerial (*State, ex rel Rothgery,* v. *Trustees of Firemen's Pension Fund,* 20 C.C. [N.S.], 13). The constitution and by-laws of the Police Relief Association, which are attached to the bill of exceptions (Exhibit A) and which constituted the rules of the trustees of the fund when Delaney was placed on the pension rolls and when the trustees undertook to suspend the payment of his pension, contain no provisions authorizing such action, nor is there any warrant or authority under the statutes governing this fund, which would authorize the trustees of this fund to suspend or revoke any one's pension. By Rule 44 pensions in the police department were to be granted upon the recommendation of the mayor or board of directors, and the approval of the police commissioners, and when so granted it shall be the duty of the president and the secretary of the board of directors, together with the president of the board of police commissioners, to sign and attest monthly warrants for pensions. The official notification of the clerk of the board of police commissioners shall give the proper authority.

By Rule 45 it is provided that pensions may cease on restoration to duty and full pay. The police commissioners' board under the law and the rules, was the only body authorized to recall a pensioner to duty and full pay; and whenever they did this the clerk of the commissioners under this rule 45 should notify the directors or trustees of the fund, of that fact, and thereupon the pension should cease and the officers of the directors or trustees should cease signing warrants for such discontinued pension.

By rule 46 any member of the police force who shall while in the performance of his duty, become, or be found upon examination by the board of police commissioners to be physically or mentally permanently disabled so as to render necessary his

retirement from all service in the police department, upon the recommendation of the mayor, with the approval of the board of police commissioners, shall be allowed a pension of $40 a month, payable from the fund.

By rule 52 honorably retired members of the force shall have no interest in the fund other than that provided for them in the constitution and by-laws, and they shall not be subject to dues or assessments.

The mayor and the police commissioners were the only ones who had authority to grant, suspend or revoke pensions.

By the provision of Section 4699, General Code, the board of trustees shall administer and distribute the police relief fund.

By the act of April 23, 1902 (95 O. L., 223-229), paragraph (*g*) the rights of pensioned members were preserved, and under the law as then amended and by the act of April 20, 1904 (97 O. L., 241-251), paragraph (*g*), these rights were again recognized and preserved. On November 20, 1905, minutes of trustees, 362-363, the amount of the monthly pension of disabled retired members was raised to $50 per month, and that rule continues in force to this day. Removal from the state of Ohio under the law and the rules did not constitute a forfeiture of the pensioner's rights. While the police commissioners and the mayor might have made such a rule, and perhaps the trustees of the fund might also have promulgated such a rule, as a matter of fact no such rule was ever adopted by anybody having any connection with the police department or the fund. Neither the statutes nor the rules have made violation of laws or criminal acts or conduct on the part of the pensioner a cause of forfeiture of his pension; and no authority is lodged by statute or the rules of the trustees in the board of trustees of the fund, to deprive a pensioner of his pension, or to suspend or revoke the same.

Delaney's pension was never revoked by any body. The trustees undertook to suspend it, from time to time, but their acts in this regard were without authority and wholly null and void. Such actions of the trustees had no more effect on Delaney's

rights than if they had been taken by the city treasurer or any other person or body. There was no jurisdiction in the board of trustees to suspend Delaney's pension.

It is urged that Delaney had misconceived his remedy and that he has an adequate remedy at law in an action against the city to recover the amount of his withheld pensions. We think that the pension being a gratuity, there is no legal liability which could be enforced in an action at law to recover either damages for breach of contract or for moneys due. His remedy is in mandamus, and he is properly before this court. *State, ex rel Rothgery,* v. *Trustees of Firemen's Pension Fund,* 20 C.C.(N.S.), 13; *Karb* v. *State,* 54 O. S., 363; *Commrs of Wood Co.* v. *State, ex rel Holz,* 41 O. S., 423; *State, ex rel Weiss,* v. *Keefer et al,* 20 C.C.(N.S.), 366.

Mandamus is now held to be a civil action and may therefore be subject to the statute of limitations, if there be facts to show that the statute operates. *State* v. *Philbrick,* 69 O. S., 283.

We do not think that Delaney is chargeable with laches or acquiescence in the suspension of his pension, because the board of trustees having no power to suspend his pension their action was null and void and there was no legal action in which he could acquiesce. Before one can be charged with acquiescence in a wrongful action, the person or body taking the action must have had power to act, but acted wrongfully, unjustly or without proceeding properly. There can be no acquiescence where the action taken is without jurisdiction or power. Where there is no power to act, the case stands as though no action had been taken.

We think this case is ruled by the case above cited, *State, ex rel Rothgery,* v. *Trustees of Firemen's Pension Fund,* 20 C.C. (N.S.), 13.

We are of the opinion, however, that by the failure and neglect of Delaney to assert his rights, his claim is subject, by analogy, to the rule that would apply to a case where the statute of limitations could be invoked. This statute which might be invoked if it were an action to recover the money, is Section

11224—Sub. 4—the four years statute. An action shall be brought within four years after the cause thereof accrued. 4. For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated. His right to bring mandamus would accrue or arise each month. When his pension became payable, a refusal to issue a warrant in his favor by the trustees, would give him a right to sue in mandamus; so that part of his claim which ante-dates four years from the commencement of this action should not be allowed, but he will be entitled to a writ commanding the defendants to issue a warrant upon the city treasurer for a sum equal to fifty dollars per month for the four years preceding the filing of the petition herein, and from that date, together with interest on each installment of $50 from the date the same should have been paid, up to the date of the decree herein.

Judgment accordingly.

Opinion on Rehearing.

State of Ohio, ex rel Jeremiah Delaney, v. John R. Holmes, etc., et al.

Henry T. Hunt and *Denis F. Cash,* for plaintiff.

Walter M. Schoenle and *Saul Zielonka,* City Solicitors, contra.

Gorman, J.; Jones (E. H.), J., and Jones (Oliver B.), J., concur.

Both parties filed motions for a new trial in this case.

Defendants set out several grounds upon which they claim the motion should be granted. The court does not consider any of the grounds well taken by defendants, and does therefore overrule their motion for a new trial.

The plaintiff's motion for a new trial is based upon the ground that the decision of the court is contrary to the law and the evidence and against the weight of the evidence. In the argument

to the court on this motion plaintiff's counsel claimed that the court erred in holding that the plaintiff could not recover his pension beyond a period of four years prior to the commencement of this action, and in holding that although the statute of limitations does not apply to this case, nevertheless by analogy the rule laid down in Section 11224 limiting the recovery to four years, when the action is a civil one for an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated.

The court was in considerable doubt as to whether or not the plaintiff would be barred from a recovery by reason of his laches, and if so what rule of the statute of limitations by analogy should be applied to this case. Upon further consideration we are of the opinion that the better rule to apply is the one laid down in Section 11222, General Code, which limits actions upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture of penalty, to a period of six years after the cause thereof accrued.

In a case somewhat similar to the one at bar, entitled *Merrill* v. *Board of Education of Cincinnati*, 4 C. C., 97, the circuit court of this county held that where there had been such conduct on the part of the relator as amounted to a waiver on his part of compensation for a part of the time he acted as a school examiner, in analogy to the statute of limitations the court should now refuse a writ of mandamus requiring the board of education of the city of Cincinnati to fix the compensation of the relator for any period prior to six years before the commencement of this proceeding.

In that case the court by analogy applied the rule laid down in Section 11222, General Code. We therefore conclude that the rule laid down in the above entitled case should be followed by us, and there will be a modification of the opinion heretofore rendered herein limiting the right of the plaintiff to recover to a period of six years prior to the date of the commencement of this action.

DEFENSES OF WANT OF JURISDICTION AND ON THE MERITS.

Court of Appeals for Columbiana County.

JOHN H. SMITH v. GEORGE FRESHWATER ET AL.*

Decided, April 8, 1915.

Jurisdiction—Defense of Want of, Must be Made at Threshold of the Case and Continued to the End—Effect of Objection to Jurisdiction Not Destroyed by Subsequent Answer on the Merits.

Where a defendant has interposed by motion an objection to the jurisdiction of the court over his person, he does not upon the overruling of the motion submit to the jurisdiction by filing an answer in which he challenges the jurisdiction of the court in the first defense and in a second defense answers to the merits of the cause.

W. F. Lones and *Geo. T. Farrell,* for plaintiff in error.

Billingsley, Moore & Van Fossan and *Hughes & Tripplehorn,* contra.

HOUCK, J. (of the Fifth Appellate District, sitting in place of Spence, J.); POLLOCK, J., and METCALFE, J., concur.

This is an error proceeding. The parties to this case stand here in the same relation to each other as in the court below.

The plaintiff brought suit in the common pleas court of this county against the defendants, claiming damages from them in the sum of five thousand dollars, as the result of injuries and damages to a vein of coal belonging to plaintiff. Summons was issued for all of the defendants, but was only served upon two of them. The defendants, George Freshwater, Lee Freshwater, Philip Freshwater, Milton Freshwater and Elmer Freshwater, were not served with summons. Their attorney appeared and

*Motion to direct the Court of Appeals to certify its record in this case to the Supreme Court, overruled July 2, 1915.

filed a motion solely and wholly for the purpose of attacking the jurisdiction of the court over their person, and asked that the summons be quashed. Why the motion was filed we do not know, and the record does not disclose. They then filed an answer, setting up two defenses: *first,* attacking the jurisdiction of the court over their person; *second,* answering to the merits of the cause set out in the petition of plaintiff. The cause was heard, and the action was dismissed as to them, and to their dismissal the plaintiff excepts.

The only question to be determined is, whether by answering in the first defense in which they challenged the jurisdiction of the court, they submitted themselves to the jurisdiction of the court, by interposing a second defense in which they answered to the merits of the cause? We think not.

In support of the view of the court in this case, we desire to call counsel's attention to the case of *Long* v. *Newhouse et al,* 57 O. S., 368. We might say, in the first place, as the court views it, he who attempts to invoke the authority that a court has no jurisdiction over his person, must do so at the very beginning of the case, and continue it until the end. In other words—

"It must be at the very threshold of the defendant's appearance to the action. The reason is a plain one. If a party may at the same time invoke the jurisdiction of a court on the merits of an action, and deny its jurisdiction over his person it would work great injustice."

The court here, in distinguishing and passing upon the case in 11 O. S., 379, and also in 7 O. S., 234, say:

"He could under such practice, if the judgment on the merits is in his favor, avail himself of it as a bar to another action, but if it should be against him, he could set it aside for want of jurisdiction of his person. Hence it is said, that, 'If a party wishes to insist upon the objection that he is not in court, he must keep out for all purposes except to make that objection.' In *Allen* v. *Miller,* the court is careful to observe that Miller embraced the first occasion which offered, to-wit, in his answer, to assert his objection to the jurisdiction of the court; and distinguished

the case from that of *Evans* v. *Iles*, 7 O. S., 234, where the defendant had previously filed a demurrer, and, although withdrawn, had, as the court held, subjected the defendant to its jurisdiction. And, commenting on the withdrawal of the demurrer, the court said: 'It ceased to be of any consequence in the case; but as a fact, the evidence of which was indelibly fixed on the journal of the court, and constituting of itself an appearance in the case, it was as significant and as operative after the demurrer was withdrawn as it was before.' ''

Therefore, in the case at bar, the defendants in question interposed an objection to the court's jurisdiction over their person. And after the motion was overruled, filed an answer, and in the first defense again challenged the jurisdiction of the court over their person; and we think that having pursued this from the beginning until the end the court was without jurisdiction over the person.

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

REVOCABLE GRANT FOR THE LAYING OF TELEPHONE CONDUITS.

Court of Appeals for Hamilton County.

STATE OF OHIO, EX REL THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY, V. THE CITY OF NORWOOD AND HARRY J. PIERSON, DIRECTOR OF PUBLIC SERVICE.

Decided, February 5, 1915.

Municipal Corporations—Contracts with Utility Companies Which May be Terminated or Modified—Rights Under a Municipal Grant Not Determinable in a Mandamus Proceeding.

1. An ordinance granting the right to a telephone company to construct and maintain underground conduits in the streets, avenues and public ways of a municiptlity, but imposing conditions of so meager and indefinite a character as to necessarily imply that the real conditions are vested in the discretion to be exercised by the director of public service, and which ordinance had not been accepted by the company or acted under by it, is subject to revocation, and the revoking ordinance under consideration in the present case is held valid.
2. A controversy between a municipality and a telephone company as to the right of the latter to be granted a permit to lay conduits in certain streets can not be determined in a mandamus proceeding.

Miller Outcalt, J. W. Heintzman and *Frank Cook,* for plaintiff.

S. A. Headley, contra.

JONES (OLIVER B.), J.; SWING, P. J., and JONES (E. H.), J., concur.

The relator in this case, a telephone company under the laws of Ohio, seeks by writ of mandamus to compel the director of public service of the city of Norwood and the city of Norwood to issue a permit to it to construct and maintain underground

conduits, with the necessary manholes and laterals for same, in five certain avenues in the city of Norwood.

The right is granted to a telephone company regularly organized in Ohio to use the highways of the state by provisions of law found in Title 9, Div. 2, Subdiv. 2, Chapter 2, of the General Code (Sections 9170 to 9198), but it is provided by Section 9170 that the construction of such line "shall not incommode the public in the use thereof," and by Sections 9197 and 9198, that consent of the city or village must be obtained therefor, and in the construction and maintenance of underground wires and pipes or conduits and other fixtures that consent shall be given by council. These sections indicate sufficient official control to prevent the public from being incommoded by these utilities in the use of public highways.

In a municipality the council and the director of public service have the care, management and control of the streets and the highways (General Code, Sections 3714, 4240, 4324, 4325 and 4326). And the municipal authorities have power to determine on the mode of use.

In *Telephone Co.* v. *Cincinnati,* 73 O. S., 64, 81, it is determined that where wires are to be laid underground, "that the consent of the city is thus made an essential condition." No terms are fixed by the statute as to the mode and manner of the use of the streets, but it is left to the determination of the municipal authorities. It was clearly not the intention of the Legislature to confer a *carte blanche* to such companies to use as much or as little of the public streets or highways as they might see fit, and it was evidently intended to confer upon the municipality sufficient authority to deal with the subject and to impose proper terms upon the company in granting its consent. *Columbus Telephone Co.* v. *Columbus,* 88 O. S., 466, 468, 469.

Council of the city of Norwood on December 18, 1913, passed an ordinance authorizing the relator telephone company to construct and maintain underground conduits in the streets, avenues and public ways of said city, one of the conditions of the ordinance being that:

"No streets, avenues, alleys or public ways shall be disturbed for the purpose of constructing conduits until said telephone company shall secure a written permit from the service director of the city of Norwood."

The ordinance fails to specify what streets or public ways are to be used; whether the wires and conduits are to be placed in thoroughfares or in back streets and alleys; whether all public ways are to be used, or those to be selected by the company or those to be selected by the city authorities; how many conduits are to be laid in any street; what size, form, or what material, or what manner of construction is to be used; how much and what portion of the street is to be occupied; how deep they are to be laid and what provision is to be made to prevent interference with sewers, water pipes, gas pipes and house connections for same. The only conditions provided by the ordinance are:

1. The one quoted above, that the company must secure a written permit from the director of public service.

2. That the conduits shall be of sufficient depth and strength to permanently maintain the surface of the streets without breaking, and constructed under the supervision and to the satisfaction of the city engineer, and that the street or public way shall be restored to "its former state of usefulness" and the city saved harmless from damages caused to persons or property.

3. A reservation of sufficient space in each subway for wires for the fire and police departments of the city.

4. The giving of a bond of $2,000 to secure faithful performance of the provisions of the ordinance.

All the other provisions and conditions for the protection of the city of Norwood must evidently have been intended to be covered by the written permit which the ordinance requires must be first secured from the service director before any street or public way should be disturbed for the purpose of constructing such conduits. This necessarily confides to this important officer, who is made by law the chief administrative officer of the city, a high degree of official discretion to be exercised by him in determining what conditions shall be imposed upon the issuance

of this permit. It can hardly be claimed that the service director is a mere automaton vested with no official discretion, and that he is compelled to issue a blanket permit to open any street or avenue at any place for the purpose of constructing conduits of any kind or description that the telephone company may be pleased to request.

The defendants in their answer, however, deny that the ordinance was ever accepted by the telephone company, and allege that it was repealed by an ordinance passed February 16, 1914, and as no time was fixed in the ordinance for the duration of the grant and nothing had been done by the telephone company under the terms of said grant, the city was within its legal rights in the repeal of said ordinance.

It appears from the evidence that the telephone company on December 31, 1913, deposited with the clerk of the council of the city of Norwood a bond in the sum of $2,000 guaranteeing that it would faithfully comply with the provisions of said ordinance. No written acceptance, unless said bond can be considered such, was filed with the city, and no action is shown to have been taken by the city council looking to the approval of said bond or showing that it had in any way been brought to the attention of the council. It also appears that between December 18, 1913, and January 15, 1913, certain plans and blueprints were prepared at the instance of relator, a copy of which was attached to the application made by said company to the director of public service for permission to construct conduits in certain parts of Wayland avenue, Regent avenue, Hudson avenue, Elsmere avenue and Floral avenue, and which application was dated February 18, 1914. It appears that these plans were actually prepared before the ordinance became effective, and there is no evidence to show that the preparation of these plans had in any way been brought to the attention of any of the municipal authorities of said city of Norwood prior to the date of said application. On February 16, 1914, the council of the city of Norwood duly passed an ordinance repealing its former granting ordinance No. 2585 which had been passed December 18, 1913,

and under which the relator claims to have secured vested rights for the construction of said conduits. The application for permit was made February 18, 1914.

Under this state of facts it therefore becomes a question whether a contract or franhise had been created between the parties, which had become irrevocable without mutual consent. It is undoubtedly essential, to create such a grant, that an acceptance must be had on the part of the grantee. This is usually evidenced by a formal written acceptance filed with the granting authority, but such written instrument is not absolutely necessary, but the acceptance may be evidenced by the acts of the parties.

When a franchise has been created by a grant duly accepted, it can not be revoked merely at the will of the grantor. *Louisville* v. *Cumberland Telephone Co.*, 224 U. S., 649; *Grand Trunk Western Ry.* v. *City of South Bend*, 227 U. S., 544; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S., 58; *Russell* v. *Sebastian*, 233 U. S., 195.

In each of these cases it appears that there was no question of acceptance, operation and large expenditures of money under the grant.

But if no formal acceptance has been had, and no steps have been taken amounting to an acceptance by the acts of the parties, and no money has been expended under said grant, it would appear that by proper action the granting authority might withdraw its proposed grant and change the terms and conditions thereof, or revoke it entirely.

In *Matter of New York Electric Lines Co.* v. *Empire City Subway Company*, 201 N. Y., 321, the following language is used in the opinion of the court, page 331:

"The question thus arises as to whether a bare acceptance of the permit granted by the resolution of the common council amounted to an irrevocable franchise granted by the city. Clearly in the absence of partial performance under the permit, by which some vested interest in property is acquired, the state does not become bound by such permit."

And on page 334:

"Should a public service corporation be permitted to acquire an irrevocable franchise by mere acceptance without spending a dollar by way of performance, and then hold up the public in its enjoyment of the privileges contemplated by the grant indefinitely, or until they can be bartered away for a fortune? Should the municipalities to whom the Legislature has delegated the right to grant permits for the use of their streets for public service purposes be denied the power to revoke licenses granted in case of failure of the grantee to render substantial performance? We think not. No reasons for the deprival of the municipalities of such power are suggested and none are apparent to our minds. We, therefore, incline to the view expressed by the trial court that the mere granting of a permit by a city to a corporation to use the streets for a purpose, is a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed contemplated by the permission sufficient to create a right of property and thus form a consideration for the contract."

This case has been reviewed by the Supreme Court of United States, where the judgment of the New York Court of Appeals was affirmed, and will be published in 235 U. S., 179.

The principle laid down in the case *of East Ohio Gas Co.* v. *Akron,* 81 O. S., 33:

"Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto,"

would further support the right of the municipality to repeal a granting ordinance before any acts, operations or expenditures had been had thereunder by the grantee.

In the case at bar, considering the meager and indefinite character of the conditions imposed by the granting ordinance, which necessarily imply that the real conditions are vested in the discretion to be exercised by the service director in granting the permits thereunder, it can not be claimed that anything had been

done which would cause this so-called franchise to become irrevocable by the city, and in the opinion of the court the action of the city council in passing the revoking ordinance must be held to be valid.

Even if the court should be wrong in its conclusion in the matter of the effect of the revocation ordinance, it would still be a question as to whether relator has established in this case the right to the writ of mandamus sought herein. The writ is defined by Section 12283 and the succeeding sections of the General Code. It can only issue in a case where there is a clear right and an absolute obligation and where there is no adequate remedy in the ordinary course of law. The office of a writ of mandamus has been very fully considered and carefully analyzed in the opinion of Shauck, J., in the case of *Fraternal Mystic Circle* v. *Fritter,* 61 O. S., 628.

In the case of *State, ex rel Gallinger,* v. *Smith,* 71 O. S., 13, a writ of mandamus was refused against a county auditor where the right to require him to do the thing sought was not clear and the duty was not one specifically enjoined upon him by law.

In *Mt. Vernon* v. *State,* 71 O. S., 428, the third proposition of the syllabus states:

"A controversy between the parties to a contract as to their respective rights under the contract can not be determined in proceedings in mandamus."

State, ex rel v. *Moore,* 42 O. S., 103:

"If judgment or discretion must be used by an officer, his exercise of them in the absence of fraud, bad faith or abuse of discretion will not be controlled or directed by mandamus."

A clear right to the issuance of the permit not having been shown, and the director of service being undoubtedly vested with official discretion in regard to same, the writ of mandamus prayed for must be refused.

CONSTRUCTION OF COUNTY BRIDGES UNDER THE EMERGENCY STATUTE.

Court of Appeals for Tuscarawas County.

S. A. SWANSON ET AL v. BOARD OF COUNTY COMMISSIONERS OF TUSCARAWAS COUNTY, OHIO, ET AL.

Decided, June 11, 1915.

County Commissioners—Power of, to Construct a New Bridge in Case of an Emergency—Approval of the Prosecuting Attorney—Notice Not Required—Pleading in an Action Involving the Contract.

1. In an action involving the contract for the building of a county bridge under the emergency statute, an allegation that the prosecuting attorney approved in writing the form and correctness of the contract as entered into by the county commissioners, is a sufficient compliance with the requirement of Section 2356, General Code, having reference to contracts exceeding $1,000.
2. The provisions for notice of an intended purchase or improvement, found in Section 2414, do not apply to the construction of a new bridge in case of a casualty requiring prompt action.
3. A petition drawn under favor of Section 5638, involving the replacing of a county bridge at a cost exceeding $18,000 without a vote of the electors, is not open to demurrer for indefiniteness of statement as to whether the new bridge is to occupy the site of the old one. An objection of that character can only be reached by motion.

Lynch & Day, D. A. Hollingsworth and *J. F. Greene,* for plaintiffs in error.

W. V. Wright and *E. E. Lindsay,* contra.

HOUCK, J.; POWELL, J., concurs; SHIELDS, J., dissents.

This cause is here on error to the common pleas court of this county.

The court below sustained a general demurrer to the petition of plaintiffs in error, the plaintiffs below, and judgment was rendered against plaintiffs in error for the costs, and error is

now prosecuted to this court to reverse the judgment of the common pleas court in sustaining said demurrer.

The right is claimed, by plaintiffs, to maintain their action and their petition is drawn under favor of Section 5638, *et seq.* of the General Code of Ohio which provides for the construction of a bridge in a case of casualty, at a cost exceeding $18,000, without a vote of the electors, when *"an important bridge belonging to or maintained by any county becomes dangerous to public travel, by decay or otherwise and is condemned for public travel by the commissioners of said county, and the repairs thereof, or the building of a new bridge in place thereof, is deemed by them necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county."* * * *

Counsel for defendants, rely upon three grounds in support of the demurrer, to-wit:

1. That the contract, between plaintiffs and defendants, was not approved by the prosecuting attorney, as required by law.

2. Failure to publish notice of intention to erect bridge.

3. That the averment in the petition "that the contract provided for the construction of a new bridge to be built *at or not far distant from the point where the old bridge stood"*—is not sufficient, and does not comply with the sections of the General Code hereinbefore referred to.

We have given each and all of the grounds of the demurrer careful consideration, and as to the first, we are of the opinion that the allegation in the petition—*"that the prosecuting attorney of the county also in writing approved the form and correctness of the contract"* is a compliance with the requirements of Section 2356 of the General Code, which provides:

"Before work is done or material furnished all contracts that exceed one thousand dollars in amount shall be submitted by the commissioners to the prosecuting attorney of the county. If found by him to be in accordance with the provisions of this chapter and his certificate to that effect is indorsed thereon, such contract shall have full force and effect, otherwise they shall be null and void."

The second ground of the demurrer attacks the validity of the petition, for the reason, that Section 2444 of the General Code was not complied with. This section of the code provides:

"Before the county commissioners purchase lands, or erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate handbills and publish in one or more newspapers of the county, notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time that such purchase, building, or location is made. They shall hear all petitions for, and remonstrances against, such proposed purchase, location or improvement."

Statutes are construed according to their intent and meaning. The petition, in this case, was drawn under favor of Section 5638 *et seq.* of the General Code, which provides for the construction of new bridges in case of casualty. It is a special statute and to be used on special occasions, and was enacted by the Legislature to cover particular cases as they might occur, and which needed *prompt* action on the part of the county commissioners, and for which other statutes did not provide.

Giving to Section 5638 *et seq.* that fair and liberal interpretation that the Legislature certainly intended they should have, and for the purposes for which they were enacted, we are unable to see where Section 2444 of the General Code has any application to the case at bar, and therefore are of the opinion that this branch of the demurrer is not well taken.

Coming now to the third branch of the demurrer, which is the real problem to be solved, will say that it is a question of importance and has caused us much study of the numerous authorities cited by counsel, as well as an exhaustive research on the part of the court of other authorities.

Counsel for the demurrer, in their brief, contend that the commissioners have no right to contract for a bridge to be constructed at a point—"not far from the old bridge," but they do not say anything concerning the word "at," which precedes the above language and is followed by the word "or." The language in

the petition is "at or not far from the point where the old bridge stood."

Would it not be just as reasonable to say that the bridge was to be built *at* the place where the old bridge stood? How can a court relying wholly and entirely upon the language used infer that the bridge is or will be constructed not far from the *point* where the old bridge stood? Has not the court the same right to rely upon the word *at* and say that the bridge will be built *at* the point where the old bridge stood?

The court in passing upon the demurrer has no right to go outside of the petition for information, but must rely wholly and entirely upon the language used in the petition.

The demurrer challenges the language of the petition as not being sufficient in law, but must and does admit all the allegations to be true.

Can it be properly claimed from the language used that the contract does not provide that the new bridge *can* be built at a point where the old bridge stood? We think not. And if this be true then the petition is good as against a general demurrer.

If the defendants did not know, or could not ascertain from the language used in the petition, whether the new bridge was to be built at a point *where* the old bridge stood, or not far from the point where the old bridge stood, then it was their privilege to file a motion, asking that the petition be made definite and certain in this particular.

The most that can be claimed for the language used, is that it is indefinite; if so, then the objection should have been raised by motion and not demurrer.

The sufficiency of pleadings under the code, as to certainty, precision, definiteness and consistency of allegation, and indeed in respect of every other variety of defect of allegations which does not amount to such an absolute omission of fact as to constitute no ground of action or defense, must be taken advantage of or objected to by motion under the provision of the code, and can afford no ground for demurrer.

The demurrer admits all that is expressly alleged and properly set forth in the petition, and also whatever can, by a fair

and reasonable intendment, be implied from the allegations of fact contained therein.

Taking this view of it, and upon the whole case, a majority of the court is of the opinion that the common pleas court erred in sustaining the demurrer, and the judgment below is reversed, and the cause remanded to the court of common pleas with direction to overrule the demurrer to the petition, and for further proceedings according to law.

TIME LIMIT FOR FILING A BILL OF EXCEPTIONS.

Court of Appeals for Hamilton County.

JOSEPH B. KELLEY, ADMINISTRATOR, ETC., v. LOUIS P. HERMANN ET AL.

Decided, December, 1914.

Bills of Exceptions—Construction of the Statutes Relating to the Time Limit for Filing—General Code, 11472.

There is no warrant for considering a bill of exceptions which was not filed in the court of appeals until eighty days after the entering of the judgment in the common pleas court, notwithstanding said judgment was entered more than a month before the overruling of the motion for a new trial and the bill of exceptions was within proper time allowed and filed in the trial court within seventy-seven days. Had it been filed in the court of appeals on the same day as in the common pleas court it might have been considered.

W. F. Chambers and *J. B. Kelley*, for plaintiff in error.
Simeon Johnson, contra.

JONES (Oliver B.), J.; SWING, J., concurs; JONES (E. H.), J., concurs in a separate opinion.

This cause comes before the court on a motion filed by a defendant in error to strike from the files the bill of exceptions

filed herein because the same was not filed within the time provided by law.

The record shows that a final decree was rendered in this case February 20, 1914. Motion for new trial was filed February 21, 1914, by the present plaintiff in error, who was defendant below, which motion was overruled on March 21, 1914. On April 16, 1914, a bill of exceptions was prepared and filed by the defendant below, plaintiff in error here. After objections and an extension of time this bill of exceptions was allowed and filed in the trial court, May 8, 1914. On May 11, 1914, the bill of exceptions with an additional transcript showing its filing below was filed in this court. The petition in error, original papers other than the bill of exceptions, and the original transcript, were filed in this court March 30, 1914. It will be observed that the bill of exceptions was originally filed on the 26th day after the overruling of the motion for a new trial, and was within the time prescribed by Section 11564 of the General Code; and it was finally allowed and filed in the trial court on the 48th day after the overruling of the motion for a new trial, which was within the time prescribed by law.

It is contended by defendants in error that under the provisions of Sections 12263 and 12270, General Code, as amended, a bill of exceptions must be filed in the court of appeals within seventy days, and that if filed later than that date it can not in any event be considered. This brings the court to a construction of the terms of Section 11572, General Code, which is as follows:

"A party desiring to have a final judgment or order reviewed, on error, may file his petition in error, his transcript and other papers in the proper court, without waiting to perfect a bill of exceptions, and thereupon may, if he desires, secure a stay of execution of such judgment or order, by giving the bond therefor as provided by law. Thereafter, within the time limited by law therefor, he may prepare, have allowed and signed, a bill of exceptions, which, when duly allowed and filed in the trial court, he also may file in the error proceeding; whereupon it shall be be received and considered by the reviewing court as if filed with his petition in error."

The words found in the last sentence of this section, "within the time limited by law therefor," refer to the time fixed for the original filing of the bill of exceptions in Section 11564, and for the signing and allowing of same by the trial judge, including any extension of time made by him under Sections 11565 to 11571 inclusive. And the words in the same section "which when duly allowed and filed with the trial court he may also file in the error proceeding," fix the utmost limit within which a bill of exceptions may be filed in the error proceeding as the time when it must be filed in the trial court if beyond the seventy day period fixed by Section 12270, General Code.

In this case the final allowance and filing of the bill of exceptions by the trial court, May 8, 1914, was seventy-seven days after the entry of the judgment, and if the bill of exceptions had been filed in the reviewing court on the same day that it was filed in the trial court, under the terms of Section 11572, it might be received and considered, even though it were filed seven days after the limit of time ordinarily fixed. But plaintiff, on whom the duty rested, failed to file the bill of exceptions in this court within that time, but filed it three days later, which is outside of the utmost limit allowed by law, and there is therefore no warrant for its consideration by this court.

Motion to strike it from the files will therefore be granted. And it appearing from an inspection of the record that a bill of exceptions is necessary to show any of the errors claimed in the petition in error, the judgment of the court below must be affirmed.

JONES (E. H.), J.

I agree with my associates in the construction of Section 11572, General Code. I most reluctantly concur in the action of the court in striking the bill of exceptions from the files, and do so only because the question seems to have been settled in this state by the language of the court in deciding the case of *Young* v. *Schallenberger,* 53 O. S., 291, and by *Dowty* v. *Pepple,* 58 O. S., 395.

The construction which I think our statutes bear is discussed and expressly disapproved by Judge Williams on page 299, *et seq.*, of the opinion in the former case. It will be noted that it was claimed by counsel for plaintiff in error in that case "that the judgment was prematurely entered, and for the purposes of the question here should be treated as rendered at the time of the overruling of the motion for new trial." The Supreme Court found against this contention. At that time six months were allowed from the date of the judgment within which to file a petition in error and it is quite likely that situations such as this did not often arise.

But with the time reduced to seventy days they become less rare. Within two months this court has stricken from the files four bills of exceptions. In at least two instances the motions for new trial were still pending, and in one case it had not been argued, seventy days after the entering of the judgment. The motions for new trial in all of the cases, as in this, were filed under authority of Section 11576, General Code. That section is found in Chapter 5, Part 3, Title 4, Division 3 of the General Code. In this section and throughout the chapter where it is found, the motion for a new trial, such as was filed in this case, is described as a motion after "a verdict by a jury, a report of a referee or master, or a decision by the court" (see Section 11575, General Code). This chapter bears the heading "New Trial." Chapter 6 of Division 4, Part 3, Title 1 of the General Code, bears the heading "Other Relief after Judgment." This is probably only important to show the construction placed upon these sections by the codifiers and the views they held which led to this collection and arrangement of the provisions of the code with reference to the re-submission of a case.

I think that the judgment by the court below in this case was entered prematurely. The section under which the motion for new trial was filed contemplates, and indeed expressly provides, that such motion must be filed after the decision, verdict or report.

The understanding which I have of this and the following sections is that the motion and the decision thereon must antedate

the judgment. When the Legislature provided that the motion should be made within three days after the decision, the intention was that it should be made before the judgment, and this is as clear to my mind as if the words "before judgment" were incorporated in the statute. A judgment entry made prior to the disposition of a motion for new trial is not void but is, with due respect to the opinion of the Supreme Court, prematurely entered. And for the purpose of this motion the judgment should be considered as having been entered at the time or after the motion for new trial was overruled.

Such a construction would obviate much of the difficulty and awkwardness in which attorneys and clients are placed by the unauthorized haste in which judgments are entered in cases like unto this. A situation in which a lawyer finds that he is required to prepare and file a petition in error and bill of exceptions while his motion for new trial is still pending, and before he can be sure he will have any complaint to urge in a reviewing court, certainly calls for new legislation or a new construction of that which we now have. I am of the opinion that no new legislation is necessary and that, if practicable, the matter should again be presented to the Supreme Court for consideration.

SUFFICIENT GROUNDS FOR RECISSION OF CONTRACT FOR SALE OF REAL ESTATE.

Circuit Court of Cuyahoga County.

O. W. JOHNSON AND SUSIE JOHNSON v. H. A. TILDEN ET AL.

Decided, May 10, 1912.

Fraud—Rescission of Contract—In Doubtful Case Reviewing Court Will Follow Trial Court as to Weight of Evidence—False Representations as to Rental Value Ground for Rescission of Contract.

1. In a contract for the sale of real estate, false representations as to the rental value of the property and as to the existence of a sewer connection in a house, constitute fraud for which a rescission of contract will be granted.
2. In an action in equity for the rescission of a contract, heard upon a transcript of the evidence in the court below where there is some uncertainty as to the weight of the evidence, an appellate court will accept the conclusions of the trial court which saw the witnesses face to face, and had better opportunity to judge of their credibility.

H. J. Doolittle, for plaintiffs in error.

F. C. Scott, contra.

DUSTIN, J. (sitting in place of Winch, J.); POLLOCK, J. (sitting in place of Marvin, J.), and NIMAN, J., concur.

This case is here on appeal. It was brought in the common pleas court for a rescission of a certain contract for the exchange of real estate on the ground of deception and fraud. There was a denial of misrepresentation, denying the knowledge of certain facts, and an assertion that Johnson had warning and an opportunity to examine, knew all of the facts and that he later was satisfied. On the hearing in the common pleas court, the court granted the prayer of the petition and gave a decree for a rescission of the contract in quite lengthy terms. The case is here upon the transcript of the evidence below and upon some new and additional testimony.

Now, the story of the case is about as follows:

Johnson had a farm of 117 acres in his wife's name, which

he desired to exchange; Tilden had a lot of city property which he was willing to exchange. The two got together through agents, the agent of Tilden being one Hepner. Johnson came to town and looked over the properties, being conducted about by Hepner. He claims that Hepner made misrepresentations as to certain houses on Ninety-First street in two respects; one is as to the rentable value, or rather what the actual rental was, claiming that it was $25 per house for the two houses, whereas the truth of the matter was that the rental was only $18; also that the cellar was adequately drained by a sewer in the street, whereas it wasn't drained at all by the sewer, but the laundry tubs in the cellar drained into a cesspool in the rear, and the cesspool would fill and overflow back into the cellar, and the house was uninhabitable part of the time on account of standing water in the cellar to the extent of several inches in depth; there was no connection of the cellar with the sewer. Also claimed that there was misrepresentation as to the rentable value of other properties on Ninety-Ninth and One Hundred and Twelfth streets. Some of these properties were new and not yet rented, but the claim is that he represented that certain parties were anxious to take them at certain prices, all of which was false and he knew the same to be false. Also that as to the properties on Ninety-Ninth street, there was a misrepresentation as to the gas connection. Gas pipe was there in the house, a new house, and the representation was, according to Johnson, that they would furnish the fixtures according to the choice of the purchaser; that there was connection there, but it turned out that there was no connection at all; there was no gas on the street. Also that there was general misrepresentation as to the value of these properties, Johnson not being acquainted with city values, and the representation was so extravagant that it makes it a case of gross failure of consideration.

Now, as to the matter of rental value of the Ninety-First street houses, it appears that the agent took Johnson to one of the tenants to advise with her, to confirm his story and she reported that the rental was $25 a side, but it afterward appeared in examination of this witness that shortly before the collector of rent had appeared and told her that hereafter the rent would

be $25, and it was claimed that was a part of the scheme to deceive Johnson. As to the other tenant of the Ninety-First street houses, she was absent at the time and no information could be obtained from her.

Later, the parties all met in a law office to talk matters over and to make out deeds and exchange papers. Meantime Johnson had had a tip from one of the tenants as to water standing in the cellar and a statement made that there was no connection with the sewer, whereupon Tilden, being present at this conference, brought up one Brister or Brisker who had owned the property, to state that there was a sewer there that he had constructed, and that the engineer's office of the city would show a sewer in that street. That seemed to calm the fears of Johnson, and there was also an explanation as to the rental. He had a tip that it was only $18, and the explanation was that if that was the case, and only $18 has been paid for the current month, and that there was some yet due, and in the adjustment of taxes and interest upon mortgages (for all of these properties were encumbered, including the farm, and there had been an adjustment of taxes and interest), there was an allowance of one-half the rental received for that month, which was $18.

The papers were exchanged and some of the properties being new and liable to mechanics' liens, the deed for Johnson's farm was placed in escrow, not to be delivered until the time had expired within which mechanics' liens could be taken. This was in November. At the same time there was found to be due Johnson about $203 which they settled for $200 on the adjustment of interest and taxes and this rent, and a check was given Johnson for $200, post dated thirty days. Johnson did not discover the post date on the check and deposited it at once with his bank, but it was ultimately returned, as there was nothing due, and one of the claims in the petition is that there is $200 due on that, and that was considered as evidence of fraud, and it appears that there was no money to meet that check, nor was it ever paid, but the claim of defendant is that there was a tender made of the amount of that check, and they acknowledge the amount due in the answer and express a willingness to pay it.

It is claimed on the part of the defendants that Johnson was not a farmer but a business man, to some extent acquainted with values; he was anxious for the trade and thought that he was getting the better of the bargain; that he expressed himself afterward as satisfied, and apologized to some extent for some remark he had made concerning their efforts to misrepresent, but it also appears that his apology was made within a few days and before he had come into a full realization of the situation, and that he did not find out about the sewer and all the facts in the case until later. As against that, there is some evidence tending to show that Tilden, in talking over the matter of the cellar with Johnson, said: "This property should be raised." That Tilden said, referring to this house, "I had bids upon it, and it would cost about $400 to raise it, and that if he had kept the property he would have raised the house." And he (Johnson) seemed satisfied at the time.

Also claimed that this representation as to the rental value of these other properties, new, was a near estimate of what they might bring, and they should not be chargeable with any deception there.

The testimony is quite lengthy, and as to the principal points in dispute is contradictory, especially as to what occurred in the office in the presence of Johnson and Tilden. But upon looking it all over, all the facts and circumstances, all testimony in the case, we have arrived at the same conclusion as the court below. The case is made out by a preponderance of the evidence. It is not a very strong case, but we are inclined to give to the court below the benefit of any doubts we might have as we would to the verdict of a jury, because the situation was before that court; he could see and hear the witnesses and he has issued a decree for a rescission of the contract.

I should mention, perhaps, the claim that it is too late for rescission. We do not think so. The farm property is still intact, the personal property which was in the contract for exchange was not disposed of, and was so prevented by injunction, and as to the mortgages, they may be paid, according to interest due upon them and taxes.

Of course, since the decree below, there have been rents collected by Johnson, of which we have no evidence as to the amount, and there is rent, of course, on the farm. We haven't the facts before us to make an exact decree, because we do not know what was collected by Johnson, nor have we any evidence as to the reasonable rent of the farm. There is something yet to be done by the attorneys here. They ought to be able, without much trouble, to make an adjustment of these matters. We will issue a decree for rescission, and a re-transfer of the real estate and personalty, and as to the adjustment of these differences of the taxes and rentals and interest, if the parties can not agree, we will refer the same to a master.

There is some language in the decree below to which we do not quite agree. It is stated in two places that the house was found to be uninhabitable. We think that is putting it too strong. It was not uninhabitable except at times; it was probably unwholesome and uncomfortable, and by reason of the water in the cellar, was not rentable, but it was not uninhabitable. This phrase should be stricken out.

The court also says that the rentals received by Johnson were far less than the amount expended by him; that, therefore, he is not held accountable for the rent, but not stating what they were in either case. That should probably be made more definite.

If counsel will take a cue from what we have stated to them and get together upon this situation as it has developed since the decree of the common pleas court, we should be able to approve any agreement they make. If they are unable to agree, they can present the matter to the court for adjustment, or to a master for more accurate determination.

CONSTRUCTION OF A DISCHARGE IN BANKRUPTCY.

Circuit Court of Cuyahoga County.

THE NATIONAL CITY BANK v. ABRAHAM C. WERTHEIM ET AL.

Decided, May 10, 1912.

Bankruptcy—Discharge in Bankruptcy of Individuals Doing Business as Partners Discharges from Individual Liability.

Where partners have all signed a bankruptcy petition individually, setting up that they have surrendered their property individually as well as a partnership, were all adjudicated bankrupts individually as well as a partnership, but the final order of the court was that they were discharged from provable claims against them as partners, the discharge relieved them from any individual liability for the debts of the partnership.

Hidy, Klein & Harris, for plaintiff in error.
Max E. Meisel and *J. H. Sampliner,* contra.

DUSTIN, J. (sitting in place of Winch, J.); POLLOCK, J. (sitting in place of Marvin, J.), and NIMAN, J., concur.

This is an action brought for the balance due upon certain promissory notes. There is an answer setting up a discharge in bankruptcy in certain proceedings in which a petition was filed by Wertheim and two partners, doing business as the Northern Ohio Cigar Company. The reply makes the issue, however, that the discharge was not of the individual partners, but of the partnership, and the question, of course, arises upon that, in view of the record.

Now the petition was by the partners individually; they all signed the petition; they set up that they have surrendered their property individually as well as a partnership, and scheduled the same. They were all adjudicated bankrupt individually as well as a partnership, but when it came to the petition for discharge, the order of the court was that they were discharged from provable claims against them as partners, doing business as the Northern Ohio Cigar Company, and it is claimed under

that discharge, that the defendants named herein are not individually relieved.

With such a state of facts and the briefs, which were quite elaborate and learned, and oral arguments which were quite helpful to the court also, we have reached the following conclusion:

We think the weight of authority and the better reasoning are in accord with the views announced by Judge Chapman in his written opinion in this case.

The petition in bankruptcy was signed by the partners individually, and the entire individual estates were scheduled and surrendered for the partnership creditors, there being no individual debts alleged or proven. As individuals. they were adjudged to be bankrupts. That would have been untrue and an improper judgment, if either member of the firm had retained any estate available to creditors.

The presumption is that it was true and founded upon sufficient evidence and the parties were, therefore, entitled to a discharge. The discharge was "from all debts and claims which are made provable by said act against their estates as partners," etc.

Plaintiff's claim (like all others) was a partnership claim, and was extinguished under the bankruptcy act, by the surrender of the partners' "estates," as well as the partnership property.

There was no need of a discharge from individual indebtedness, because there was none. And as to plaintiff's claim, we think there was a specific discharge from all in its class.

In distinguishing the authorities, we think the point is well taken that the cases favorable to plaintiff's view arise under *involuntary* bankruptcies, where acts of bankruptcy may be committed by the partnership, not applicable to the individual members, who are not covered by findings as to the partnership. But in the case at bar there was a petition by all the partners individually as well as a firm, and a surrender of both kinds of property, giving the court the widest latitude in its decree, of which latitude we think it has taken advantage. The fact that

one of the partners, out of an abundance of caution, thought best to file a separate petition, can have no effect upon the scope of validity of the other decree, and does not indicate the views or intentions of the court with reference thereto.

The judgment will therefore be affirmed in this, as in two similar cases, 5071 and 5072, in which the same questions are involved.

LAND DAMAGED BY WATER DUE TO CHANGE OF GRADE OF STREET.

Circuit Court of Summit County.

JOACHIM EVERS v. CITY OF AKRON.

Decided, October 12, 1912.

Waters—Municipal Corporation Liable for Increasing Flow of Surface Water.

A municipal corporation is liable to a land owner for damages resulting from an increased flow of surface water upon his land, caused by a change in street grades by which water is brought from another street to that upon which the land abuts and from which it flows upon the land.

Hollaway & Chamberlain, for plaintiff in error.
J. Taylor, City Solicitor, and — *Kemfield,* contra.

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

The plaintiff sued the city for damages to his property abutting on West Tallmadge avenue in the city of Akron, just west of the intersection therewith of Cuyahoga street, occasioned by the change of grade of Cuyahoga street, which street, he claims, formerly carried the surface water accumulating and flowing thereon, away from said intersection, but after the change in grade, carried it toward said intersection and to and upon plaintiff's premises, washing gulleys in West Tallmadge avenue in front of plaintiff's premises and through his premises, filling

up his well and depositing so much gravel upon his land as to make it unfit for cultivation.

The evidence introduced by plaintiff shows that his premises are much lower than the grade of either Cuyahoga street, which runs north and south, or West Tallmadge avenue, which runs east and west. It was the grade of Cuyahoga street that was changed, not the grade of the street upon which plaintiff's premises abut.

Evidence was also introduced by the plaintiff tending to show that by the improvement of Cuyahoga street surface water which was accustomed theretofore to flow away from plaintiff's premises, was accumulated and caused to flow toward and upon his premises and that he had suffered damage therefrom.

At the close of plaintiff's evidence the court directed a verdict for the defendant, upon the theory, as we are advised, that surface water is a common enemy, which the lot owner may fight by raising his lot to grade, or in any other proper manner, and that the municipality has the undoubted right to bring its streets to grade, and has as much power to fight surface water in its streets as the adjoining private owner.

This doctrine has some endorsement in *Dillon on Municipal Corporations,* 5th Edition, Sections 1731 to 1745 inclusive. It also has some sanction in the case of *Springfield* v. *Spence,* 39 O. S., 665, see page 671.

Farnham on Waters denies there is any such rule, and says that its origin and scope are shrouded in mystery.

The latter authority is quoted with approval by Judge Summers, in the case of *Mason* v. *Commissioners,* 80 O. S., 151, where he also collects many cases on the flow of surface waters. He also says (page 180):

"The law in this state is in harmony with the cases that have been quoted from at such length and they have been quoted from at such length only because of the importance of the questions presented, and because of the seeming difficulty many times in applying the law to the facts."

Let us examine some of his quotations.

"The owner of the upper ground has no right to make any *excavations* or drains by which the flow of water is directed from

its natural channel and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the wash upon the lower fields."

"If the owner of the upper ground wrongfully direct an unnatural quantity of water upon the ground of a lower neighbor, by collecting several streams together and discharging them at one place, or by any other means, the neighbor below may have an action against him."

"The diversion by a land owner of surface water, collecting on his land from rain and melting snow, out of the course which nature has provided for it, in such a way as to cause it to flow upon the land of another where it has not flowed before, is an actionable trespass."

"While the owner of the lower lands shall receive all water that naturally flows from the next higher lands, the owner of the higher lands may not open or remove natural barriers. and let on such lower lands water that would not otherwise naturally flow in that direction."

"It is now well settled that neither a corporation nor an individual can divert water from its natural course so as to damage another."

"A lower tenement is under a natural servitude to a higher one to receive from it all the surface water, accumulating from falling rains and melting snow, or from natural springs that *naturally* flow from it to and upon the lower one. This advantage of the higher tenement is a part of the property of the owner of it, and he is not indebted to the lower tenement therefor."

This last quotation is from the syllabus of the case of *Blue* v. *Wentz*, 54 O. S., 247; the syllabus of the case of *Mason* v. *Commissioners*, 80 O. S., 151 conforms to it.

The record of the case at bar tends to show that the defendant changed the natural flow of the water on Cuyahoga street, collected into one channel water that usually flowed off upon the lower lands by several channels and discharge it at one place, thereby materially increasing the wash upon plaintiff's fields. The record seems to show that the damage complained of by

plaintiff was occasioned by water that would not naturally have flowed in his direction.

As he was not an abutter upon the street, the grade of which was changed, he never had an opportunity to be compensated for any damage that change of grade might occasion him.

It is the settled law of this state, though Dillon also criticizes the Ohio cases which enunciate it, that "a municipal corporation, like an individual, is liable for injuries resulting to the property of others from the acts of such corporation, though acting within the scope of its corporate authority, and without any circumstances of negligence or malice." *McComb* v. *Akron*, 15 Ohio, 474.

It is therefore liable for damages resulting from a violation of those rules of law which concern the flow of surface waters, the same as any individual might be liable.

The petition and the evidence in this case would have been sufficient to warrant its submission to the jury, if the defendant had been an individual. This being so, the fact that the defendant was a municipal corporation did not warrant the case being taken from the jury.

A case something like this is reported in 12 C.C.(N.S.), 220, where the city of Cincinnati was held liable for unnecessarily collecting and casting upon plaintiff's premises more surface water than would naturally flow thereon. There an eight-inch pipe was emptied by the city on the hillside back of the plaintiff's premises. It was probably a drain for surface water from some other street.

Judgment reversed and cause remanded for further proceedings.

PROSECUTION FOR ILLEGAL PRACTICE OF MEDICINE.

Circuit Court of Summit County.

LYMAN D. TRIPLETT v. STATE OF OHIO; AND ORA L. BROWN v. STATE OF OHIO.

Decided, October 12, 1912.

Constitutional Law—Evidence—Indictments—Laws Regulating Examination and Registration of Medical Practitioners Constitutional—Chiropractic and Magnetic Healing Practice of Medicine—Evidence of Training Not Admissible in Prosecution for Violation of Laws Requiring Examination and Registration of Medical Practitioners—Indictment, When Not Bad for Duplicity.

1. Sections 1286, 1287 and 12694, Ohio General Code, relating to the appointment and powers of the state board of health and the state board of medical examination and registration, and providing for examination and registration of those practicing medicine, are a proper exercise of the police power and are constitutional.
2. Advertising to cure by chiropractic treatment, or by magnetic healing, or taking fees for treatments under those systems, is practicing medicine within the meaning of the statutes requiring examination and registration of medical practitioners.
3. In a prosecution for violating the statutes regulating the practice of medicine, testimony on behalf of the accused, relating to the course of study which he pursued in preparation for his profession and that his treatments did not consist of administering drugs or performing surgical operations, is not admissible.
4. Where a statute declares the doing of any one of several things to be practicing medicine, an indictment which charges the accused with having done all of them is not bad, and he may be found guilty, if the evidence at the trial establishes the fact that he did any one of them.

W. J. Laub, L. D. Slusser and *H. M. Hagelbarger,* for plaintiffs in error.

F. J. Rockwell, contra.

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

These two cases are considered together because they both involve convictions for violating the statutes regulating the

practice of medicine and have many propositions in common. The constitutionality of the law under which the accused were convicted is attacked in both cases.

Neither of the accused held a certificate obtained from the state medical board in the manner required by law.

Lyman D. Triplett was tried by the Probate Court of Summit County upon an affidavit filed with it specifying that he had used the title "Prof." in connection with his name upon cards with which he advertised that he was a "Class School Graduate of the Weltmer School of Suggestive Therapeutics (Magnetic Healing)." "Every Known Disease Cured Without Medicine or Surgery. Office Treatment. Home Treatment. Absent Treatment. Thousands Cured via this *Drugless* Route." That he, for a fee, examined and diagnosed a certain bodily infirmity or disease of one Louise Zimmerly as hardening of the arteries and, for a fee, prescribed, advised, recommendd and administered a certain application, agency, operation and treatment to affiant unknown, for the relief of said bodily infirmity or disease.

Ora L. Brown was tried by the Common Pleas Court of Summit County upon an indictment specifying that he had used the letters "D. C.," being an abbreviation of and meaning Doctor of Chiropractice, in connection with his name, thereby representing that he was engaged in the practice of medicine and surgery for the cure, relief and treatment of bodily infirmities and diseases; that he, for a fee, examined and diagnosed a certain bodily infirmity or disease of one Jacob A. Kepler, as partial paralysis and, for a fee, prescribed, advised, recommended and administered a certain application, agency, operation and treatment, the name of which is chiropractic adjustment, and the nature of which is a manipulation or pretended adjustment of the vertebrae of the spinal cord, for the relief of said bodily infirmity or disease.

The sections of the General Code upon which the prosecution of these cases were based are 1286, 1287 and 12694.

These sections are derived from the act of May 9, 1908 (99 O. L., 492), revising and consolidating the laws relating to the appointment, powers and duties of the state board of health, the state board of medical registration and examination, etc.

Said act contains former acts regulating the practice of medicine, and amendments thereof, which have been passed upon by the Supreme Court of this state, their constitutionality being upheld.

There is nothing new in the sections of the General Code referring to the practice of medicine which has not been settled by the decisions of this state, so that it may be said that their constitutionality is no longer an open question

The following quotations from the leading Ohio cases on the subject make that point plain:

"The giving of Christian Science treatment for a fee for the cure of disease is practicing medicine within the meaning of the statutes regulating such practice in this state.

"The statute making it a misdemeanor to give such treatment for a fee is not an interference with the rights of conscience and of worship conserved by Section 7 of the bill of rights, and is not on that ground unconstitutional.

"Legislation prohibiting any one from treating a disease for a fee excepting such persons as have prescribed qualifications, is a valid exercise of the police power of the state and *is constitutional.*

"The act regulating the practice of medicine in this state exacts reasonable qualifications and excludes no one possessing them and *it is not void as discriminating against Christian Scientists* in that it prescribes that any one possessing certain qualifications may practice ostheopathy, and *does not make special provision for those who wish to practice Christian Science.*" *State of Ohio* v. *Marble,* 72 O. S., page 21.

"That the practice of medicine may be regulated by legislation has been decided in every court in which the question has arisen. In the leading case. *Dent* v. *W. Va.*, 129 U. S., 114-122, Mr. Justice Fields says: 'The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure, or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states from time immemorial, to exact in many pursuits a certain degree of skill and learning,' " etc. *State of Ohio* v. *Marble*, 72 O. S., page 34.

"That the Legislature in its wisdom, might prescribe a uniform examination, we do not doubt, and that it may recognize

one school without recognizing all, is also true, if the recognition be in the exercise of proper classification and for the public welfare, and not with a view to create a monopoly in the schools recognized or a discrimination against other schools. *Parks* v. *State,* 159 Ind., 211; *State, ex rel Kellog,* v. *Currens et al,* 111 Wis., 431; *Scholle* v. *State,* 90 Md., 729." *State of Ohio* v. *Marble,* 72 O. S., page 38.

"The power conferred upon the state board of medical registration and examination is administrative in character, and not judicial within the meaning of Section 1 of Article IV of the Constitution of the state.

"It is competent for the state, under its power to provide for the welfare of its people, to establish needful regulations and impose reasonable conditions calculated to insure proper qualifications, both with respect to learning and moral integrity, of persons desiring to engage in the practice of medicine in the state, and require compliances therewith by such persons before they shall be permitted to practice within the state. The regulations adopted by this statute are of that character, and do not infringe upon the privileges and immunites guaranteed by Section 2, of Article IV, of the Federal Constitution to citizens in the several states, *nor abridge those secured to citizens of the United States by the fourteenth article of amendment of that Constitution.*" *State* v. *Mosier,* 78 Ia., 321.

"The right to labor and enjoy the rewards thereof is a natural right which may not be unreasonably interfered with by legislation where, however, the pursuit concerns in a direct manner, the public health and welfare and is of such a character as to require a special course of study or training, or experience to qualify one to pursue such occupation with safety to the public interest, it is within the competency of the General Assembly to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance." *State* v. *Gardner,* 58 O. S., 599.

In the opinion in the Gardner case, the court say:

"The acts referred to fall within the exercise of the police power of the state, that power, conceded to reside in the people's representatives, which is rightfully exercised by the regulation of the use of private property, or so restraining personal action, as to secure, or tend to the comfort, health or protection of the community. *Further examples of its exercise are found in the laws which require study and examination before one is per-*

mitted to practice law or medicine or engage in the occupation of a dentist or a pharmacist." *State* v. *Gardner*, 58 O. S., 606.

In the above case it was held that the business of plumbing, while not to be ranked with the professions as to degree of learning, is one which is so nearly related to the public health that it may with propriety be regulated by law, and reasonable regulations tending to protect the public against the dangers of careless and inefficient work and appropriate to that end do not infringe any constitutional right of the citizen pursuing such calling.

In the case of *State of Ohio* v. *Liffring*, it was held:

"The system of rubbing and kneading the body, commonly known as osteopathy, is not an 'agency' within the meaning of the act of February 27th, 1896, 'to regulate the practice of medicine' (92 O. L., 44), which forbids the prescribing of any drug or medicine or other agency for the treatment of disease by a person who has not obtained from the board of medical registration and examination a certificate of qualifications." *State* v. *Liffring*, 61 O. S., 39.

In the case of *State* v. *Cravett*, it was held that:

"The system of rubbing or kneading the body, commonly known as osteopathy, is comprehended within the practice of medicines defined by Section 4403*f* of the Revised Statutes as amended by the act of April 14th, 1900 (94 O. L., 200)." *State* v. *Cravett*, 65 O. S., 289.

In distinguishing the two cases, the court said that in the Liffring case, as the statute then stood, by applying the doctrine *noscitur a sociis*, the application of which doctrine was called for by the statute as it then stood, the rubbing or kneading process, commonly called osteopathy, was not included within the terms of the statute, while in the Cravett case the amendment to the statute, which had been made since the former case, made the act so comprehensive that the above doctrine could be of no aid in construing the statute, and that the process of kneading and rubbing the body, commonly called osteopathy, was included within the statute as amended. The court in the Cravett case, however, found the act of April 14, 1900 (94 O. L., page 200), to

be defective in that it discriminated against osteopaths by requiring them to hold diplomas from a college which requires four years of study. At the next session of the Legislature the act was again amended (95 O. L., 212) so as to rid the statute of this vice by eliminating the four year requirement for osteopaths.

About forty objections to the form of the affidavit in one case and the indictment in the other case were presented in the lower courts and overruled. They have been presented for review here, but we find that in both cases the accused were informed of the charges against them with that definiteness and certainty that the law requires.

In the Brown case it is further contended that the court erred in refusing to permit him to testify that he did not practice medicine on the day in question.

There was no error in this. The question simply called for Brown's conclusions as to what he did and his own characterization of his own acts. His acts were before the jury, and it was for the jury to determine whether those acts amounted to practicing medicine contrary to law.

In the Triplett case certain rulings on evidence are complained of.

The trial judge refused to allow the introduction of any evidence to show what the Weltmer School of Suggestive Therapeutics was, and likewise what magnetic healing consisted of, for the purpose, as claimed, of showing that the advertising matter set up in the information could not reasonably have represented plaintiff in error to be engaged in the practice of medicine or surgery.

The trial judge also refused to permit the accused to show by other witnesses than himself that his practice, whatever it was, was not the practice of medicine or surgery.

This is practically the same point that was made in the Brown case, and nothing further need be said about it. It was not for the witness, but for the jury, to determine the character of his practice.

Both of these questions, however, have been adjudicated by the Supreme Court.

From the record of the unreported case of *State* v. *Hughes,* 83 O. S., 445, it appears that the prosecuting attorney excepted to the admission of evidence on behalf of the defendant in the following particulars:

"Fifth. Testimony of the defendant concerning his course of study and preparation for his profession as healer.

"Sixth. Testimony of the defendant as to the nature of his treatments. That the same did not consist of administering drugs or performing surgical operations."

The judgment of the Supreme Court is: "Exceptions sustained."

This is sufficient to show that the Supreme Court considered that the trial judge in the Hughes case erred in admitting evidence that was ruled out in both the Brown and Triplett cases.

The objection to the reading of the coroner's minutes of what Triplett said at the inquest is not well taken. The record shows that counsel for the accused consented to the reading thereof.

The charge of the court in the Triplett case is brought to our attention. The complaint is that it divided the offense charged in the information in such a manner as to lead the jury to believe that the violation of the statute could be committed in any one of three ways.

On this subject the charge is as follows:

"I further charge you as a matter of law, that it constitutes practicing medicine or surgery in the state of Ohio to do any or all of the following acts or things, before having obtained a license or certificate from the state medical board of Ohio, to-wit:

"(1) To use the words or letters 'Dr.', 'Doctor', 'Professor', 'M.D.' 'M.B.' or any other title in connection with one's name which in any way represents one as engaged in the practice of medicine or surgery in any of its branches.

"(2) To examine or diagnose for a fee or compensation of any kind.

"(3) To prescribe, advise, recommend, administer or dispense for a fee or compensation of any kind direct or indirect a drug or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound, fracture, or bodily injury, infirmity or disease. And if you find beyond a reasonable doubt, as I shall define that term to you, that the defendant on or about the 21st day of August, 1910, or on or about

the 22d day of September, 1910, did any one or all of the matters and things which constitute the practice of medicine, as I have defined it to you, then you should find the defendant guilty."

This charge was correct.

A statute often makes punishable the doing of one thing, or another, sometimes specifying a considerable number of things. Then by proper and ordinary construction a person, who, in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment on such a statute may allege in a single count that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction "and" where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them. *Bishop's New Criminal Procedure,* Volume 1, Section 436.

We find no error in the record of these judgments and they are affirmed.

VALIDITY OF A CONTRACT FOR SALE OF REAL ESTATE.

Circuit Court of Cuyahoga County.

THE TAYLOR LAND & IMPROVEMENT COMPANY v. FRANK H. ELWORTHY.

Decided, November 13, 1912.

Contracts—A Contract Results Upon the Meeting of the Minds Upon all Material Points.

A written contract for the sale of certain real estate which is definite as to the subject-matter of the contract, the amount to be paid and the dates of payment, shows a meeting of the minds on all the material parts of the contract and it is not rendered unenforceable by the fact that a blank space was left to be filled in with a list of second mortgages to be taken as collateral to secure the payment of the purchase money when due.

A. C. Waid and *Geier, Farrell & Edwards,* for plaintiff in error.

Dellenbaugh, Newman & Heintz, contra.

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

The real question in this case is whether the parties hereto entered into a contract on the 13th day of April, 1909. If they did, the plaintiff is entitled to recover in this action, for it is not claimed that the defendant has performed any such contract, while it is clear from the evidence that if what was done by the parties on that day constituted a contract between them, there has been no failure to perform on the part of the plaintiff.

On the date mentioned the parties both signed in duplicate a written instrument, each taking a copy.

The clauses of said writing especially to be considered to determine whether it constitutes a contract, read as follows:

"The party of the first part hath this day agreed to sell unto the party of the second part the following described tract or lot of land" (describing it) "and the said party of the second part doth hereby agree to pay to the said party of the first part, its successors or assigns, for the land aforesaid, the sum of thirteen thousand two hundred and ninety dollars ($13,290), being the value of said premises, payable as follows: The said Frank H. Elworthy is to execute his promissory note of even date for said sum of $13,290 payable in sums of $135 per month, said promissory note to be secured by the following notes and second mortgages as collateral."

This last sentence is not followed by any list or description of any notes or mortgages, the next words reading, "together with interest thereon from this date," etc.

On the part of the defendants it is urged that this omission to name the contemplated collateral shows that the minds of the parties never met, and that there was therefore no contract.

We do not regard this contention as sound. Their minds did meet on the terms of the sale. The plaintiff was to sell the premises to the defendant for a definite sum of money, which sum the defendant promised to pay at a fixed rate per month, and to evidence this he was to give his promissory note.

The language quoted indicates that the parties contemplated that certain collateral security would be given, but there was a distinct promise to sell at a price; there was a distinct promise to pay that price in fixed installments, and to evidence such promise to pay installments by a promissory note. Nothing else was fixed by this contract, but all these things were fixed.

If it be urged that this blank in reference to the collateral shows that the minds of the parties did not meet, to a degree, at least, the same argument might be urged because of another blank in the instrument as to insurance, in the following sentence: "Said grantee agrees to have and keep the buildings upon said lot insured in the sum of $—— in company," etc.

It would hardly be urged that because of this blank there was not a meeting of minds, to such degree as to constitute a contract between the parties.

Take the next clause of the sentence relative to insurance; it reads: "In a company to the full satisfaction of said first party."

A claim that there was no contract because the minds had not met upon the particular insurance company, whose policy should be obtained, would surely not be sustained.

If we go to the oral evidence to determine whether the minds had met, and if from that we should find that the entire contract was not expressed in the written instrument, we should have to find that they did meet upon the proposition that collateral security, in the form of notes and second mortgages to the satisfaction of John W. Taylor, was to be furnished.

This is as definite and complete a meeting of the minds as there is a building contract which provides that materials and workmanship are to be to the satisfaction of an architect; and yet this is the common form of such contracts, and they are universally upheld. *Page on Contracts*, Sections 349 and 1380.

We conclude, therefore, that if there were nothing in the oral evidence to modify the writing, it constitutes a contract. If the same is modified by the oral evidence, such modification is simply that the clause as to the collateral was to be that they were to be such as were satisfactory to John W. Taylor; that

this does not make the contract void for uncertainty, and that, therefore, there was a valid contract between the parties and that the defendant has failed to perform.

There is a provision in this contract that failure to pay as stipulated, for three days after any payment becomes due, shall authorize the plaintiff, at its option, to declare all the remaining payments to be due. Nothing has been paid by the defendant; the plaintiff has exercised the option by bringing this suit and is entitled to an accounting of the amount of purchase money and interest remaining unpaid, together with taxes, etc., and to an order that unless the defendant, within a day to be named by the court, shall pay in full the amount so found due, the premises be sold and the avails be applied to the payment of the costs in this action, and to the payment of the amount due the plaintiff.

Decree accordingly.

PROMISES MADE WITHOUT CONSIDERATION NOT ENFORCIBLE.

Circuit Court of Cuyahoga County.

EMMA S. TOWNSEND v. THE CITIZENS SAVINGS & TRUST CO.

Decided, December 16, 1912.

Contracts—When Mutual Promise to Make Gifts Not a Consideration—Deed Absolute, When Treated as Mortgage.

1. Mutual promises to make gifts can not be enforced by the donee, even if some of the donors complete their gifts, unless the donee is an educational, religious or philanthropic institution, or has expended money or incurred obligations arising from the acceptance of the promise; hence, mutual promises to contribute toward the payment of the debt of another furnish no consideration for the promise of one of the number, under no obligation to the promisee, who relinquished no rights and incurred no obligations by accepting such promise.

2. A deed executed to secure the payment of money will be treated in equity as a mortgage and not as an absolute conveyance, and when the grantor retains possession of the land such deed is voidable in so far as it was given to secure the payment of an obligation not the grantor's and for which the grantor received no consideration.

A. A. & A. H. Bemis, for plaintiff.

M. B. & H. H. Johnson and *C. R. Mergerth,* contra.

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

This is an action by plaintiff to have a deed, absolute on its face, declared a mortgage, for an accounting of the amount due thereon and redemption of the premises.

The deed in question was executed by plaintiff and her husband, F. H. Townsend, August 6, 1907, to David Morison, and at the same time an instrument in writing was executed, which witnessed that said premises were held by said Morison in trust, first, as security for the payment of the indebtedness owing by the grantors to the Dime Savings & Banking Company, and secondly, as security for the payment of the indebtedness of one John P. Cowing to said bank.

Plaintiff's indebtedness to the bank at that time was about $18,000; it is now somewhat less. Cowing's indebtedness to the bank was nearly $300,000.

Since the execution of the deed to Morison the Dime Savings & Banking Company has failed and its assets have all been turned over to the defendant, the Citizens Savings & Trust Company, to which company Morison, in pursuance of his trust and upon request of the Townsends, has deeded the premises described in the deed to him, the latter company to hold said premises upon the same trusts upon which it was conveyed to Morison.

The Citizens Savings & Trust Company has since sold the premises to one Harry E. Chapman, who had full notice of the title and facts in the case, and the latter mortgaged them to the Guardian Savings & Trust Company, which company we find took without notice of plaintiff's claims.

Plaintiff is ready to pay the balance now due on her own original indebtedness to the Dime Savings & Banking Company,

but says that she ought not to be compelled to pay any of the Cowing indebtedness to that bank for two reasons; first, because she was misled by the agent of the bank into signing certain papers in which she assumed the Cowing indebtedness to the bank, and second, because there was no consideration for her assumption of said Cowing indebtedness.

As to the first proposition, it is sufficient to say that the evidence does not sustain plaintiff's claim.

The second proposition is more difficult; it involves a consideration of two written instruments signed by plaintiff and others, one dated August 6, 1907, and executed contemporaneously with the deed to Morison, and the other dated October 18, 1907. Copies of these two agreements are appended to this opinion, but their contents will be stated as briefly as possible.

The writing dated August 6, 1907, is a three-party agreement; the first parties are plaintiff and her husband, F. H. Townsend; the second party is Charles A. Post, and the third party is David Morison. This agreement recites that the parties "have done and agreed to do as hereinafter stated, the consideration for the things done and agreed to be done by each party being those done and agreed to be done by the other parties."

Then follows a statement that first parties, for the purpose of securing payment of the indebtedness of John P. Cowing to the Dime Savings & Banking Company, have conveyed to third party the land here in question, subject to the right of the bank to require said land to be applied in satisfaction of any indebtedness owing to it by first parties jointly. Frank H. Townsend also pledges certain stock for the same purpose, and there is a provision for the application of securities pledged by Cowing and his wife on his own indebtedness. Second and third parties, for the purpose of further securing the indebtedness of Cowing to the bank, agree that after the securities of Cowing and his wife and the securities of first party, so far as applicable, have been applied by the bank to Cowing's debt, they will each pay one-half of the balance of Cowing's indebtedness to the bank, not exceeding, however, $50,000 for each of second and third parties. Second party also pledges to the bank certain securities as collateral for his promise.

The evidence does not show any obligation on the part of plaintiff to pay the bank any part of the Cowing indebtedness, unless that obligation was created by this instrument, or the one of October 18, 1907, which will be referred to later. Whether F. H. Townsend, Charles A. Post or David Morison were under any obligation to the bank to pay any part of the Cowing indebtedness, is immaterial. If they were not, then all the parties to the three-party agreement were volunteers, so far as the Cowing debt was concerned, and their promises in behalf of the bank would be gratuitous; if all but plaintiff owed some moral or legal duty to the bank, growing out of the Cowing claim, that duty from them to the bank does not make the obligation of Mrs. Townsend any stronger; on the contrary, it weakens it.

It is clear that the three-party agreement was made for the benefit of the bank, although it was not a party to the agreement. It is equally clear that no consideration moved from the bank to plaintiff for her promises contained in this agreement; from it arose no benefit to her nor detriment to the bank.

It is claimed by defendant, however, that consideration for plaintiff's promise is found in the promises of David Morison and Charles A. Post to each pay one-half of the indebtedness of Cowing to the bank after the application thereto of the Cowing securities and the Townsend securities.

To analyze this claim, let us assume that none of the parties were under any obligation to pay the Cowing debt. Then all of them, as is certainly true of Mrs. Townsend, were promising to make gifts to the bank.

Mutual promises to make gifts can not be enforced by the donee, even if some of the donors complete their gifts, unless the donee be of the character found in the case of *Irwin, Admr.*, v. *Lombard University,* 56 O. S., 9, or has expended money or incurred obligations arising from acceptance of the promise. No such qualifying circumstances are found in this case.

If the other parties were under some obligation to the bank to make good Cowing's debt to it, then, as was said before, its claim upon Mrs. Townsend's promise to make a gift is weakened, not strengthened. Had they not completed their promises they could have been compelled by the bank to keep them, but

that fact would have completely wiped out any apparent consideration moving from Morison or Post to Mrs. Townsend, in the guise of detriment to them, or benefit to her; nor could her promise then be said, in the language of the case cited, to "in any manner influence the conduct of others."

So far attention has been given only to the question of consideration for Mrs. Townsend's promise to pay Cowing's debt, as contained in the three-party agreement of August 6, 1907. The deed to Morison securing that promise, has not been mentioned.

Were that instrument an ordinary mortgage, it is conceded that this case would be ruled by the case of *Kuzell* v. *The Citizens Savings & Trust Company,* No. 5034, decided by this court February 13, 1912, where it was held that consideration is needed to support a mortgage and that the antecedent debt of a third person is not in itself sufficient consideration to support a mortgage given to secure that debt, but the mortgage must have some new consideration to support it.

It is urged that this was held upon the theory that in this state a mortgage does not pass a legal title until default and possession taken by the mortgagee, but gives only a lien, a contractual right, which requires consideration to support it.

The deed to Morison was absolute on its face; it contained no defeasance clause. It was intended, however, to secure the payment of money and the property was to be reconveyed upon such payment. Mrs. Townsend remained in possession of the premises and the deed must, in equity, be treated as a mortgage, though not a legal one. This is so because equity looks to the substance and not to the form; it gives effect to the intention of the parties. *Kemper* v. *Campbell,* 44 O. S., 210; *Bank* v. *Tennessee Coal, Iron & R. R. Co.,* 62 O. S., 564.

This action is between the original parties to the instrument, their privies or those holding with notice of the equities (except the Guardian Savings & Trust Company, whose rights will hereafter be mentioned).

If the deed to Morison is to be treated as a gift, as defendants claim, on the theory of their case now being examined, then there must have beeen an intention on the part of Mrs. Townsend to make a gift, consummated by delivery. Delivery of what? Not

of the deed, which she did not intend as an absolute conveyance, but of the land itself, and of this she retained possession.

We consider that neither in the three-party agreement nor in the deed, both executed August 6, 1907, is any consideration found for Mrs. Townsend's promise to pay Cowing's debt, and that neither show an executed gift from Mrs. Townsend to the bank.

It remains to consider whether any such consideration can be found in the agreement of October 18, 1907.

That instrument was signed by the same four persons; it was not signed by the bank. It purports to be a request from said four persons to the bank to accept certain mentioned notes of Cowing to the bank "as evidencing portions of his indebtedness now due said company, and also as evidencing his agreement to repay the same," and recites that "in consideration of said company accepting said notes, we each agree with said company to be bound by and to do and perform the things stipulated as done and to be done by us, respectively, by the terms of a certain writing bearing date August 6, 1907," etc., and "that said company may from time to time extend time for payment of any of the said notes," etc.

This writing doubtless was intended to furnish consideration for the instruments of August 6, 1907, but it fails to do so, because the evidence shows that the notes mentioned in this writing were in the possession of the bank at the time Mrs. Townsend signed this last agreement and were held by it as collateral, *only*, to Cowing's original indebtedness, and, as the writing itself states, these notes were held "as *evidencing* portions of his indebtedness *now due*" the bank and "his agreement to repay *the same.*"

Under this agreement the bank suffered no detriment and Mrs. Townsend gained nothing.

Notwithstanding this agreement the bank could still have sued Cowing on this original indebtedness; it did not accept the notes mentioned as *payment* of any part thereof, nor extend or agree to extend time for payment of the indebtedness to which his said notes were collateral.

It follows that neither the Dime Bank, its trustee, Morison, his successor in interest, the Citizens Savings & Trust Company, nor any of the defendants claiming under it, for they took with notice, except the Guardian Savings & Trust Company, are entitled to hold the premises described in the deed to Morison otherwise than as security for Mrs. Townsend's individual and original indebtedness to the Dime Bank.

The Guardian Savings & Trust Company holds a mortgage on the premises for $15,000. It is an innocent purchaser for value without notice, as shown by the evidence. Its claim must be protected. Protection will be afforded it by requiring plaintiff to redeem from it, to the amount of its claim, paying the balance, if any, due from her on her indebtedness to the Citizens Savings & Trust Company. We understand that the other parties, as between themselves, have protected their own rights, or can arrange with regard to them.

Judgment for plaintiff as indicated.

FEES FOR COLLECTING SPECIAL ASSESSMENTS.

Circuit Court of Cuyahoga County.

STATE OF OHIO, EX REL J. A. CLINE, PROSECUTING ATTORNEY, v. ROBERT C. WRIGHT ET AL.

Decided, 1912.

Prosecutor May Not Maintain Action to Recover Moneys Not Belonging to County—Auditor's Fees.

1. A county prosecuting attorney has no authority under Section 2921, General Code, to bring an action to recover from a county auditor fees alleged to have been wrongfully retained by him from the collection of special assessments levied in municipalities, as such assessments are not funds belonging to the county.
2. Under Section 1069, Revised Statutes, a county auditor was entitled to five-tenths of one mill on all moneys collected by the treasurer on special assessments, even though as a matter of convenience to the treasurer, such special assessments had been transferred to the grand duplicate instead of to a special duplicate.

J. A. Cline, for plaintiff in error.
Smith, Taft & Arter, contra.

WINCH, J.; MARVIN, J., concurs.

The prosecuting attorney of Cuyahoga county brought his action against Robert C. Wright, who was formerly auditor of Cuyahoga county, to recover certain excess fees which said auditor is alleged to have retained on the collection of special assessments levied by various municipalities situated in said county.

A demurrer to the petition was interposed and sustained on two grounds; first, that the prosecuting attorney was not authorized by law to bring the action; and second, that the auditor was entitled by law to the fees retained by him.

We think both of these grounds well taken.

First. The authority of the prosecutor to bring such actions is limited by Section 2921, General Code, to cases where funds of the county or public moneys in the hands of the county treasurer or belonging to the county, have been misapplied or illegally drawn or withheld from the county treasury, and in *such cases*, the action must be for the use of the county.

Special assessments collected by the county auditor for municipal corporations are not "funds of the county," nor are they "public moneys in the hands of the county treasurer" within the meaning of said section. They are "public moneys," it is true, but belonging to the municipal corporations for which they are collected, and no action can be brought for their recovery "for the use of the county," for the county has no interest in them.

This was held to be the case with regard to moneys paid into the county treasury by virtue of proceedings for the location and construction of a county ditch, in the case of *Loe* v. *State, ex rel Platt, Prosecuting Attorney*, 82 O. S., 73, and in the case of *State ex rel Gilmer, Prosecuting Attorney*, v. *Sager*, unreported, the Trumbull County Circuit Court, at its September term, 1911, held the same thing with regard to moneys paid into the county treasury by virtue of proceedings for the improvement of roads in special road districts.

Second. Under Section 1069, Revised Statutes of Ohio, in force when the fees here in question were retained, the auditor was allowed as compensation for his services, two-tenths of one mill on "all moneys collected by the county treasurer on the grand duplicate of the county," and five-tenths of one mill on "all moneys collected on any special duplicate."

The petition in this case shows that the auditor transferred the special assessments, certified to him by various municipalities, to the grand duplicate, and not to a special duplicate, and they were collected on the grand duplicate by the treasurer.

This was a mere method of bookkeeping and probably more convenient for the treasurer than keeping a separate duplicate for the special assessments. These levies still remained "special assessments," however, were collected as such and it is clear that the law intended that the auditor, for his labor in transferring such assessments, which it appears he has done in this case, should have compensation based upon a percentage of five-tenths of one mill on all special assessments collected.

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

INJUNCTION AGAINST COLLECTION OF A SEWER ASSESSMENT.

Circuit Court of Cuyahoga County.

GEORGE MUNZ ET AL v. GEORGE F. MYERS, TREASURER, ET AL.

Decided, November 18, 1912.

Taxation—Special Assessments Must be Levied in Proportion to Benefits.

Where in a sewer assessment district consisting wholely of farm lands, some of the lands are very remote from the sewer, while others are in close proximity to it and would be enabled to use the sewer as an outlet by making a short extension, an assessment which levies the same amount per acre upon the remote lands as upon those in close proximity to the sewer, is not levied in proportion to the benefits, and its collection will be enjoined.

M. W. Beacom, for plaintiff in error.

J. A. Cline, W. D. Meals and *Green, Zmunt & Zmunt*, contra.

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

This is an action to enjoin the collection of special assessments levied upon the lands of plaintiffs in the village of Newburgh Heights ti pay for the building of a sewer in Cuyahoga street in said village, and an outlet thereto. It is contended that although the assessments were pretended to be levied according to benefits, they were not in fact so levied by the municipal authorities.

The case was heard upon an agreed statement of facts from which it appears that Newburgh Heights covers a territory of about three square miles of irregular shape, but extending north and south perhaps twice as long as its width east and west. On the northern boundary of the village is a creek running into the Cuyahoga river. At about the middle of the northern boundary on this creek was established the outlet of this sewer, and it was built to the south from there some 855 feet, to the intersection of Washington boulevard and Cuyahoga street, and then the sewer proper was built southerly some 2,000 feet on Cuyahoga street to Harvard street, which runs east and west.

Cuyahoga street may be said to bisect the northern part of the village and is about three thousand feet long, ending at the tracks of the South Shore Railroad, which here runs in a generally east and west direction. The thickly populated part of the village lies north of these tracks; south of them are farm lands.

Washington boulevard, from the point where it intersects Cuyahoga street, curves to the southeast and then runs in a southerly direction parallel to Cuyahoga street, and about one thousand feet east of it, until it ends at Harvard street, from which point Independence road extends to the southerly boundary of the village, as a continuation of Washington boulevard.

All the proceedings for the building of the sewer, issuing of bonds to pay for it, levying assessments and equalizing them, were regualar and the assessments levied should be paid, if the

amount found to be due from the several property owners was rightly determined according to law.

No estoppel is pleaded or claimed to bar the action of plaintiffs, if they are right in their contention that the assessments were improperly distributed.

In distributing the cost of the improvement the assessing board and the equalizing board determined the area of the territory to be assessed by its elevation with reference to the improvement in question, and limited it to those lands which could be drained into it either by direct connection or through the construction of intermediate sewers having their outlet in the improvement.

The area thus designated for assessment was divided into three classes; the lands furnished drainage by direct connection with the improvement, those furnished drainage through intermediate sewers connecting with the improvement at some point along Cuyahoga street and those furnished drainage through intermediate sewers to be connected with the so-called outlet at some point north of Cuyahoga street.

No complaint is or can be made of this division of the benefited lands into classes. Plaintiff's lands belong to the third class and the area thus thrown into the third class, its size, shape and character and the method of dividing the assessments among the owners of property of the third class must be further considered.

From the map in evidence it appears that the first class of property lies along Cuyahoga street; the second class is a compact territory nearly round in shape, lying on both sides of Cuyahoga street, which appears as the north and south diameter of the circle. The third class shows on the map as an irregular strip of land, lying on both sides of Washington boulevard and extending from north of Cuyahoga street to the south, passing the second class with a narrow width of 200 or 300 feet, and then broadening out to perhaps 1,500 feet in width, then contracting to a narrow width, and lying on both sides of Independence road. Evidently it was thought that another sewer would sometime be built through Washington boulevard com-

mencing north of Cuyahoga street, paralleling Cuyahoga street to Harvard street, and then running south along Independence road a distance of over 8,000 feet, and that the property in this territory, called the third class, would be benefited by a sewer so constructed and emptying into the so-called outlet at the north.

The most graphic way to describe this third class territory, without a map, is to call it a shoe string, with the northerly end tied to the improvement and the southerly end eight thousand feet away on the farms of plaintiffs.

Now the assessors state that they levied the assessments within this territory at the rate of $17 for each and every acre of it, the southernmost acre being assessed the same as the northernmost acre lying next to the improvement or outlet.

The council legislated on this subject and declared that all assessments should be according to benefits; the assessors reported the assessments at $17 per acre, and solemnly declared that they had levied the assessment according to benefits; the council adopted the assessor's report and the report of the equalizing board, which was the same, and all declared that the assessment had been made according to benefits, but the agreed statement of facts contradicts all these statements and shows that the assessment was not made according to benefits, but by a rule of thumb which is nowhere authorized by the statutes of Ohio.

Manifestly an acre of land a mile and a half from a sewer is not benefited by it equally with an acre of land within one or two hundred feet of it. There is no present advantage from the construction of the sewer to the owner of the land at the south end of this narrow strip of territory, while there is to the owner at its north end. Nor will the owner at the south ever be benefited by the construction of this particular improvement, until a sewer is built a mile and a half along down Washington boulevard and Independence road, and then he will be assessed for the construction of that sewer.

That this territory in class three should be assessed some part of the cost of the outlet may be conceded, but the owner of land in this territory on Washington boulevard near the outlet can

connect with it at once, while the plaintiffs may not live long enough to get any benefit from it.

The geography of the third class territory contradicts the assertion that every acre in it is equally benefited by the improvement.

It appearing that the assessments levied upon plaintiffs' lands were not made according to benefits, their collection is enjoined.

SIMULATED PAYMENT OF A STOCK SUBSCRIPTION.

Circuit Court of Lorain County.

C. E. VANDEUSEN, TRUSTEE, v. E. M. RANSOM.

Decided, December 2, 1912.

Corporations—Stockholder's Liability for Unpaid Subscriptions Not Defeated by Any Device Short of Payment.

Capital stock or shares in a corporation, especially the unpaid subscriptions to such stock, constitute a trust fund for the benefit of creditors, which can not be defeated by simulated payment of the stock subscription or by any device short of actual payment; hence, where a subscriber to stock in a corporation pays only 80 per cent. of its par value and a board of trade is credited with a commission of 20 per cent. for procuring the purchaser, which 20 per cent. is immediately assigned by the board of trade to the purchaser, according to a pre-existing agreement, such transaction is not a valid payment of the 20 per cent. as against creditors of the corporation or a trustee in bankruptcy.

White, Johnson & Cannon, for plaintiff in error.

G. A. Resek and *L. B. Fauver,* contra.

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

The plaintiff in error is the trustee in bankruptcy of the National Steel Products Company, a corporation. He was plaintiff in the action below, the action there being brought to recover the balance claimed to be due on the defendant's subscription

to the capital stock of said the National Steel Products Company.

The evidence establishes the fact that the defendant subscribed for fifty shares of the capital stock of the National Steel Products Company and agreed to pay therefor the sum of $100 per share, which was the par value of the stock, but that in fact he actually paid only $80 per share. The difference between the par value and the price actually paid for the stock was sought to be recovered in the original action.

To defeat the plaintiff's claim, the defendant relied upon an affirmative defense, stated in the second amended answer, in the following language:

"Further answering, and for a second defense to the petition of plaintiff, this defendant says that on or about the 17th day of September, 1909, said the National Steel Products Company attempted to increase its capital stock from $25,000 to $50,000 and at said time said company was insolvent and had no working capital, and was unable by reason thereof to sell or place any of said additional capital stock; that the officers attempted to raise capital by obtaining subscriptions to its capital stock, but were unable to secure any subscribers; that at said time there was in existence in the city of Lorain an industrial organization known as the board of commerce, which board was composed of the leading business men, bankers and professional men of the city of Lorain; that said company, as a final resort in its efforts to obtain subscriptions, enlisted the services of the industrial committee of said board of commerce and entered into an agreement with said board of commerce whereby said board of commerce agreed to obtain subscriptions for said second issue of said stock, and said company agreed to pay said board of commerce for said services the sum of $20 per share for all subscriptions secured; that the said services of the said board of commerce were reasonably worth said sum of $20 per share.

"This defendant further says that he subscribed for fifty shares of the capital stock of said company under an agreement whereby this defendant was to pay for said stock the sum of $100 per share, of which $80 per share was to be paid in cash, and $20 per share in commissions earned by the board of commerce and assigned by said board of commerce to this defendant; that this defendant paid the sum of $80 per share in cash, and the board of commerce assigned to this defendant said commissions of $20 per share, thereby relieving said company from the payment of said commissions to said board of com-

merce, and credited this defendant with said commissions, and that this defendant is not indebted in any amount whatever to said company or to plaintiff herein, by reason of said stock subscription."

This defense was controverted by the plaintiff; the defendant assumed the burden on the trial of the action, and at the conclusion of his evidence the court overruled a motion made by the plaintiff to direct a verdict, which motion was renewed at the close of all the evidence, with like ruling by the court. The verdict was for the defendant. To reverse the judgment entered thereon, the plaintiff in error prosecutes this action.

It is contended on behalf of the plaintiff in error that the proof of the alleged contract between the National Steel Products Company and the board of commerce, and of the rendition of services by the board of commerce in selling the stock purchased by the defendant, is insufficient to support the contract; that the agreement relied upon by the defendant, even if made as claimed, is a mere device to enable the company to sell its stock at less than par, and made for the purpose of enabling the defendant and other purchasers of stock to avoid further liability, and therefore void as against creditors who are represented here by the trustee in bankruptcy; that the board of commerce of the city of Lorain being a corporation not for profit, could not make a contract for commissions and agree to sell stock and receive profit therefrom, even though such commissions were assigned to purchasers of stock.

The board of commerce is a corporation not for profit, having for its object the advancement of the commercial and industrial welfare of the city of Lorain.

We are not prepared to hold, as a matter of law, that it would be beyond its powers to enter into a contract with a corporation for the purpose of assisting in the sale of the stock of the company, for the purpose of promoting the general industrial growth of the city and giving to purchasers of stock the commissions contracted for, providing it was reasonably fair and the contract entered into in good faith and not for the mere purpose of enabling those who might subscribe for stock to pur-

chase the same at less than par and avoid further liability thereon.

There was evidence in this case which required the submission of the issues to the jury, and the trial court did not err in overruling the motion of the plaintiff to direct a verdict. A consideration of all the evidence, however, convinces us that the verdict is not sustained by sufficient evidence.

The arrangement entered into between the board of commerce, or the industrial committee representing the board, and the National Steel Products Company, strongly suggests the inference that it was intended to provide thereby a device whereby stock of the company could be sold at $80 per share to all who might desire to purchase, regardless of the services rendered by the board of commerce in making sales, and to protect purchasers against further liability if they should ever be called upon to pay the remaining $20 per share.

It appears that the company, which was in the manufacturing business and located in the city of Lorain, being desirous of increasing its capital stock, sought the assistance of the board of commerce of said city in selling additional stock. The president of the board of commerce was first approached by officers of the company, who proposed to him that if he would use his influence in putting $20,000 of the company's stock on the market, he should receive as compensation the sum of $2,000. This proposition was rejected by the president of the board of commerce but the matter was referred to the industrial committee of the board. As a result of the action of the industrial committee, the assistance of the board of commerce was secured in placing the company's stock on the market, and an arrangement was made whereby a commission of 20% of the par value of the stock was to be, in form at least, paid to the board of commerce, but in fact this commission was never paid, but was credited on the subscriptions of those who took stock. The company issued a prospectus which, after setting forth various information concerning the company and its affairs, contains this language:

"Stock is offered at a net price of $80 per share, this basis having been arrived at in conference between the management

of the company and the industrial committee of the board of commerce, as a fair adjustment between the present and the prospective stockholders. An adjustment between the par value of $100 and the net price of $80 per share will be made by way of a commission, which will be refunded to the subscribers so that they will be relieved of any liability in the future for what would otherwise be an unpaid portion of the par value of the stock."

If the transaction between the company and the board of commerce was designed merely to furnish a plan whereby those who subscribed for stock and obtained the same at less than par, might be relieved of further liability thereon, the law is such that such transaction can not be interposed as a defense to an action brought by the trustee in bankruptcy for the company. The law is well established that, although an issue of stock is for cash under an agreement that only part of the par value need be paid, yet corporate creditors or their representatives may compel the persons receiving the stock to pay the unpaid par value. As between the corporation and the stockholder, the agreement would be good, but where the rights of creditors of the corporation are involved, such agreement constitutes no defense in an action for the unpaid balance of the subscription.

Sawyer v. *Hoag, Assignee,* 84 U. S., 610, is typical of numerous decisions. It was there held:

"Capital stock or shares of a corporation, especially the unpaid subscriptions to such stock or shares, constitute a trust fund for the benefit of the creditors. This trust can not be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith. An arrangement by which the stock is nominally paid and the money immediately taken back as a loan to the stockholder, is a device to change the debt from a stock debt to a loan, and is not a valid payment as against creditors of the corporation, though it may be good as between the company and the stockholder."

There is some evidence here that the board of commerce, or some of its members, had some influence in inducing the defendant to subscribe for his stock, but in view of what seems to us the manifest character of the arrangement, we think that this evidence and other evidence offered on the subject of the reason-

able value of the services in obtaining subscriptions to stock of the corporation, are insufficient to sustain the verdict, and that the motion of the plaintiff for a new trial should have been granted on the ground that the verdict is not sustained by sufficient evidence, and for error in overruling said motion, the judgment is reversed and the cause remanded for further poceedings according to law.

This opinion and the result herein indicated represent the views of a majority of the court.

DISREGARD OF STATUTORY REGULATIONS IN OPERATION OF AN AUTOMOBILE.

Circuit Court of Cuyahoga County.

JOHN W. TAYLOR, ADMINISTRATOR OF THE ESTATE OF ISABEL HAMPTON ROBB, DECEASED, v. THE CLEVELAND RAILWAY COMPANY AND PAUL T. LAWRENCE.

Decided, December 2, 1912.

Automobiles—Negligence—Operation of Motor Vehicle in Violation of Sections 12603-4, *General Code—Negligence.*

The operation of a motor vehicle in violation of Sections 12603 and 12604, is *prima facie* evidence of negligence, where such operation of the motor vehicle caused a pedestrian, in order to avoid it, to step back in front of a moving street car which strikes and kills her.

Ong, Thayer & Mansfield, for plaintiff in error.

Squire, Sanders & Dempsey and *Stearns, Chamberlain & Royon,* contra.

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

This was a suit for wrongful death of said decedent. On the 15th of April, 1910, the decedent was caught between two cars of the railway company at the corner of Euclid avenue and East 100th street, in the city of Cleveland, the one going east

on the south track of said company, and the other west on the north track. Being so caught, she was crushed to death.

These cars were on Euclid avenue, a main thoroughfare in said city, and at the point of this occurrence much used by vehicles of all kinds.

East 100th street does not cross Euclid avenue, but leads from said avenue to the south. This occurrence was in broad daylight, and resulted either wholly from the negligence of the decedent or from the combined negligence of the decedent and that of either one or both of the defendants, or wholly from the negligence of one or both of the defendants, or it was an accident for which no one was responsible because it did not result from the want of reasonable care on the part of anybody.

The plaintiff, as administrator of the decedent's estate, brought suit charging that it resulted wholly from the combined negligence of the defendants. Each defendant answered denying negligence on its part and charging negligence against the decedent. The case went to trial, and the court directed a verdict in favor of the defendant Lawrence, and submitted the question of the liability of the railway company to the jury, which returned a verdict in favor of the railway company. By proper proceedings the case is here for review, it being urged that the verdict in favor of the railway company is against the weight of the evidence, and that there was error on the part of the court in directing a verdict in favor of Lawrence.

We are of opinion that the evidence does not show want of reasonable care on the part of the decedent. She and another woman were walking on the north sidewalk on Euclid avenue; when they reached a point opposite to the sidewalk on the east side of East 100th street, they turned to cross Euclid avenue. This necessitated the crossing of both tracks of the railway company, and of course the devil strip between the tracks. At this time the two cars, already mentioned, were coming in opposite directions, the one from the east, being at a considerable distance from the line on which the women were crossing—at a rate and far enough away so that they crossed the track in safety—the one coming from the west was nearer, but the witness Falls says it was going slowly, apparently making a

stop. At any rate, this car was not approaching at such a rate of speed as to prevent these two women from passing in front of it with safety, for Miss Canfield, the woman who was with the decedent, did so cross. The witness Falls says, in describing the occurrence:

"They crossed the street between the curb and the street car track without any occurrence of moment, until they hesitated on the south track or rather the track of the east bound car, stepped back into or almost into the track of the west-bound car; the one woman, rather both ladies, started again for the south side of Euclid avenue, one lady continued on to the south side of Euclid avenue very hurriedly; the other lady stepped back into the devil strip."

This one who stepped back was plaintiff's decedent.

The defendant Lawrence was driving an automobile to the east, and was so near to the place where Miss Canfield crossed, and where Mrs. Robb must have crossed, that the mudguard of his machine grazed her clothing. Mrs. Robb then was in this situation immediately before she was caught. She was on the east-bound track, and but for the approach of the automobile she could have crossed in safety, but a dilemma presented itself. If she moved forward, she was in imminent danger from the automobile; if she stood still or stepped back, she was in danger from the approaching cars. She had to determine on the instant, and she stepped back and so was caught.

Both on reason and authority it is clear that one so situated is not bound to exercise such judgment as is required where one has time to deliberate and choose. It does not appear from the evidence that Mrs. Robb did not exercise as much care as an ordinarily prudent person would exercise when confronted with a like combination of circumstances, and so neither the action of the court in directing a verdict for the defendant Lawrence, nor the finding of the jury, can be justified on the ground of negligence on the part of the decedent.

We reach the conclusion, too, that the verdict of the jury in favor of the railway company is not by any means clearly against the weight of the evidence, and this largely on the evidence of the witness Falls, a part of which has been hereinbe-

fore quoted. The question then remains as to the direction of the court to return a verdict for the defendant Lawrence.

If there was any evidence tending to show that this defendant was negligent in any manner charged in the petition and that such negligence directly caused or contributed to the accident resulting in the death of Mrs. Robb, then this was erroneous.

At the time of this accident Lawrence was driving his automobile to the east on the south side of Euclid avenue. The witness Falls says that the machine swerved into the track of the east bound car to avoid a wagon which was standing on the south side of Euclid avenue east of the cross walk of 100th street. Miss Canfield stepped in front of the automobile, or rather rushed, and her clothing was grazed by the right front mudguard of the automobile. This automobile pulled then into the track in front of the east bound car. Either the defendant saw or failed to see these women; if he saw them and the situation they were in, he knew that his approach with the car was threatening to them, and calculated to cause them to step back as they did. It is possible that he did not see them until he had swerved into the track, because of the east bound car being between him and them, as it is not improbable that they did not see him until he so swerved into the track, or if they did see him, it must have been when he was far enough back of the car as that he could, if driving carefully, have stopped or slowed down his machine. As already said, it is possible that he did not see them until he swerved into the track, but the evidence tends to show that he was violating two sections of the statutes of the state, viz., Sections 12603 and 12604, General Code.

The first of these makes it an offense to operate a motor vehicle on the public road or highway at a speed greater than is reasonable or proper, having regard for width, traffic, use, etc., of such road or highway, or so as to endanger the property, life or limb of any person.

The second makes it an offense to operate a motor vehicle at a speed greater than fifteen miles an hour within the limits of any municipality.

The testimony tended to show that Lawrence so operated his vehicle as to endanger the life and limbs of whoever should

be crossing Euclid avenue at the point where these ladies undertook to cross; indeed, the danger to Miss Canfield who, by rushing across the street, avoided being hit by him, but who came so near to being hit that the mudguard grazed her clothing, tended to show that he was driving at a speed greater than fifteen miles an hour. True, the witness who says the speed was greater than fifteen miles an hour says he can not say how fast it was going, but that it was going at a speed higher than fifteen miles an hour. It by no means follows that because one can not say how fast an object is going, he may not positively know that it is going faster than some given speed. One does not need to have witnessed many horse races to know that a horse which is actually going at the rate of 2:10 is going faster than a three-minute gait, though he may not know whether it is going at a 2:10, 2:12 or 2:20 gait. All of us have ridden on railroad trains when we knew they were going more than twenty-five miles an hour, without knowing whether they were going at forty or fifty miles an hour. But one may operate an automobile or a street car at a negligent rate of speed, without violating a statute or a municipal ordinance. Whoever supposes that if he violates no statute and no municipal ordinances by the speed at which he is operating any vehicle, he is necessarily not negligent in the matter of speed, is most greviously mistaken.

The evidence tending to show in this case that Lawrence was violating either or both of the sections of the statute makes a *prima facie* case of negligence against him, but it is said that the evidence does not tend to show that this negligence, if established, contributed directly to the injury and death of the decedent. We think otherwise. The stepping back of Mrs. Robb when she saw the automobile approaching at such speed was not unnatural; it was such as might reasonably have been expected, and such as might not have been expected if he had been operating his machine at such a rate as is prescribed by Section 12603, General Code, that is, at a speed that was reasonable or proper, having regard to the width, traffic and use of the street, and so as not to endanger the life or limb of any person.

It is further said that if the defendant was negligent in such wise as to have contributed to the injury of Mrs. Robb, it was

not the negligence charged in the petition against Lawrence. This contention is not sound. The language of the petition in that regard is that this motor vehicle, operated by Lawrence, "was being propelled by said defendant over the street crossing and intersection described in the petition; that said defendant was operating said automobile at a dangerous and negligent rate of speed, greater than was reasonable or proper, having regard for width, traffic and use and the general and usual rules of said highway, and so as to endanger the lives of pedestrians thereon, and especially said Isabel Hampton Robb; that said defendant was then operating said automobile on said street in said city at more than fifteen miles an hour."

This charges the negligence which the evidence tends to establish, and which, as already pointed out, directly contributed to or caused the injury to Mrs. Robb.

We are not impressed with the soundnesss of the argument made on the hearing that the rate of speed of the machine had nothing to do with the accident; that it was the failure to stop or slow down, or the being at this particular point at this time, that caused Mrs. Robb to step back to the point where she was struck by the car. If this argument is sound, it could equally well be made against all statutes and all ordinances against the speed of motor and all other vehicles. The object of all these regulations is to prevent the operation of these vehicles in such wise that they are likely to strike and injure persons or property, and it is a matter of common knowledge that the momentum acquired by rapid motion enhances the difficulty of stopping or slowing down.

We reach the conclusion, therefore, that the court erred in directing a verdict for the defendant Lawrence. We find no error in the charge as given in reference to the railway company, nor do we find any error in refusing to charge as requested by the plaintiff before argument. Without stopping to analyze these requests, we call attention to the fact that the request was general as to the entire series, but we also find that as to each, there was matter asked that would justify a refusal to give in the exact words of the charge. The result is that the judgment

in favor of the railway company is affirmed, and the judgment in favor of Lawrence is reversed for error in directing the jury to bring in such verdict.

The case is remanded for further proceedings between the plaintiff and the defendant Lawrence.

MONTHLY PAYMENTS TO WIFE IN A DIVORCE PROCEEDING.

Circuit Court of Cuyahoga County.

KATE D. FENN v. EVERTON W. FENN.

Decided, December 3, 1912.

Divorce and Alimony—Decree Adjudging Property of Husband to Wife Divorced for Aggression Not Subject to Modification.

Where a divorce is decreed a husband because of the aggression of the wife, the further jurisdiction of the court in respect to the property rights of the parties is determined by Section 5700, Revised Statutes; and where in such case the decree provides for a monthly payment of alimony by the husband extending through a term of years, such payments are in fact not alimony, but property of the husband adjudged to the wife, and are not subject to modification.

Squire, Sanders & Dempsey, for plaintiff in error.

Kline, Tolles & Morley, contra.

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

The action out of which this proceeding in error arises was begun in the Common Pleas Court of Cuyahoga County by Everton W. Fenn, the defendant in error, against Kate D. Fenn, the plaintiff in error, to secure a divorce.

On the trial of the original action the plaintiff was granted a divorce from the defendant upon the ground of willful absence for more than three years, but the plaintiff was ordered to pay to the defendant for her support the sum of $25 each month beginning December 1st, 1904, for the period of six years from and after said date. This was in addition to certain payments which the plaintiff was ordered to pay for the support of the children of the parties.

The journal entry in connection with this order states:

"This provision for alimony for the defendant herein is made in view of the fact that a liberal allowance had already been made by an agreement resulting in the settlement of a suit instituted by the defendant against the plaintiff for alimony in this court."

The plaintiff complied with the order made, and fully paid the installments provided for in the decree.

On December 15, 1910, the defendant filed a motion to modify the decree so as to secure an order on the plaintiff to pay to her such sum per month as the court might decree proper during the life of the defendant, or until she should remarry.

Notice of the filing of this motion was given the plaintiff in Chicago, and also to counsel of record for the plaintiff in the original action. Subsequently counsel for the defendant sought to take depositions on her behalf in support of the motion. Notice of the taking of such depositions was sent to the plaintiff by registered mail, and was served on his attorney of record. At the time set for the taking of depositions, a witness was called before the notary and questions put to him seeking to elicit information concerning the financial condition of the plaintiff. On the advice of counsel the witness refused to answer.

The notary then certified his proceedings to the court of common pleas, and asked for instructions in the matter of requiring the witness to answer the questions propounded to him. On consideration of this application, the court adjudged and decreed that it had no jurisdiction over the person of the plaintiff, and instructed the notary not to require the witness to answer the questions, and to take no further proceedings in the taking of the depositions.

On the hearing of the motion, the court adjudged that it was without jurisdiction of the plaintiff or the subject-matter of the motion, and therefore declined to consider said motion on its merits.

Exceptions were duly taken to these rulings, and by this proceeding in error it is sought to secure a reversal of the judgment entered against the defendant below.

It is contended on behalf of the plaintiff in error that the court may at any time on any change of circumstances of the parties, increase or reduce the amount awarded one of the parties as alimony, and that application for such purpose may be made in the same cause.

This contention is sustained by numerous decisions both in this state and elsewhere, where the subject-matter of the controversy is alimony in the proper and strict sense of that term. *Cole* v. *Cole,* 142 Ill., 811; *Jungs* v. *Jungs,* 5 Ia., 541; *Hoffman* v. *Hoffman,* 15 O. S., 427; *Olney* v. *Watts,* 43 O. S., 499; *Pretzinger* v. *Pretzinger,* 45 O. S., 452.

The determination, therefore, of the soundness of the rulings of the court of common pleas, which resulted in the judgment against the defendant, complained of in this proceeding, requires a consideration of the nature of the order sought to be modified. If it was a decree for alimony proper, the jurisdiction of the court was continuing and the judgment below was erroneous. If, on the contrary, it was a mere judgment for the payment of money, such that its rendition exhausted the powers of the court on that subject, unless vacated or set aside in some manner authorized by law, the action of the court below was correct.

Section 5700, Revised Statutes (now Section 11993, General Code), is as follows:

"When the divorce is granted by reason of the aggression of the wife, she shall be barred of all right of dower in the lands of which her husband is seized at the time of filing the petition for divorce, or which he thereafter acquires, whether there is issue or not; and the effect of the judgment of divorce shall be to restore to her the whole of her lands, tenements or hereditaments not previously disposed of, and not allowed to her husband as alimony, subject to the dower right of her husband therein, and the court may adjudge to her such share of the husband's real or personal property, or both, as it deems just and reasonable or the husband shall be allowed such alimony out of the real and personal property of the wife as the court deems reasonable, having due regard to the property which came to the wife by marriage, and the value of her real and personal estate at the time of the divorce, which alimony may be allowed to him in real or personal property, or both, or by decreeing to him such sum of money, payable either in gross or in installments, as the

court deems just and equitable; and if the husband survives his wife he shall also be entitled to his right of dower in the real estate of his wife not allowed to him as alimony, of which she was seized at any time during the coverture, and to which he had not reliquished his right of dower."

Since the divorce in this case was granted the husband by reason of the aggression of the wife, the power of the court to decree any of the husband's property to her is based on said Section 5700.

The order made upon the plaintiff to pay the defendant the sum of $25 per month for six years must be referred to the authority of the court, not to award the defendant alimony, but to "adjudge to her such share of the husband's real or personal property, or both, as it deems just." The fact that the payments ordered made are described as alimony does not affect their essential character. The order was in legal effect a judgment under authority of said Section 5700, Revised Statutes, for such share of the husband's property as the court deemed just, and that judgment is not subject to modification in the manner attempted by the defendant.

That a distinction between alimony proper, and a judgment rendered under authority of said Section 5700, Revised Statutes, exists, is recognized by the Supreme Court in *Hassaurek* v. *Markbreit, Admr.*, 68 O. S., 544. In the opinion on page 579, it is said:

"Nor need we consider the nature of the obligations upon which decrees for alimony are founded, since the finding of the court upon the evidence that the wife had been willfully absent for more than three years, and its judgment that the marriage relation should be terminated for that reason, excluded her right to alimony. The court having concluded that a divorce should be decreed for her aggression, its further jurisdiction was defined by Section 5700 of the Revised Statutes as follows: 'and the court may adjudge to her such share of the husband's real or personal property, or both, as it deems just and reasonable.'"

See also *Law* v. *Law*, 64 O. S., 369; *Fickel et al* v. *Granger*, 83 O. S., 101.

The judgment of the court of common pleas is affirmed.

PROCEDURE FOR ENFORCING STOCKHOLDERS' STATUTORY LIABILITY.

Court of Appeals for Fulton County.

GEORGE W. GRIFFIN v. EDWARD F. ROWLEY, RECEIVER.*

Decided, December 28, 1914.

Summons—Attempted Service by Publication on Resident of the State —Invalidity of, Not Material When—Enforcement of Statutory Liability Against Stockholders—Proceeding in the Nature of a Suit in Equity—Stockholders in Court by Representation—Matters Which May be Conclusively Adjudicated in Their Absence—Preservation of the Right of a Personal Defense—Pursuit of a Stockholder in Another Jurisdiction.

The invalidity of service by publication upon a resident of Ohio, in an action to assess the statutory liability of stockholders of an insolvent corporation, constitutes no defense where legal service has been obtained in a subsequent action to recover the amount found due.

Ham & Stahl, for plaintiff in error.

R. S. Holbrook and *C. R. Banker,* contra.

GRANT, J.; WINCH, J., and MEALS, J., concur (sitting in places of Judges Kinkade, Richards and Chittenden).

Error to the court of common pleas.

To avoid confusion and for the purpose of clearness, in this opinion the order of parties will be designated as it was in the court of first instance; that is to say, in the reverse position of that stated in the caption here.

Prior to January 25th, 1914, the Union Central Savings Bank Company, whose receiver the plaintiff is, was a corporation of the state of Ohio. Also prior to that date, that corporation became indebted to the Central Savings Bank Company, also a corporation, and to others, its creditors. At that date also, and

*For decision below, see 14 N.P.(N.S.), 625.

when such indebtedness arose, the defendant was a stockholder in the Union Central Savings Bank Company. At that date the Central Savings Bank Company had reduced its claim to judgment, and an execution having been sued out against the debtor upon it, and this having been returned unsatisfied, the creditor in question began a suit in the Court of Common Pleas of Lucas County to compel satisfaction of its claim by the stockholders of the debtor corporation, under the statutory liability at that time existing by the Constitution and laws of Ohio in that behalf provided.

In the petition in that cause and in an amendment to it, the creation of the debt named, the rendition of judgment thereon, the failure of the debtor to satisfy the execution issued upon it, the insolvency of the delinquent corporation, the fact that the defendant, among others, was a stockholder at the time and when the credit was extended, and other proper averments were aptly made. The plaintiff in that action sued on its own behalf, and for the benefit as well of all other creditors of the alleged insolvent debtor. To that petition the corporation was made a defendant, as also were its officers and shareholders, including the defendant. No personal or *actual service*, however, was at any time had upon him in the action, nor was any attempted to be had upon him. On the contrary, he was named in the proceeding as a defendant non-resident of Ohio, upon whom such service could not be had within the state, and thereupon and for that stated reason, constructive service upon him as such non-resident defendant, and as a resident of the state of Indiana, was attempted and purported to be had, by publication, in the form allowed by statute for that purpose having been first made.

This allegation of non-residence and the consequent inability to have actual and personal process upon him, was not true in point of fact, the defendant being at the time a resident of Fulton county, Ohio, having an actual and visible domicile there, and having had at no time a residence in the state of Indiana.

The prayer of the petition in that case was for an ascertainment by the court of the several amounts due from the defendant

corporation to the plaintiff in the action and to the other creditors on whose behalf it sued, for the like ascertainment of the stockholders of the corporation, and for an order requiring each of these to pay his ratable share necessary to satisfy the debts due to the plaintiff and its creditors, in accordance with the liability of each created by statute. A receiver also was asked for, to collect the amounts so to be found forthcoming from the shareholders of the insolvent corporation.

By an interlocutory order in that cause a referee was appointed, who was directed to try the issues both of law and fact and to report his findings and decision thereupon, the corporation itself having duly entered its appearance in the action.

The referee reported his findings of fact and conclusions of law arising in the proceeding, those material to the present inquiry being to the effect that the defendant here, George W. Griffin, was a stockholder in the defaulting corporation to an original amount of $500, upon which there was a then present liability of $608.91, under the statutes of Ohio.

Upon the coming in of this report, the court approved it, with certain modifications, unimportant in the present controversy. The confirmation was followed by a finding of the court that the defendant had become liable to the creditors of the defunct corporation in the sum already named, that being the amount of his holding with the interest which had accrued since the liability attached, and that this should be collected by the process about to be awarded, "or so much thereof as may be necessary to secure the payment of the amounts heretofore found due the several creditors, together with the costs," etc., the finding in this respect and so far, being in terms contingent as to the amount to be paid by the defendant, although it was arithmetically certain that such amount must be the entire amount.

It was then by the court "ordered, adjudged and decreed" that the plaintiff in that action and its co-creditors "recover" from the several shareholders the amounts set opposite their names, that set opposite the name of the defendant here being the full amount of his assessment, already mentioned, "or so

much thereof as may be necessary to pay the aforementioned debts * * * and it is ordered that execution issue therefor."

This is the formal language usually employed in the rendition of a money judgment *in personam*. Nevertheless, the same contingency is reserved in terms as to the amount of it as is done in the basic finding, although, here again it was obviously certain that the contingency of a less amount than the full amount could not, under the circumstances, happen. It is supposed that the awarding of the execution was wholly redundant, the right to that accruing as of course, if there was a personal money judgment.

A receiver in the action was appointed thereupon, to collect the various sums "hereinbefore found to be due from said respective stockholders, or so much thereof as may be necessary to pay the said claims against said corporation," the language denoting liability still being less than absolute as to the amount to be required from the defendant, although in fact such amount could in no manner be uncertain.

In the decree now being recited, the only language as to defendants to the action non-residents of Ohio, is the following: "As to the defendants who are non-residents and upon whom service was had by publication, which service is hereby approved and confirmed * * *." And, "Said defendants so found to be non-residents are * * * George W. Griffin." This language seems to assume, but not make, a finding of non-residency, in what state or jurisdiction does not appear.

As to the assumed, but not found, defendants non-residents of some place, ten in all, and upon whom service by publication is assumed to have been properly had, the receiver is authorized by the decree to pursue by action "outside of the state of Ohio, or *wherever jurisdiction may be had*, for the purpose of collecting the several amounts so found due."

That judgment and decree is still unreversed and operative to effect, so far as the record here discloses.

Acting under the authority thus conferred, the plaintiff here—who is the receiver named in the decree—commenced the present

action against the defendant, in this, the county of his residence, declaring for substance on the proceedings and judgment in the original suit in Lucas county, and praying judgment in the amount there purported to have been fixed as the liability of Mr. Griffin as the aforementioned stockholder, under the statute then in force, and interest. In this action the defendant was personally summoned. He answered, admitting the proceedings in Lucas county and the findings of that court thereupon, in substance, and admitting—by not denying—that Griffin was a shareholder, as alleged. By an amendment to the answer, he was expressly admitted to have been such, and in the amount found in the other suit.

The answer, aside from its admission, concerned itself with two things: first, that the defendant was sued in the Lucas county cause, not by his full and proper name of George W. Griffin, but by the name of G. W. Griffin only, which was the fact; and, second, that the finding of that court to the effect that the defendant was a non-resident of Ohio and therefore amenable to constructive service by publication as such, was wholly false and that no service in the action was ever had upon him, or jurisdiction acquired over him, that could be made the basis of the present action. The assault upon the Toledo judgment in this respect was vigorous to the verge of violence. Many, many times in the answer, what the Lucas common pleas did, and decreed, found and adjudged, is characterized by the limiting word "pretended." But the substance of that document is as we have stated. The allegation is that the defendant was not only at all times a resident of Ohio, but that the fact ought to have been well known, and probably was well known, or at least could easily have been ascertained, by the instigators of that action. A separate defense of the statute of limitations also was pleaded in the answer. To the name of answer in the pleading now referred to the title cross-petition was added. But the prayer of it was wholly defensive in character and amounted to no more than asking for a dismissing of the petition. A reply to the answer was made, not materially changing the issues made, or attempted to be made, in the case.

After much intervening litigation, not necessary or useful to recite here, the cause came on for trial to a jury in the court below. A motion by the defendant for judgment on the pleadings was denied.

The plaintiff introduced a full transcript of the record and proceedings of the court of Lucas county, of the tenor and effect already narrated, and rested.

The defendant then moved for a judgment in his favor on the plaintiff's case, and this was refused. He then produced evidence the tendency of which was to prove his residence was always in Ohio and that the plaintiff in the case of first instance had full opportunity to know the fact, and rested.

Thereupon the defendant renewed his motion for a judgment in his favor, as upon undisputed evidence decisive of the case, but reserved a right to go to the jury upon the evidence if the motion should be denied. It was denied.

The plaintiff then moved for judgment upon the evidence, in his favor and asked that the jury be directed to return a verdict for him.

Before this latter motion was passed upon by the court, the defendant presented a series of written instructions and requested that they be given to the jury as the law governing the case. These amounted to the direction of a verdict for the defendant, on the ground that since he was not a non-resident of Ohio at the time he was alleged to have been so in the proceedings had in Lucas county, the notice published for him was inert to confer jurisdiction and that any judgment in that cause purporting to bind him was void for want of jurisdiction to make it—it not being claimed that any process upon him personally, by summons, was obtained in that action.

These requests were severally refused, and the court proceeded to direct the jury to return a verdict for the plaintiff for the sum claimed by him, which was done, accordingly.

Appropriate exceptions were saved to these actions of the trial court, adverse to the defendant. A motion for a new trial was seasonably made and overruled, to which an exception also was taken, and judgment upon the verdict was rendered.

And these several rulings of the trial court are assigned as so many errors to be corrected here by a reversal of the judgment below, and complained of in the present proceeding.

The people of Ohio, by their adoption of the Constitution of 1851, issued their imperative mandate to the legislatures and courts of the state, requiring the one to pass adequate laws securing to creditors of corporations their dues by fixing an individual liability upon their stockholders, and the other to advance the remedies thus provided. The constitutional purpose was to supply by law that conscience which a soulless body could not have, and thus to check the improvident habits which corporations not thus restrained surely would have.

Having this view of the mischief aimed at in view, the Legislature of Ohio, in obedience to the command, have passed laws progressively appropriate to the purpose and it is the duty of the courts to administer these, upon occasion, in the spirit of the constitutional provision for safeguarding the rights of corporation creditors.

Disregarding as not useful here, the genesis of the legislation referred to, and coming at once to that which can usefully be brought to bear upon the present contention, it is to be said that by the provisions of what became in the revision of 1880, Section 3260 of the Revised Statutes of Ohio, the individual liabilities of stockholders might be enforced by a creditor of a corporation at the suit of the latter against all the shareholders, jointly. The contingency of non-residence or failure to obtain service of process upon any for any other reason, does not seem in that act to have been contemplated; in any event, it was not provided for.

The scope of remedy was materially widened by the amendment found in Ohio Laws, Vol. 91, page 88, as follows:

"Section 3260. (*How Such Liability Enforced; Inability to Summons Stockholders, Etc.*) A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders, and in such action there shall be found and de-

termined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any action the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not been summoned, giving their residence, if known, and that it is impracticable to secure the services of summons upon such stockholder or such legal representative of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders, not served with summons except those who may be insolvent or non-resident of the state, and judgment shall be rendered against the stockholders who have been served with summons, for the pro-rata amount for which they would be liable if all solvent stockholders resident of the state were served with summons; and when a creditor has prosecuted against a corporation an action of (at) law begun before any action to enforce the stockholders' liability and has recovered final judgment only after such an action to enforce the stockholders liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in section thirty-two hundred and fifty-eight."

Without remark as to the respects in which the enlargement is evidenced by this enactment, except to say that the power to pronounce personal judgment against liable shareholders is restricted by it to such as "have been served with summons," and that it does not undertake to absolve such as have not been so served—although for aught that appears they may be parties to the action—we pass to the act of April 16th, 1900, which further broadened the field of remedy and crystallized the law of procedure in the following language:

"Section 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees, or other superintending officers

of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

"Section 3260*a*. The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers.

"Section 3260*b*. If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders, and enforce the same by its judgment, as in other cases.

"Section 3260*c*. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the court shall give notice to non-resident stockholders as provided in Sections 5048, 5049, 5050, 5051 or 5052 of the Revised Statutes, and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"Section 3260*d*. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder.

"Section 3260*e*. Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

"Section 3260*f*. Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors."

This states the statute in substantially its present form, as Sections 8693 to 8697 of the General Code. It is the law applicable to this case and a proper consideration given to it must coerce our conclusion upon the merits of the petition in error here.

The nature of the action thus authorized is stated by Spear, J., in *Kulp* v. *Fleming,* 65 O. S., 321, at 339, as follows:

"True, our method of enforcing the liability of stockholders is by a proceeding in the nature of a suit in equity which contemplates the bringing in of the corporation, of all the creditors, and of all the stockholders, and a decree which will adjust and finally settle the rights and liabilities of the parties. This is made practicable because the corporation is a creature of our law, the stockholders principally residents of the state, and a multiplicity of suits may thus be avoided."

The sweepingly equitable scope of the proceeding is not diminished by the subsequent legislation, which allowed as defendants the directors and officers of the corporation, as well as the corporation itself and its stockholders, the basic purpose plainly being, as is suggested by the language just quoted, to preclude many suits where the remedy may be made effectual by one suit.

The first words of this quotation signify that the learned judge was differentiating the Ohio law and policy in this regard from the possible legislation of other states in respect of the subject, suggesting caution in the application of adjudications elsewhere bottomed, perhaps on materially different statutory provisions. But the point now emphasized is that the proceeding is equitable in quality, as well as highly remedial in ultimate design. Possibly this inference may be further stretched in the same direction by observing that the name of the initial pleading in the

proceeding is called a "complaint" and not a petition, and so far departing from the provisions of our procedure statute fixing the nomenclature of papers.

Under this act the corporation is a necessary party if its solvency is called in question. Such of its directors and officers as are sought to be charged in the action with a liability, must also be parties. And so must such stockholders as are being sued in the action as for unpaid subscriptions for their holdings, and doubtless such other shareholders upon whom the judgment should definitely be fastened in a fixed sum of money to such effect as would cut off personal defense of non-ownership of stock, or payment of the liability being enforced, or an allowable set-off to it. Some further clue to the line of cleavage between those things in the suit as to which the shareholder must be considered to be vicariously represented by the corporation, and those which may be used to fix a money obligation, beyond the reach of an independent personal defense, may be found in the syllabus of *Kulp* v. *Fleming, supra,* as follows:

"A provision of statute that the stockholders of a corporation shall be individually liable to creditors for the debts of the company does not alone create the liability. It is rather a legislative requirement that whoever becomes a stockholder shall thereby assume an individual liability, and thus gives legal effect to the acts of the parties. The actual liability becomes operative by the act of the shareholder in becoming such, being founded on his proposal to become liable which arises from the membership and individual agreement to abide by the organic law of the corporation, and the acceptance thereof by the creditor by extending credit. Such obligation is contractual."

Some things which the court can do in a suit thus authorized, and which were done in the suit prosecuted to effect in Lucas county, are things in which the shareholder is conclusively in court by representation only. His representative in that respect is the corporation. In those respects he surrendered his right to appear or to have process, personally, when he subscribed for his stock, *ipso facto.* By doing *that,* in legal effect he issued to

the corporation his letter of attorney, irrevocably sending his company to act and answer in his stead in those respects. Among the things in regard to which the corporation is deemed conclusively to represent him, are the questions of its own insolvency, the distribution of its assets, the necessity of fastening the statutory liability upon its shareholders and the amount of such liability, as a result flowing from their status as such, to be visited upon each. And this is equally so whether the individual stockholder is a party to the action or not. In either case he is in court in the artificial personality of his company (*Spring, Trustee,* v. *Rose et al,* 75 O. S., 355). The case at bar perhaps may be assimilated to that case upon the consideration that the signing of the premium notes in the one, was the equivalent in legal contemplation of the subscription for the stock in the other.

The landmark which is now sought to be made visible is suggested in the language quoted in the opinion in the case just cited from *Commonwealth Mutual Fire Ins. Co.* v. *Hayden et al,* 61 Neb., 457, apparently approvingly:

"We do not mean that it (the judgment of assessment) is conclusive as against any individual sued as a stockholder, that he is one, or if one, that he has not already been discharged by payment to some other creditor of the corporation the full measure of his liability, or that he has no claims against the corporation, or judgments against it which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment; but in other respects it is an adjudication binding him."

The bead-roll of authorities called by our Supreme Court in support of this proposition seems to settle the law for us in this respect, as we think.

It appears to be equally clear that there are still other things that the court is competent to adjudicate, by permission of the statute last quoted, to binding effect and for the purposes of the suit, without the personal presence of the individual stockholder, in court at the command of a summons to judgment, and as to

the conclusiveness of which it is immaterial whether he is there or absent. And it was competent for the Lucas county court to pass upon such matters, regardless of whether its writ had effectually run as to him individually or not. These things may be said to sound *in rem;* if the expression may be allowed, they are *quasi in rem.*

They include the appointment of a referee to take an account of the assets and liabilities of the corporation adjudged to be insolvent, and the number and persons of its stockholders and the amount of the holdings of each, as well as the appointment of a receiver in the action and the using of him to force the collection of the assets in any appropriate manner, including the asset in the form of a statutory liability of the indivdual stockholders, when ascertained and fixed by adequate judgment, rendered after jurisdiction is acquired. These things have to do with the assets of the corporation and not of themselves with the personal obligation of the shareholder, although they may be a part of the necessary train of causes which are to eventuate in fixing such a liability. But primarily and of themselves, they look to the husbanding of the corporation's present resources and the sequestration of such as are yet *in gremio legis* only, to the ultimate payment of its debts. If in the suit the shareholder is in court in person, at the foot of a summons to judgment, as well as being there *sub modo* under the aegis of his company, then the court may proceed further and pass a judgment upon him finally, in such wise that its writ of execution may run against him for collection by any of the processes known to the law. Such a judgment, proceeding under a jurisdiction acquired by personal process, cuts off and determines any personal defenses which the debtor may interpose, such as non-stockholdership, payment of the liability, or a set-off against it; for then he will have had his day in court and his opportunity to be heard. But unless he is so in court in obedience to its process, he is not concluded as to these rights of defense, because in such event there has not been due process of law as to him in those respects, and the law of the land has not in his case been observed.

In most instances of the enforcement of the statutory liability of stockholders, the former of the two alternatives is the fact. The shareholders are generally residents in the same jurisdiction with the locus of the corporation and the writ of the court will run to the domicile of all of them. They are therefore usually before the court by process of its summons, so that a final adjudication can be had as to all in one action, and a multiplicity of suits and of costs is avoided. This is the reason given by Judge Spear for the form of proceeding taking its present shape, to the end that the rights and obligations of all may be worked out in a single action, if that is practicable, and so far as it may be practicable, the whole squaring with the equitable theory which is the reason of the statute.

But if, for any cause, personal service is not had on a given shareholder, so that a money judgment, upon which execution may issue, can not be rendered as to him, no good reason is perceived why the court may not still pass upon these matters as to which he is represented vicariously by his corporation and those which are *in rem* merely, to all proper legal effect, and so far conclude him. In such case his personal rights of defense the law preserves to him against his day in court, when he is there by due process to answer, with his consequent opportunity to be heard. For, after all and in the last analysis, these two things are the sum total of his rights. In the underlying suit in Lucas county, the court had jurisdiction to do what it purported to do in the matters in which the stockholders were conclusively represented by the corporation and as to those which were *quasi in rem only*. And when these were adequately attended to; that is to say, when the insolvency of the corporation, the amount of its debts, the number and persons of its shareholders and the shares held by each, were fixed—when these merely mechanical operations were performed, arithmetic and the statute did the rest. It was then a mere thing of computation. An adding machine could render the judgment from these data, as well as the court, to the great saving of judicial mental tissue.

And upon a critical reading of the judgment rendered in the case in Lucas county, it may perhaps be doubted whether more was there attempted to be done. For in all cases in the decree where a money liability is undertaken to be fastened upon individual defendants, the figures reached by the perfunctory mechanical process just noted are limited to such part thereof as might be necessary to liquidate the demands of the corporate creditors. And this result is not disturbed in the law's eyes by the self-evident fact that it was all along certain to take an amount sure to do this, to-wit: the amount of each shareholder's stock, plus interest.

And what the court in that judgment did in respect of service upon the defendant by publication, in like manner is in the twilight zone of literal uncertainty. The court assumed a publication and confirmed the assumption. And it did no more, having regard only to the wording of its decree. It did not find the fact of publication. Attention has already been called to the court's language in both these respects.

But, let it be granted that this view is wholly a mistaken view, and that the court in Lucas county undertook to go beyond the point of adjudication to which, as has been shown, it lawfully could go, and what follows? What did the plaintiff take by it? And what did the defendant lose by it? The answer in either case must be, nothing. It would be destructive of every just principle of jurisprudence to allow that a legal right or a correlative legal obligation can arise from a falsehood. And the non-residence of the defendant in the state of Ohio was admittedly a falsehood. A cart load of solemn adjudications in the form of findings could not make it a truth. Immunity from collateral attack could not make it true. The allegation of it was altogether inert and conferred no right and called for the performance of no legal duty. It is not now perceived why this result should not be found in this case.

And if the nullity of this attempted service by publication be admitted, so that in the judgment in Lucas county the law

saved to the defendant his right still to have his day in court, and his right to wage his personal defenses to the creditors' claims against him, it does not follow, inevitably, as we think, that he must go free of his real obligation in that respect, when the right to enforce it is legally asserted. If the nugatory character of the attempted constructive service be allowed to work an immunity against a personal judgment in that case, does that fact operate as a judgment against his being made to pay a just debt when properly haled to court for the purpose of making him discharge an unperformed legal duty? We must think not.

But the decree in the case in Lucas county did one thing more, and that it did have a right to do. It authorized the court's receiver "to bring suit or suits against any or all of said defendants outside the state of Ohio or *wherever jurisdiction may be had,* for the purpose of collecting the several amounts so found due." This sentence is to be read, manifestly, we think, as if a comma were placed after the word "defendants." As to the defendants assumed to have been found to be non-residents of the state, the decree has already authorized the receiver, specifically "to take all such actions he may deem necessary to collect the amount so found due" from them. The authorization to bring suits extended to all defendants in other jurisdictions, whether resident or not in Ohio. And this is strictly pursuant to the Ohio statute.

Acting in accordance with the authority this conferred, the receiver brought the present action in Fulton county—the residence county of the defendant—where the defendant was summoned in the action.

Due process of law includes two essential things—notice and an opportunity to be heard. The defendant, therefore, has had due process of law. The defendant would have been entitled to no more if the purported non-residence assumed in the Lucas county case had been a fact. In all the essential things as to him the law of the land has been observed—that law which, as Webster defined it in the Dartmouth College case, " which hears

before it condemns, which proceeds upon enquiry, and renders judgment only after trial." In this case all the substantive defenses to which he was entitled have been open for the defendant to make; that is, all the defenses as to which the corporation must not be held to represent him, and all matters which were not matters of computation alone, arising from the fact of insolvency, the amount of debts and the number of shareholders and the amounts of their holdings. Is it a question that he is a stockholder? His answer in this case admits it. Has he paid his share of the indebtedness thence arising? It is not claimed that he has. Has he a set-off? He does not assert it in his answer. Having no defense to make on the merits of the case, shall he be exempt from a liability otherwise complete because of the assumed misdirected act of the Lucas county court in finding him a resident of a state in which his rights could have been in no way differently treated than if the finding had been that he resided in Ohio? Upon the footing of substantial justice and the administration of a law to which he assented by becoming a stockholder, it is hard to see that he should. He is deprived of no right by being sued in his own county in Ohio rather than in Indiana, his putative residence, if the record in the Lucas county case imports verity. And no additional burden is placed upon him. That he has a summons instead of a notice is to the prejudice of no right of his. In *McVicker* v. *Jones*, 70 Fed., 754, it is said:

"The twelfth cause of demurrer is grounded upon want of an averment of notice to the defendant of the judgment or claim against him before commencement of the suit. The notice to persons sought to be charged, required by the Kansas statute before execution shall issue against the stockholder, would seem to have reference to the motion made in open court, that execution issue against the stockholder, and not to the original claim, or the process anterior to the judgment. Under the statute the creditor may elect to proceed by motion and notice, with a view of obtaining execution direct against the stockholder, or by his action upon the judgment, giving, of course, the usual notice required in instituting proceedings at law; and no reason

is seen why the stockholder can not avail himself of all matter by way of defense in an action at law which would be open to him as objection against a motion for execution, where the creditor elects to proceed under such motion rather than by action. Looking to the statute, therefore, it can not be found that it either expressly or impliedly contemplates notice of the claim to the stockholder before commencement of an action at law, where the creditor elects such proceeding as his remedy."

Holding, as we do, that the action of the court in Lucas county—whatever it may literally have been—in regard to notice to the defendant as a putative resident of Indiana, was null and of itself conferring no right on the receiver that he would not have had without it, leaving the receiver, both by its decree and the express authority of the statute, with full power to pursue the defendant stockholder into "other jurisdictions," one of which "other jurisdictions" might be, and in this case is, Fulton county, Ohio,—which the receiver has done in the present action—finding these things, we say, and to our apprehension the two questions mainly argued before us, namely, the effect of the assumed constructive service by publication and whether the answer here is a direct or a collateral attack on the Lucas county judgment, become relatively unimportant. The former disappears by elimination, and the latter loses all coercive force through entire irrelevancy. In short, neither is longer in the case.

That leaves the receiver in the position of obeying the order of the court whose officer he is, in pursuing the defendant by suit in the jurisdiction of his residence, declaring in that suit on the judgment rendered in Lucas county, which conclusively furnished the basis of his action as to all things in which in the suit of origin the corporation represented the defendant and as to the matters adjudicated which sounded *in rem*, leaving open to the latter all defenses which he could have made in the Lucas county case had he been there present visibly in person at the behest of the court's summons. This pursuit to another jurisdiction was permitted also by the statute.

It has been made, and the defendant is having that which he complains that he did not have in Lucas county—his day in court and due process of law. When thus brought to the bar his defenses are not that he is not a stockholder, or that he has paid his dues to the creditors of the defunct corporation, as he agreed to do when he became a stockholder in it, or that he has a set-off to their claim. His answer is concerned with the alleged invalidity of the Lucas county adjudication, upon the ground already fully discussed, that he was attempted to be sued in that jurisdiction by the initial letters of his first and second names and that the action is barred by the statute of limitations. None of these, it is to be observed, touches the matter of the defendant's real obligation to the creditors of his company, to enforce which both actions were brought.

As to the first of these defenses our views are already given.

In regard to the misnomer assigned, we think there is nothing in the point.

As to the statute of limitations, the court below properly disregarded it, in our opinion.

The petition before us does not in terms assign either of these two things as matter of error, unless they come within the complaint of "other errors." But we mention them as being by that possibility in this case. As already narrated, at the conclusion of all the evidence the defendant moved "for judgment on the undisputed evidence," but with a named reservation of his "rights to go to the jury upon the evidence if the court holds against me."

The motion was then overruled. The plaintiff then made a motion for a judgment in his favor on the same ground, and also moved for a directed verdict.

Before this motion was acted on by the court the defendant presented certain instructions in writing, and requested that these be given in charge to the jury before argument. These amounted to the direction of a verdict for the defendant. They were refused and there was no argument.

The court then directed a verdict for the plaintiff. All proper

exceptions were saved, and a motion for a new trial was thereafter made and denied.

The motion by the defendant for a judgment on the evidence in effect submitted the issue to the court to be found, nor did the attempted reservation, without more, withdraw the submission, and the court found the issue to be with the plaintiff.

If our view of the law as already expounded is correct; if the attempted constructive service was inert, taking no legal right from defendant and fastening no liability upon him, then the trial court was right in directing the jury to return a verdict for the plaintiff.

If, on the other hand, our view in this respect is mistaken and the assumed finding of the Lucas county court as to such service operated as a judgment against the defendant, it still remains an integral part of that judgment until reversed in that cause or some cause having such reversal for its direct purpose. The present action is not of that nature.

Upon either footing the defendant must fail.

We are quite aware that in somewhat laboriously reaching this conclusion the fact that we have in words paid so little attention to the very voluminous briefs filed in the case, will be thought a cause of grief if not grievance to the compilers. With cyclonic energy and with the zeal of crusaders, with characteristic industry and with the learning which has had the effect that Festus imputed to Paul, the utmost corners of the judicial earth have been ransacked for law, and from all the immense armories of legal resource authorities have been marshaled before us in the wildest profusion.

> "Mastering the lawless science of our law—
> That codeless myriad of precedent,
> That wilderness of single instances."

It has not quite been "Love's Labor Lost," for we have examined these with attention always, and with those parts of some of the briefs which in wealth of language transcend the picturesque at times and approach the frontiers of the lurid,

the court has been affected even to admiration. The very prodigality of cases cited has precluded a more particular allusion to them in the course of this opinion. But they have been considered, and the result of the consideration is embodied in what we have now said. So much is due to the labor and erudition of counsel in the case.

We have heard in one of the briefs the tocsin sounded that this case may "pathfind its way" to a higher court. The outcry has no terrors for a court whose humble but sole ambition is to be right, even at the expense of being set right by any tribunal having authority to do that. Certainty of being right is not the monopoly of any mortal. We aspire only to that "learned and modern ignorance" which the great historian of Rome's fall characterizes as the mark of great minds.

The result of our consideration is that we find no intervening error of substance in this record, injurious to the rights of the defendant, and we are unable to say that substantial justice has not been done in the case.

The judgment complained of is, therefore, affirmed.

HARMLESS IRREGULARITIES IN A FIRST DEGREE MURDER TRIAL.

Court of Appeals for Muskingum County.

CHARLES LYNCH v. STATE OF OHIO.

Decided, May Term, 1915.

Summoning a Grand Juror Under the Wrong Initials—Not Ground for a Plea in Abatement—Description of the Instrument With Which the Crime Was Committed—Testimony of Undivorced Woman Living With Defendant as His Wife May be Received Against Him.

1. The summoning of a grand juror under the wrong initials is a misnomer only, and is not an irregularity of which advantage may be taken by a plea in abatement.
2. Under the present rules for pleading in criminal cases, which require reasonable certainty only in an indictment, the fact that the pleader might have been a little more explicit in his statement as to why the instrument alleged to have been used in committing the homicide could not be more fully described, does not constitute ground for quashing the indictment.
3. Where the woman with whom the defendant was living as his wife at the time of the commission of the crime, is shown to have been previously married to another man who was still living and from whom she had not been divorced, it is competent for the state to call her as a witness against the defendant.

E. F. O'Neal and *E. R. Myer*, for plaintiff in error.
C. F. Ribble and *Perry Smith*, contra.

SHIELDS, J.; POWELL, J., and HOUCK, J., concur.

At the September (1914) term of the Court of Common Pleas of Muskingum County, Ohio, the grand jury of said county returned an indictment against Charles Lynch, the plaintiff in error, charging him in four separate counts with murder in the first degree—in killing John G. Albert. Upon trial had the plaintiff in error was convicted of the crime charged and upon a recommendation of mercy by the jury in its verdict, he was

sentenced to the penitentiary for life. For the purpose of having the judgment and proceedings in the court below reviewed upon proceedings in error, a petition in error was filed in this court containing numerous assignments of error, and while not waiving any rights under the various errors assigned therein, the errors discussed and urged upon the attention of this court were: (1) that the court below erred in overruling and dismissing the plea in abatement of the plaintiff in error to said indictment; (2) that said court erred in overruling the motion of the plaintiff in error to quash the first and second counts in said indictment; 3) that said court erred in overruling the demurrer of the plaintiff in error to the first and second counts in said indictment; (4) that said court erred in admitting evidence upon the trial to the prejudice of the plaintiff in error; (5) that said court erred in its charge to the jury; (6) that the verdict of the jury was manifestly against the weight of the evidence and not sustained by sufficient evidence and was contrary to law.

1. Taking up the errors alleged in their order, it was contended on behalf of the plaintiff in error that the grand jury presenting said indictment was not legally constituted: (1) That one J. F. Bell participated in the deliberations of said grand jury as a member thereof when he was not selected or drawn as a grand juror in the manner prescribed by law; (2) that said grand jury was impaneled and sworn before the date set out in said indictment as the date of the commission of the crime charged, and that therefore defendant did not have an opportunity of making any challenge to the array or to any one in said grand jury.

In reply to the plea in abatement setting up this alleged irregularity, after making general denial of the claim thus made by the plaintiff in error, the state by its counsel averred therein:

"That the said J. F. Bell as mentioned and referred to in defendant's plea in abatement is and was the same person considered by the jury commissioners of this county at the time they selected names of the jurors for the present year as that indicated and designated by the said commissioners as F. M. Bell

of Fourth Ward B., the said jury commissioners then believing that said person's name to be F. M. Bell instead of J. F. Bell; that the said name F. M. Bell, Fourth Ward B., with others, were by said commissioners selected, written on separate pieces of paper uniform in size, quality and color, placed in the jury wheel and certified to as jurors for the ensuing year.

"That upon the order of this court of common pleas, the clerk in the presence of the sheriff, judge and jury commissioners, after turning the jury wheel several times, drew therefrom the number of names of the persons to serve as grand jurors specified in said order, among which names was 'F. M. Bell, Fourth Ward B.' That the clerk forthwith issued to the sheriff a venire facias commanding him to summon the persons whose names were so drawn as aforesaid to attend as grand jurors at the time and place in the order stated.

"That thereupon, on the 15th day of September, 1914, the said sheriff in endeavoring to serve said summons drawn in the name of F. M. Bell as aforesaid, left a true copy thereof at the usual place of residence of the said J. F. Bell, to-wit, at No. 229 Jackson St., Fourth Ward B., Zanesville, Ohio; that the said J. F. Bell appeared in answer to said summons at the time and place named in said order and said summons and answered to the name of F. M. Bell; was impaneled, sworn and charged as a grand juror in and under the name of F. M. Bell, and as such served on said grand jury and took part in all the deliberations and consideration of said grand jury, all of which appears of record in the journal of this court, a copy of which record is hereto attached, marked Exhibit A, and made a part hereof.

"That the said J. F. Bell who so served on said grand jury as aforesaid was at said time possessed of the requisite qualifications to act as a juror, and was not selected and drawn as a member of said grand jury in any manner other than as herein set forth.

"That at the time the names of the jurors were selected by the said jury commissioners as aforesaid, and at the time of the service of said summons by said sheriff as aforesaid, there was no other F. M. Bell or J. F. Bell living in said Fourth Ward B."

Upon a demurrer being filed to the foregoing reply, the court below overruled the same and dismissed said plea in abatement. Under the facts stated, was the action of said court erroneous? The statutes point out the manner in which the drawing, sum-

moning and impaneling of grand jurors shall be conducted. Section 11435 of the General Code provides that:

"A challenge to the array may be made and the whole array set aside by the court when the jury, grand or petit, was not selected, drawn or summoned, or when the officer who executed the venire did not proceed as prescribed by law. But no challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror or jurors; but on challenge, a juror or jurors may be set aside by reason of a misnomer in his or their names; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors."

Here it appears that J. F. Bell was supposed and believed to be the same Bell whose name was selected by the jury commissioners, and whose name was afterwards drawn from the jury wheel to serve as one of the grand jurors, as appears more fully in the reply to said plea in abatement. Taken all in all, in our judgment, it was a misnomer at best, and the qualifications of J. F. Bell as a grand juror not having been raised or challenged, but who it is not claimed did not have the requisite qualifications to act as such grand juror, said alleged irregularity under the provisions of said Section 11436, General Code, was not such an one, in our judgment, as that the plaintiff in error could avail himself of and thereby defeat the state in its right to further prosecute.

Again, aside from the fact that said plea in abatement seems to rest upon conclusions rather than upon facts stated, can irregularities and defects in the selecting, drawing and impaneling of a grand jury be taken advantage of by a plea in abatement?

In the case of *Huling* v. *State,* 17 O. S., 583, it is held that—

"It is a good plea in abatement in a criminal case, that one or more of the grand jurors who found the indictment had not the legal qualifications of such grand jurors.

"But mere irregularities in selecting and drawing grand jurors, which do not relate to or affect their personal qualifica-

tions as such, must be taken advantage of, if at all, by challenge for cause, and can not be so pleaded in abatement."

The principle laid down in the foregoing case has since been cited and followed in a number of cases decided by the Supreme Court of this state, among which are the following: 81 O. S., 504-5; 70 O. S., 373; 45 O. S., 649.

And in the case of *Lindsey* v. *State,* 4 C.C.(N.S.), 409, affirmed in 69 O. S., 201, which was a case in this district, the court in its opinion held that—

"The errors complained of as to impaneling the grand jury are irregularities only, and not objections to any of the panel as to their qualifications. Sections 5162 and 5167, Revised Statutes, provide for the selection, drawing and summoning of grand and petit juries. Mere irregularities in selecting and drawing grand juries, which do not relate to or affect their qualifications as such, must be taken advantage of, if at all, by challenge for cause, and can not be made grounds to quash the indictment or be pleaded in abatement.

"Technical defects in obtaining and impaneling a grand jury which do not affect the competency of the persons to act, can not properly be made the basis of a motion to quash the indictment or plea in abatement, but must by express statutory provision be availed of, if at all, by challenge before the jury is impaneled and sworn."

And in the case of *McHugh* v. *State,* 42 O. S., 154, in which the array was challenged for misnomer of a grand juror, it was held:

"It not appearing that the officer had acted in bad faith, or that the accused had been injured by the mistake in any of his substantial rights, the error, if any was committed, afforded no ground of reversal."

And the judge announcing the opinion in said case on page 164 said:

"An indictment can not be held invalid for a defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant on the merits."

Can it be said that the plaintiff in error was injured or prejudiced in any of his substantial rights by J. F. Bell acting as a grand juror when his qualifications to act as such were not questioned, especially when we consider that the manner of selecting and drawing juries concerns the public rather than the accused? We do not think so, and we further think that the action of the court below was fully justified in dismissing said plea in abatement and that such action affords no ground of reversible error.

2. The second error complained of is that the court below erred in overruling the motion of the plaintiff in error to quash the first and second grounds of said indictment (said motion to quash the third and fourth counts in said indictment having been sustained). It was contended on behalf of the plaintiff in error that said indictment is indefinite in this, that it does not sufficiently describe the nature and character of the instrument alleged to have been used by the plaintiff in error in causing the death of the said John G. Albert, thereby failing to apprise the plaintiff in error of the charge he was called upon to meet and defend against. That one charged with crime is entitled to be advised of the nature of such crime is fundamental, but that there are cases in which the state for want of information can not aver with certainty the character of the weapon or instrument used in the commission of a crime is also well known, and in such case the rules of criminal pleading permit the pleader to describe such weapon or instrument as "with a certain weapon, the name and character of which is to the grand jurors unknown," or "with a certain instrument, the name and character of which is to the grand jurors unknown." In the indictment before us perhaps the pleader might have been a little more explicit in stating why the weapon or instrument alleged to have been so used could not have been more fully described, but under the present liberal rules of criminal pleading, reasonable certainty in an indictment only being required, we are of the opinion that said indictment sufficiently describes the crime of murder in the first degree and of the manner in which said crime was committed.

Defects and imperfections which do not prejudice the substantial rights of the accused on the merits do not invalidate the indictment, and we do not think that the substantial rights of the plaintiff in error were prejudiced by any lack of averment in said indictment advising him more fully of the charge made against him.

Entertaining these views we are of the opinion that the court below was right and did not err in overruling said motion to quash said counts in said indictment.

3. It was also contended that the court below erred in overruling the demurrer of the plaintiff in error to the first and second counts in said indictment. From what has already been said in this opinion it is scarcely necessary to add here that in our judgment the action of said court in overruling said demurrer was proper.

4. It was urged that the court below erred in admitting certain evidence of one Mrs. Frank Brown, as the same appears in the bill of exceptions, commencing on page 245, given upon the trial in behalf of the state against the objection of the plaintiff in error, and to which exceptions were duly taken. It was claimed by the plaintiff in error that the witness was his wife and she was therefore incompetent to testify as a witness against him, while the state denied that the witness was his wife, and even under the assumption that she was, still under the present statute (O. L. Vol. 100, pp. 49-50) fixing the rights of husband and wife to testify, she was competent to testify as a witness as to the whereabouts of the plaintiff in error on a particular occasion, under favor of the special exception made in said statute. That husband and wife are competent witnesses in behalf of each other in a criminal case, and incompetent witnesses against each other, except in certain instances, is fully recognized in this state, the last announcement made by the Supreme Court, perhaps, being in the case of *State* v. *Orth*, 79 O. S., 130.

This is true as between husband and wife. Here an anomalous situation was presented—the plaintiff in error claiming that he was lawfully married to said witness and that she was at the

time of the trial his wife, while she claimed that they were never married and that she was not and is not his wife. Without here reciting the testimony offered on this subject, it is sufficient to say that it is not altogether clear that some form of marriage may have been undertaken by these parties at Newark in 1909, but it is admitted by the plaintiff in error that at the time he ran away with said witness in 1906, she was then living in Union City, Indiana, that she was then a married woman and was then the wife of Frank A. Brown of said city, with whom the plaintiff in error admitted having worked, and was well acquainted with. That he afterward never learned, nor made any effort to ascertain, whether or not the said Brown and his wife were divorced, except what said witness told him about a month before their alleged marriage. In addition to the testimony of said witness denying that she was married to the plaintiff in error and that she was not divorced from her husband, Frank A. Brown, the said Brown also testified that they were married, that they were still man and wife and were not divorced. From the foregoing it appears that the said witness had a lawful husband living from whom she had not been divorced, at the time she was called on as a witness to testify, and if this is true, the alleged marriage between the plaintiff in error and the witness was not a valid marriage. Underhill on Evidence lays down the rule that:

"The burden of proving that the marriage relation exists between the witness and the accused rests upon the party opposing the competency of the witness, unless a marriage valid or at least apparently valid in all respects is shown to exist at the time the witness is offered, or his or her testimony must be received. It is not enough that the parties, supposing the marriage to be valid, had lived together for years as man and wife and had introduced each other to the world as such. The marriage must be actually and in fact valid, and must have existed in full force and vigor down to the date of the crime alleged.

"The validity of the marriage will be inquired into upon a *voir dire* examination of the witness and if the relation of husband and wife is not found to exist, the witness is competent and must be permitted to testify."

Again, in the case of *State* v. *Rocher,* 106 N. W. Rep., 648, it is held:

"There is, of course, a presumption in favor of legality arising from naked proof that a marriage has taken place, but it is a mere presumption of the fact and may be overcome by proof, among other things, that one or both of the parties was incompetent to enter into the marriage relation. Accordingly the presumption must give way at once in the face of proof that the defendant had a former wife living, undivorced, and his incompetency to enter into the subsequent marriage is thus established."

Following the above authorities, under the proof made that the witness was then the wife of another from whom she had not been divorced, and who was then living, the alleged marriage of the plaintiff in error and the witness could not be and was not a valid marriage, and the witness was therefore competent to testify, and in permitting her to testify, in our opinion, the court below did not commit error.

It was also urged that the court below erred in admitting as evidence upon the trial the certificates issued by the State Security Bank of Zanesville to the said John G. Albert. These certificates are dated January 17, 1914, February 14, 1914, and June 20, 1914, issued by said bank to the said John G. Albert and made payable to him, and were delivered to him as of said dates. In the absence of proof to the contrary, the presumption would be that he retained the possession and was the owner of said certificates until the date of his death. True, the possession of them traced to and found in the possession of the plaintiff in error soon after the crime charged was committed, would not of itself be evidence sufficient to convict him of such crime, but it would be a circumstance for the jury to consider in connection with all the other evidence in the case, including the explanation given, if given, of such possession, and whether satisfactory or not. It was argued by the plaintiff in error that possession of these certificates may have been lawfully secured from the said John G. Albert in his lifetime by some other person, and that

their possession by the plaintiff in error was therefore not necessarily unlawful, nor was such possession to be regarded as having any connection with the crime charged. As stated, the possession of these certificates as a fact or circumstance standing alone might not be an incriminating circumstance or evidence of guilt, but the conduct and declarations of the plaintiff in error in explaining their possession might be, all of which it was the province of the jury to determine. The rights of the plaintiff in error in this respect seem to have been properly guarded and protected in the instructions of the court to the jury in its charge. We find no error upon the part of the trial court in admitting these certificates as evidence upon the trial, nor in the admission of the evidence in relation thereto.

5. One of the specifications of error in said petition in error is that the court below erred in its instructions to the jury. We have carefully examined this charge and find it to be a fair and able exposition of the law applicable to the case. In it the interests of the state and the rights of the accused are alike properly cared for.

In the charge given as well as in the refusal of the court to give certain requests of the plaintiff in error submitted to be given in charge, we think there was no error.

6. It was argued that the verdict in this case was clearly against the weight of the evidence and not supported by sufficient evidence, and was contrary to law. At the expense of no little time and labor we have carefully read the entire bill of exceptions. This we were led to do because of the important character of the case—important to both the state and the accused. Without stopping to philosophize on the value of human life or the stern demands of the law that one accused of crime shall first be given a fair trial before liberty or life is taken, in the light of this record we can not say that the plaintiff in error has not had the full benefit of this charitable and humane rule of the law. Despite his claim that he was not in the vicinity of the Albert premises on the Sunday evening in question, a reading of the record shows the decided weight of the evidence given upon the

trial to be to the contrary. His own admissions show that he was well acquainted with said Albert and was familiar with his premises. It likewise shows that during his visits at the Smithley and Quinn homes in the afternoon of that day his mind seemed to be occupied with matters concerning said Albert, and that in the evening of that day his conduct was observed to be both strange and unnatural. This evidence when considered in connection with the undisputed fact that he left his home in Zanesville for Wheeling that night (the night of the murder) without any apparent cause, and in connection with the evidence clearly showing that after reaching Wheeling or Bellaire he soon surrounded himself with ex-convict friends and laid plans with their aid to negotiate and raise money on one of the said certificates of deposit in question, and after having been taken in custody by the authorities, he stealthily sought to conceal his pocket-book containing the other two said certificates of deposit, and then denied having possession of any and all of them, these together with other facts and incriminating circumstances clearly shown, were before the jury and in their solution of them we do not think their verdict was against the weight of such evidence or contrary to law.

Finding no error in the record prejudicial to the plaintiff in error the judgment of the court of common pleas will be affirmed and the case is remanded for execution.

SETTLEMENT WITH DEBTOR HEIR.

Circuit Court of Cuyahoga County.

AUGUSTA C. LOCKWOOD, AUGUSTA L. WHITLESEY AND CHARLES H. WHITLESEY v. GRANT T. WHITLESEY, NELLIE H. WHITLESEY, AUGUSTUS M. WEBER AND THE COMMERCIAL NATIONAL BANK OF CLEVELAND.

Decided, December 2, 1912.

Inheritance—Action to Quiet Title—Debtor Heir Does Not Inherit When His Debt Exceeds His Distributive Share—Action to Quiet Title Against Claim of Debtor Heir Maintainable.

1. A debtor heir, who makes claim for distribution, is required to account to the estate for the debt he owes, the amount he is to receive depending on the accounting, and where his indebtedness to the estate exceeds his distributive share in the estate, he inherits no interest in the real estate.
2. When the distributive share of a debtor heir is less than the amount which he owes to the estate, an action to quiet title may be maintained by the other heirs to the real estate, to remove any cloud upon the title through the claim of the debtor heir or anyone claiming under him.

Carpenter, Young & Stocker, for plaintiffs in error.
Wing, Myler & Turney, contra.

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

This action was brought by the plaintiffs originally against Grant T. Whitlesey alone, the other defendants having been made such during the pendency of the suit.

The purpose of the action is to quiet the title of the plaintiffs in certain real estate described in the petition. This real estate was owned by Harriet T. Hanford at the time of her death, which occurred on the 19th day of May, 1910. She died intestate. Her only heirs at law were the plaintiffs and the defendant, Grant T. Whitlesey. The other defendants have no rights in this action except as they obtained the same through Grant T. Whitlesey. But for other facts to be hereinafter stated, the

defendant Grant T. Whitlesey would have inherited from the said Harriet T. Hanford an undivided one-sixth part of the said real estate, the plaintiffs together inheriting the remaining five-sixths.

The plaintiffs were in possession of all of said real estate at the time the action was brought. When Mrs. Hanford died she left personal property out of which all her debts have been paid, so that the title of the plaintiffs is in nowise affected by any such debts.

At the time of the death of Harriet T. Hanford the defendant Grant T. Whitlesey was indebted to her in the aggregate sum of about $3,500, no part of which has ever been paid. If there be added to the value of the real estate described in the petition the amount of the indebtedness of Grant T. Whitlesey to her, and further added the amount of all her other property after the payment of her debts and the expense of administering her estate, and the amount thus ascertained be divided by 6, it will be found that the indebtedness of said Grant T. Whitlesey to the said decedent is more than his one-sixth part of the entire estate.

Before the death of Harriet T. Hanford said Grant T. Whitlesey filed his petition for adjudication in bankruptcy in the United States District Court of this district, and he was adjudged a bankrupt. He has never, however, been discharged in bankruptcy. His indebtedness to the decedent antedated his adjudication as a bankrupt, but as he was never discharged, that in no wise affects his rights, or the rights of those claiming under him in this proceeding. And that brings us to the question of whether he inherited any fractional part of this real estate.

He did inherit one-sixth of whatever estate the decedent left, and but for his indebtedness to her this would have given him a good title to an undivided one-sixth of this real estate, but having already received from her, as shown by his indebtedness, more than one-sixth of her estate, he inherited nothing in this real estate. That is the claim of the plaintiffs, and that we hold to be the law.

We have read with great interest the elaborate and learned opinion prepared by the judge of the court of common pleas who

heard this case, and who reached a conclusion different from that which we reach, but we are constrained to hold that the conclusion reached is not sound. The question is made in the case that the effort on the part of the plaintiffs is to acquire a title to real estate and not to quiet a title which they already have. If what has already been said is true, this contention is not sound. When Harriet T. Hanford died somebody immediately became the owner of this real estate; somebody immediately had title to it. It is not essential to this proposition that all the facts should have been known at the time of her death which would fix this inherited title in particular persons, but whenever the facts became known which determined who the particular persons are to whom the title descended from the intestate, we then have the means of knowing who was entitled to hold and own this real estate. Those facts have become known and are as hereinbefore stated, that the plaintiffs together became the owners of five-sixths of all the estate which the intestate left, whether personal or real, and that the defendant, Grant T. Whitlesey, became the owner of one-sixth of all that estate, and that the defendant Grant T. Whitlesey had already received more than his one-sixth part of said estate and therefore took no estate in these lands. But the fact that he is an heir at law of the intestate, and that there had not been, prior to the bringing of this suit, any adjudication that his inheritance was all covered by the amount of his indebtedness to the decedent, constituted a cloud upon the title of the plaintiffs, which cloud it is the proper office of a suit to quiet title to remove.

Section 11901, General Code, reads:

"An action may be brought by a person in possession of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest."

Suppose that Grant T. Whitlesey had brought a suit in partition of these lands, the facts turning out to be such as they are here agreed to be. He would not have been entitled to a partition, because it would have turned out that he had no ownership in the lands; that he never had any ownership in the lands; not

because he was not entitled to one-sixth of the estate of the intestate, but because he had already received that one-sixth; that is, that the indebtedness owing by him to the intestate must be accepted first by him on his fractional part of the entire estate, and since that indebtedness exceeded his entire one-sixth, he had no interest whatever in the real estate.

It would seem entirely unreasonable to say that he should be denied partition on the ground that he had no ownership in the property, and yet, those who have the entire ownership in the property, except only what the defendant Whitlesey had, might not maintain an action to quiet their title as against him. The court below took the position that upon the death of the intestate Grant T. Whitlesey became the owner of a one-sixh part of this land, and that this suit was to take from him that title and put it into the plaintiffs. That is not the purpose of the suit. The purpose of the suit is to have it determined that he never had an interest in the lands, and the facts establish that proposition.

Section 8586, General Code, treating of advancements, is in these words:

"If the amount of such advancement equals or exceeds the share of the heir to whom it was made, he shall be excluded from any further part in the division or distribution of the estate."

In the case of *Keever* v. *Hunter,* 62 O. S., 616, the syllabus reads:

"When the lands of an intestate descend to his children, there being no personal estate for distribution, the interest of each child in the lands is subject to his indebtedness to the intestate."

And in the opinion Judge Shauck uses this language, at pages 618 and 619:

"A proposition necessarily involved in the decision of the circuit court (which was reversed by the Supreme Court in the case now under consideration) is that in a case of this character a son who owes a debt which is payable, at all events occupies a better position than one who has received an advancement which is not payable otherwise than as it may serve to diminish his inheritance. The conclusion does not contribute to the equality of inheritance, which is made so prominent in the legislation and

the decision of this state. It is not important whether, to secure equality in cases of this character, we adopt the doctrine of equitable set-off, as has been done by some courts, or, for that purpose, regard the debt as an advancement, as has been done by others. The ground of decision is that it is inequitable and at variance with the policy defined in our statutes to permit one to share in an estate which is diminished by his default and to the prejudice of those whose rights are equal to his."

Judge Shauck then quotes the following language from *Woerner on the Administration of Estates,* Section 71:

"The distinction between debts owing by an heir and an advancement made to him by the intestate is sharply drawn; in some states debts so owing can not be deducted from the share of the heir in the real estate, and from the personal estate only by way of set-off, but the true principle seems to be that a debt owing by an heir constitutes part of the assets of the estate, as much as that of any other debtor, for which he should account before he can be allowed to receive anything out of the other assets; and it is held so in the United States."

To the same effect is the case of *Tobias* v. *Richardson,* 5 C.C. (N.S.), 74, which is affirmed without report in 72 O. S., 626. The last clause of the syllabus in the circuit court reads:

"A debtor heir who makes claim for distribution is required to account to the estate for the debt he owes, and the amount he is to receive will depend upon the result of the accounting. If his debt is evidenced by promissory notes, they may, in a suit for partition, be regarded as advancements."

We reach the conclusion, therefore, that the plaintiffs are entitled to a decree quieting their title as against all the defendants, and such decree will be entered in the case.

CONFORMITY REQUIRED AS TO A CONDITION FOR APPRAISAL UNDER FIRE INSURANCE POLICIES.

Circuit Court of Cuyahoga County.

THE COMMERCIAL UNION ASSURANCE COMPANY, LTD., OF LONDON, ENGLAND, v. H. M. WEINBERGER.

Decided, November 20, 1912.

Insurance—Performance of Condition as to Appraisal Pre-requisite to Action on Policy.

Where a policy of fire insurance provides that in case of disagreement as to the amount of loss, the amount shall be determined by arbitration, such provision makes the obtaining of an award, or at least an attempt in good faith to obtain an award, a condition precedent to a right of action on the policy; and in an action upon such policy the burden is upon the insured to show that he has, on his part performed, or offered to perform, the condition as to the appraisal.

C. W. Fuller and *L. R. Canfield,* for plaintiff in error.
Hidy, Klein & Harris, contra.

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

Weinberger was plaintiff below and recovered a judgment against the assurance company for loss by fire on goods covered by four policies of insurance issued by the company. The parties plaintiff and defendant are spoken of in this opinion as they stood in the court below.

Each policy contained the following clauses:

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the ap-

praiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements.

"This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

In its answer the defendant set up these clauses and averred that there was a disagreement between the parties as to the amount of loss under each of said policies by reason of said fire, and that there had been no appraisement of the same as required by said policies of insurance.

For a reply the plaintiff denied that there had been any disagreement between the plaintiff and the defendant as to the amount of such loss by fire, and says that never until the bringing of this suit did the defendant make any objection to the amount claimed, and that never until the filing of its answer did it deny or dispute the amount of loss sustained by reason of the fire, and as shown by the proof of loss filed. He admits that there has been no appraisal of the amount of the loss, and says that he repeatedly requested the defendant to submit to an appraisement, and that he selected an appraiser to act for him, and that he gave to the defendant the name of said appraiser, and requested the defendant to select and name its appraiser, which it refused to select and name, and thereby waived any right to insist upon such appraisement.

An examination of the evidence shows that the plaintiff employed as his agent one E. M. Lee, and he testified in regard to such employment in these words:

"Mr. Lee came out to see me several times; he would like to have my claim to adjust, as he said I did not know how to go

about it. He said he has been an experienced man in that line of business, so I let him adjust my claim."

He was then asked: "You hired Mr. Lee to adjust your claim?" He answered: "Yes, sir."

He was then asked: "Now, after that, did you have anything to do with the adjustment of the loss aside from doing whatever Mr. Lee directed you to do?" To which he answered: "Yes, sir."

He clearly meant by this, "No, sir," for the next question is: "That is what you did."

And the answer is: "Whatever Mr. Lee told me, I done."

And later on in his evidence he was asked: "What did Mr. Lee and the other gentleman do?" (referring here to the representative of the insurance company).

To this he answered: "I don't know what he done: I turned the whole thing over to Mr. Lee and I didn't pay any attention to it at all."

It seems that the man to whom he referred as the other gentleman was Mr. C. F. Barnard, who was employed by the defendant to represent it in the adjustment of the loss had by Mr. Weinberger under the several policies on his stock of goods. He testifies that Mr. Lee came to his office, told him that he had been employed by Weinberger to make up his proofs of loss, as he called them, and render services to this man along these lines, adjusting the loss or making up his claim. He says he made an examination of what remained and an estimate of what had probably been destroyed; that Lee came to him and presented him the proofs of loss, showing the loss to be in the aggregate $5,463. He says that before Mr. Lee presented him with this proof of loss he had numerous talks with him in which he told him that it was perfectly apparent that there was a limited amount of stock and that it could hardly be possible, in his judgment of the ruins and condition of affairs, that there could have been as much in the fire as the goods that were taken out during the fire. He says that when the proofs of loss were brought to him by Mr. Lee he looked over the inventories and then, to quote his words:

"I told him that the amount of loss claimed was, in my opinion, absurd, and in the course of these conversations expressed myself that the loss sustained over and above the stock saved in an undamaged condition could by no means amount to as much as $1,000. I remember using that figure, and stated to him that my judgment perhaps would indicate that it was rather less, than more than that amount."

He says that in later conversations he had with Lee:

"I told him that I was entirely willing to discuss a compromise settlement if it came to that kind; I believe I went so far as to say that if he wanted to settle the claim inside of $1,000, it might be done. I told him that if he chose to compromise the case on an amount in the neighborhood of $1,000 I might discuss it with him from that standpoint, basing that as the probable amount of the man's loss."

He says that he and Lee got together and tried to adjust and fix the amount of the loss. "He said that the proposition of compromise which I made, based upon my judgment of amount, could not and would not be accepted."

He says that Lee said to him: "Why don't you have this loss appraised and relieve yourself of the trouble of it."

I said: "Of course, when the proper time comes and when proper action is taken by these parties, that will be done, for the reason that I have no power, no disposition and no power particularly to waive or set aside the policy conditions along those lines."

In answer to a question as to whether Mr. Lee or anybody representing the plaintiff ever suggested an appraisal to him, he said "No," and in this connection this question was asked him:

"Didn't he name to you Mr. J. J. Klein, a gentleman living on Buckeye road, as an appraiser of the plaintiff here?" To which he answered: "Never heard of the man before; there was no conversation relating to that sort of proposal at all so far as I recollect."

He says that after the proofs of loss were filed Mr. Lee stated to him that that ended his connection with the case—the service of these proofs of loss which he did not make upon the company

but left at his office. "He stated when he left the proofs at my office, that that ended his employment in that case. He stated he had got his money and that ended the case so far as he was concerned."

He stated that he never had any communication with Mr. Weinberger with reference to the matter; never saw him until the time of the trial.

For some reason Mr. Lee was not called as a witness in the case. From the evidence that was produced, it seems perfectly clear that there was a disagreement between Mr. Barnard, the representative of the company, and Mr. Lee, whom the plaintiff says he employed to attend to the entire business for him, as to the amount of this loss; that therefore the provision of the policy to which attention has been called in reference to an appraisement, came into force; that the plaintiff made no effort to have an appraisement, but, as he says, because Lee told him there was nothing for him to do now but to sue, he brought this suit.

We think he brought his suit too soon. He should have given notice for an appraisement under the clause of the policy quoted. Not having done that, he failed to sustain the burden which was upon him. We are not surprised that the trial judge felt, as he expressed in his opinion on the motion for a new trial, that if there was not another tribunal to review the record in the case, the court would feel constrained to grant a new trial. We have read the opinion of the court with decided interest, and with most of it we are in entire accord. We think the reasoning in the opinion clearly shows that a new trial should have been granted, because the verdict was not sustained by the evidence, and not sustained by the evidence because it showed that there was a disagreement between the parties as to the amount of loss, and failed to show that there had been any effort made by the plaintiff to have an arbitration.

That this suit was not maintainable under the facts as shown by the evidence hereinbefore pointed out, is fully sustained by the last utterance on the subject by the Supreme Court in the case of *Graham* v. *Insurance Co.*, 75 O. S., 374.

In the policies under consideration in this case, the same provisions for arbitration appear as in the case before us, and it is held that where disagreement arises as to the amount of the loss, under such policies:

"These policies plainly and definitely make the obtaining of an award or at least an attempt in good faith to obtain an award, a condition precedent to a right of action on the policy; and it is elementary that the obligation of taking the initiative or of showing an excuse for not doing so, is upon the party who has the affirmative in the action."

The second paragraph of the syllabus reads:

"In such a policy the words 'including an award by appraisers when appraisal is required,' do not impose any obligation on the insurer to demand an appraisal; but in the event of a disagreement between the insurer and the insured as to the amount of the loss, an appraisal is required by the terms of the contract, and in a suit on the policy the burden lies upon the insured to show that he has, on his part, performed, or offered to perform, the condition as to the appraisal."

In this case the evidence, as already pointed out, shows no attempt on the part of the plaintiff to obtain an award, nor is any excuse for failing to do so shown, and the court erred in refusing to direct a verdict for the defendant at the close of the plaintiff's evidence, and again in refusing defendant's motion to direct such verdict at the close of all the evidence, and again in overruling the motion of defendant for a new trial, on the ground that the verdict was against the weight of the evidence.

For these reasons the judgment is reversed and the case remanded.

MEASURE OF DAMAGES FOR FAILURE TO TAKE ENTIRE ISSUE OF CAPITAL STOCK.

Circuit Court of Cuyahoga County.

THE DAVIS LAUNDRY & CLEANING COMPANY v. F. C. WHITMORE.

Decided, December 16, 1912.

Damages for Breach of Contract in Sale of Chattels.

Where there has been a breach of a contract for the purchase of all the capital stock of a corporation, the measure of damages to which the seller is entitled is the difference between the contract price and the market price of the stock at the time of the breach; and where there has been no acceptance of the stock or transfer of the same on the books of the company, the seller is not entitled to recover the full contract price.

Ford, Snyder & Tilden, for plaintiff in error.
Cook, McGowan & Foote, contra.

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

Whitmore, hereinafter spoken of as the plaintiff, brought suit against the Davis Laundry & Cleaning Co., hereinafter spoken of as the defendant, claiming to recover the sum of $11,700 as the purchase price of 250 shares of the capital stock of the Ideal Laundry Co., a corporation which was doing a laundry business at the city of Lorain, Ohio, where it had a plant with machinery, delivery wagons, horses, etc., the plaintiff alleging that he had sold to the defendant said entire 250 shares, which was the entire capital stock of said the Ideal Laundry Co.

At the time that it is alleged the defendant purchased said stock, a writing was executed, signed by the defendant, reading:

"We agree to purchase 126 shares of Ideal Laundry stock for $5,500, and the balance of 124 shares at $50 per share from F. C. Whitmore."

This was signed by an officer of the defendant, who, it was conceded in the record, was authorized to act for the defendant in the purchase of this stock.

This writing was dated the 11th of January, 1910. One hundred and twenty-six shares of this stock were owned by the plaintiff at the time of the execution of the writing. The remaining 124 shares were owned by other parties.

It will be noticed that the writing does not set out an entire contract, because there is no time fixed for the delivery of and payment for the stock, nor is any place for such delivery or payment fixed in the contract; but the evidence is that the place of delivery was fixed between the parties as the National Bank of Commerce, of Lorain, and that payment was there to be made for the stock.

On the part of the plaintiff the evidence is that the plaintiff was to deliver this stock as soon as he could procure the shares of which he was not the owner, which he said he would be able to do very soon.

On the part of the defendant the evidence is that the plaintiff agreed to deliver this stock within a very few days.

On or about the 1st day of February, 1910, the plaintiff deposited with the bank named 243 shares of the Ideal Laundry Company's stock and notified the defendant of such deposit. The defendant then took possession of the plant of the Ideal Company at Lorain and operated it until the 19th day of February, 1910. On said last named date the defendant notified the plaintiff that it would not take the stock and pay for it.

At that time the plaintiff was unable to deposit with the bank certificates for the remaining eight shares of stock, five of which shares were owned by one Truby, then residing in Chicago, and three owned by one Daniels, residing in Florida. The defendant knew that the plaintiff was endeavoring faithfully to secure these eight shares of stock.

On the 21st day of February, 1910, the plaintiff formally notified the defendant that 242 shares were on deposit at the bank and offered to furnish a bond for the delivery of the remaining 8 shares within ten days thereafter.

On the 28th day of February, 1910, the plaintiff had secured the remaining 8 shares of stock to be deposited with the bank, so that then the entire 250 shares were on deposit with the bank for delivery to the defendant upon its paying the agreed price

therefor, and this fact was given to the defendant in writing by the plaintiff, and a demand was made for payment of the entire purchase price of the 250 shares. The defendant refused to accept and pay for the stock. The case went to trial with the result that the plaintiff recovered a judgment for the entire agreed price for the 250 shares.

It is clear from the evidence that what the defendant desired, in entering into the contract, was that it should become the owner of all the property of the Ideal Company, so that it might carry on the laundry business at the plant and with the facilities which the Ideal Company theretofore had, and this fact was well known to the plaintiff, and each party acted with this in view.

On the part of the defendant it is urged that the court erred in its charge to the jury in this:

"Now, gentlemen, if you should find under the rules I have given you, that the plaintiff had procured and had ready for delivery at the place of delivery, within a reasonable time, the entire output of the Ideal Laundry Co., to-wit, 250 shares, then he would be entitled to recover the contract price of whatever is set out in the petition, $11,700, or whatever the amount is."

In giving this charge to the jury we think there was error. We hold that if the defendant on the 19th day of February notified the plaintiff that it would not accept this stock, this being at a time when the plaintiff not only had not tendered delivery of the entire amount, but was unable to do so, if the plaintiff was entitled to recover at all he was entitled to recover because of a breach of the contract on the part of the defendant, and his measure of damages would be the amount which the contract price was in excess of the market value of the stock at the time of this breach, if the stock then had a market value less than the agreed contract price.

In support of the rule as to the measure of damages, attention is called to the following authorities:

In 35 Cyc., 592, the language of the text is:

"The general rule is that the measure of damages, when the buyer repudiates the contract and refuses to receive and accept the goods, is the difference between the contract price and the

market value of the goods at the time and place of delivery, and not the full contract price of the goods."

In support of this, the author cites a large number of cases, one from Alabama, several from Arkansas, several from California, one from Connecticut, and others from Georgia, Illinois, Michigan, Missouri, Nebraska, New Hampshire, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, and many others.

Among the authorities cited is *Cullen* v. *Bimm*, 37 O. S., 236, in the first clause of the syllabus of which the following language is found:

"If a vendee refuses to accept personal property tendered in accordance with the terms of the contract of sale, he is liable in damages for the difference between the contract price and its market value."

It is true, that the court says, in its opinion, "that whether the plaintiff could have held the ice for the defendant and recover the contract price, is a question which we need not determine," but they call attention to other cases in Ohio, among them *Turnpike Co.* v. *Coy*, 13 O. S., 84, where this language is used in the syllabus:

"Whether an action lies for the price of property sold instead of damages upon the refusal to receive the same, is doubted, for the seller would get the price and still hold the title; title will not pass without assent."

They cite, also the case of *Shawhan* v. *Van Nest*, 25 O. S., 489. This was an action brought by one who furnished the materials and constructed a carriage for the defendant in accordance with his order and direction, for which a stipulated price was to be paid. The defendant refused to receive and pay for it. In that case it was held that the defendant was liable for the contract price, and the reason is apparent, that the defendant had built especially for him a carriage; he had been put to expense of both labor and material for an article which might not be wanted by anybody else; built it especially for the defendant,

it might very well be without market price, and so it was held that the defendant must pay the contract price.

But in the opinion the court calls attention to the distinction between the sale of ordinary property and the construction of a specific article upon a contract, and cites, with approval, the case of *Gordon* v. *Noris,* 49 N. H., 376, quoting from the syllabus the following language:

"Where the vendee refuses to receive and pay for ordinary goods, wares and merchandise, which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract price for the goods, but the difference between the contract price and the market value, or the value of the same goods at the time when the contract was broken."

In the case of *Andrews* v. *Watson,* 12 C. D., 686, it is said:

"The measure of damages in an action to recover for the refusal of the purchaser of certain shares of stock, to pay for the same where there was no delivery of the stock or transfer on the books of the corporation, by delivery of the certificate thereof, or tender made prior to the commencement of the action, is the difference between the contract price and the market value of the same, and not the sum stipulated to be paid for the stock."

The same case was reheard, and is reported in the same volume at page 692. The language used in the syllabus reads, in part:

"Where the purchaser repudiated the contract and thereby waived the straight performance thereof, the seller is entitled to recover the difference between the market value and the contract price as damages for the breach of the contract."

This case is affirmed, without report, in 51 O. S., 619.

In *Sedgwick on the Measure of Damages,* 9th Ed., Sec. 753, this language is used:

"Where the title has not passed, the measure of damages is the difference between the contract and the market price of the article at the time and the place where it should have been accepted."

In the 7th edition of *Benjamin on Sales,* it is said at Section 758:

"When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract, as has been explained in Book 2, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach of the buyer of his promise to accept and pay, can only affect the vendor by way of damages. The goods are still his; he may resell or not, at his pleasure, but his only action against the buyer is for damages for non-acceptance. He can in general only recover the damage that he has sustained in the fallen price of the goods."

This and other authorities which are cited in the notes to the authorities from which we have quoted, justify, as we think, the conclusion reached as stated earlier in the opinion.

True, Williston in his Work on Sales shows that the rule here adopted is by no means universal, and that there are very respectable authorities to the contrary. The sections quoted in the brief of the plaintiff, especially Section 565, are to the effect that the rule here adopted does not commend itself to the author, and has been rejected by many courts of the highest standing.

We are not prepared, however, to depart from the general rule, as stated in the authorities from which we have quoted.

Exception is taken to a number of the rulings on evidence by the court, which we have examined and find, as we think, no substantial error in any ruling, except rulings as shown at pages 79 and 80 of the bill of exceptions.

It must not be forgotten that the defendant took possession of the plant of the Ideal Company and operated it from the 1st to the 19th day of February, 1910, at a time when 242 shares of the capital stock had been deposited with the bank for the purpose of delivering it to the defendant. Because of this fact, it was urged on the part of the plaintiff that the defendant had accepted the partial performance by the plaintiff, either as showing that the defendant recognized that the plaintiff was duly performing, or as an acceptance of so much as had been deposited as a performance to so full an extent that the defendant

would accept it and pay for the shares so deposited. In short, that because of the action of the defendant in taking charge of this business at Lorain, it relieved the plaintiff from full performance, and was bound to accept and pay for the 242 shares in any event, and to accept and pay for the entire 250 shares if the remaining 8 shares should be produced within a reasonable time.

A witness produced by the plaintiff, to-wit, B. H. Braun, was being cross-examined by counsel for the defendant. Braun had been in the employ of the Ideal Company during the time that the plant was operated by the defendant. Braun was in its employ in the management of the laundry at Lorain, and was paid by that company. This had been shown as tending to show an acceptance by the Davis Company. The Davis Company discontinued the operation of the plant, as already said, on the 19th day of February, 1910, and this question was put to Braun on cross-examination:

"Q. After the 19th day of February, 1910, after the Davis Laundry Co. people left, from whom did you get your pay, after that time for your services at the laundry?"

This being upon a cross-examination, it was not required of counsel to state what answer he expected would be given. The rule in such case is that any answer which would be competent may be presumed in favor of the party asking the question.

Suppose the answer to this question had been: "I received my pay from the Ideal Laundry Co." It would tend to show that that company did not regard the ownership of the property as having passed out of its hands to the Davis Company.

Further on he was asked, having stated that the plant was operated after the 19th of February:

"Q. Who got the returns from it?"

Objection was sustained to this.

A competent answer would have been, "The Ideal Laundry Co. got the returns," or, "The plaintiff got the returns," either of which might tend to show what it is suggested the answer to the former question might have tended to show, or the answer to either of these questions might have been that the plaintiff received the returns.

Similar questions of the same kind were asked of this witness, and an objection made by the plaintiff sustained, to which an exception was taken.

We think there was error in sustaining these objections. We think answers might have been given which would tend to weaken the claim made by the plaintiff that the defendant, by its action, had recognized that the contract was so far complete that it was bound by it, by tending to show that either the plaintiff or the Ideal Company had not yielded up its ownership of the property.

Complaint is made that the court charged that the plaintiff was entitled to a reasonable time in which to procure and deliver the 250 shares of stock.

We think that whether the agreement was that it should be delivered as soon as the plaintiff could get it together, or that it should be delivered in a few days, would have been fully complied with by delivery within a reasonable time, that is to say, plaintiff should have had a reasonable time to procure that stock which it was known to the defendant he did not own, and that he must obtain it from others. We find no error in that part of the charge.

The judgment is reversed for error in charging that the measure of damages to which the plaintiff was entitled was the contract price, and for error in ruling on evidence as herein pointed out.

CONSTRUCTION OF DEED WITH REFERENCE TO IDENTITY OF LAND.

Circuit Court of Cuyahoga County.

THE CLEVELAND CO-OPERATIVE STOVE COMPANY v. THE CLEVELAND & PITTSBURGH RAILROAD COMPANY.

Decided, December 16, 1912.

Deeds—How Construed—Identity of Land Sought to be Described is a Question for a Jury—How Title Acquired by Adverse Possession.

1. A deed should be construed according to the intention of the parties, and if its language is clear and unambiguous and does not require construction, the court will look only to the deed to ascertain the intention of the parties; but in case of doubt, the court may and should consider not only the language, but also the circumstances surrounding the transaction and the situation of the parties.
2. Where, in an action of ejectment from a strip of land ten feet wide adjoining a railroad right-of-way, it appears that the owners of a parcel of land, which was subject to a forty foot right-of-way allotted it, but the plat filed with the county recorder, through an error, described the right-of-way as sixty feet instead of forty, while deeds for lots sold recited that all lots are situated on the west line of the railroad right-of-way, the question of whether or not the grantors intended to include the ten feet when they deeded the lots is one for the jury.
3. Where one remains in actual, visible, exclusive, hostile and continuous possession of land for a period of twenty-one years, he thereby acquires title to the land.

Henderson, Quail & Siddall, for plaintiff in error.
Squire, Sanders & Dempsey, contra.

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

This is an action by the Cleveland & Pittsburgh Railroad Company against the Cleveland Co-Operative Stove Company, to recover the possession of a ten foot strip of land abutting upon and parallelling its right-of-way on the westerly side thereof at or near its intersection with Central avenue, in this city.

In 1852 the railroad company owned a tract of land, including the strip in dispute, consisting of 8.78 acres. On February 23, 1852, it conveyed the entire tract to William V. Craw, save and except a forty foot strip on the easterly side thereof, which it reserved as a right-of-way.

The tract so conveyed remained intact until 1870, when William V. Craw caused it to be alloted and a plat thereof to be made and recorded. The plat, however, shows the railroad company's right-of-way to be sixty feet in width instead of forty feet, as reserved in its deed to Craw. This was doubtless due to a mistake of the surveyor, for obviously it was Craw's intention to allot his entire interest in the tract, and from anything that appears upon the record, he lived and died supposing that this had been done.

The certificate attached to the plat contained the following language:

"This sheet contains an allotment made at the request of William V. Craw, of the south part of original lot Number 335, in East Cleveland, and bounded as follows:

"South by Quincy avenue, formerly Wade avenue, west by the east line of the Wilson Heirs' lands; and northeast by the Cleveland and Pittsburgh Railroad grounds."

This certificate also recites that Craw avenue (a street showing on the plat) is fifty feet in width and extends from Quincy street to the Cleveland & Pittsburgh Railroad Company.

On April 10, 1876, William V. Craw deeded the entire tract to James M. Craw, the land being described by metes and bounds as in the original deed from the railroad company, and with the same reservation. The deed recited that the above land has been subdivided into lots, and referred to the recorded plat. It also provided that the grantees should "fulfill all contracts heretofore made by the said William V. Craw, and to deed the same in pursuance of contracts heretofore made by said grantor for lots in such subdivision to parties holding said contracts."

By this deed William V. Craw doubtless intended to and did convey his entire interest in the tract.

On the same day on which he received the deed from William V. Craw, James M. Craw conveyed the property to Margaret W. Craw, wife of William V. Craw, using the same description and making the same reservation that was contained in the deed to him.

On February 3, 1879, Margaret W. Craw and William V. Craw, her husband, conveyed sublots numbers 1, 2, 3 and 4 of the Craw allotment to Lutz and Seelig, whose heirs and representatives, on May 17, 1881, conveyed the same to the Cleveland Co-Operative Stove Company. The description contained in the deed to the stove company was the same as that in the deed to Lutz and Seelig.

What land did the parties intend should be conveyed by the deed of Margaret W. Craw and her husband, William V. Craw, to Lutz and Seelig?

Margaret W. Craw owned to the railroad right-of-way. She might have limited the conveyance to the lands described by the plat, referred to in her deed, and reserved the ten foot strip lying between the lots conveyed by her deed and the railroad right-of-way, and clearly this would have been the effect of the deed had she been content to describe the lots by a reference to the plat only.

A deed, for a description of lands conveyed, may refer to another deed, or to a map, or to a plat, and the deed or map or plat to which reference is thus made, will be considered as incorporated in the deed itself. *Develin on Real Estate,* Section 1020.

This was the situation in the case of *The Cleveland & Pittsburgh Railroad Company* v. *The National Safe & Lock Company,* decided by this court in December, 1910, and from which this case is readily distinguishable.

On the other hand, Margaret W. Craw might have conveyed, by the same deed or a separate instrument, the lots as described by the plat, and also the ten foot strip in dispute between them and the railroad's right-of-way, for she had the undoubted title to both.

What, then, was the intention of the parties to the transaction? The description contained in the deed to Lutz and Seelig,

referred to the plat for a description of the property and in addition recited that said "lots Numbers 1, 2, 3 and 4 are situated on the west line of Craw avenue and the Cleveland & Pittsburgh Railroad." Three of the lots had no outlet except upon the railroad and the fourth had only a few feet of frontage on Craw avenue.

Lutz and Seelig owned and occupied, in carrying on a coal business, original city lots Numbers 218 and 219, immediately in front of sub-lots 1, 2, 3 and 4. It is easily conceivable that their purpose in purchasing these lots was to obtain a railroad outlet. The deed to them also contained this clause:

"This deed is made in pursuance of an agreement made by William V. Craw and said Lutz and Seelig, and the possession given them (Lutz and Seelig) on the 1st day of April, 1873."

Thus Margaret W. Craw was performing an agreement in respect of the lots, between William V. Craw and Lutz and Seelig, which, by the deed from William V. Craw to James M. Craw, and in turn by James M. Craw to her, she agreed to perform.

On May 17, 1881, the heirs and representatives of Lutz and Seelig deceased, conveyed said lots numbers 218 and 219 and sublots numbers 1, 2, 3 and 4 to the Cleveland Co-Operative Stove Company which company has ever since used the land in carrying on its business, including the ten foot strip in dispute, on which, or the greater part of which, it has piled and stored ashes, cinders, slag and moulding flasks.

From 1873, when Lutz and Seelig acquired possession of sublots 1, 2, 3 and 4 until the date of the deed to the stove company, they and their heirs and representatives assumed and held possession of, and exercised control and dominion over the ten foot strip in dispute, and nobody arose to question their right so to do. A fence was built and maintained on the westerly line of the railroad's right-of-way, which with other fences, enclosed said strip as a part of their land, and by common consent Lutz and Seelig were the accredited owners not only of Lots Numbers 1, 2, 3 and 4, but the ten foot strip contiguous thereto. In fact, nobody distinguished between the two; all was regarded as theirs.

In 1900 somebody discovered the mistake which had been

made in platting the property, whereupon on April 18, 1900, J. Odell procured a quit-claim deed of the ten foot strip in dispute from Margaret W. Craw, widow of William V. Craw, deceased, and on November 9, 1900, by quit-claim deed, conveyed the same to the railroad company. It is on this deed that the railroad company rests its claim to the property.

In this situation the court instructed the jury that the record title to the property was in the railroad company, and submitted the stove company's claim to the title to said strip by adverse possession, to the jury, who found that the right to the possession of the property was in the railroad company.

Counsel for the stove company contend that both the court and the jury erred, the court in instructing the jury that the record title was in the railroad company, and the jury in finding that the stove company had not acquired title to the disputed strip by adverse possession. We believe both contentions to be well founded.

In our opinion, the court erred in finding from these facts as a matter of law, and so instructing the jury, that the record title was in the railroad company. In arriving at this conclusion the court must have found, as a matter of law, that the reference to the plat in the description contained in the deed of Margaret W. Craw and William V. Craw, her husband, to Lutz and Seelig, was conclusive. This conclusion might have been tenable had the description in the deed referred only to the plat, and had the lots been described only by their numbers as they appeared upon the plat; but this was not the case. The certificate attached to the plat certified that the alloted land was bounded on the northeast by the Cleveland & Pittsburgh Railroad, and here sub-lots Numbers 1, 2, 3 and 4 are situated, and the deed of Margaret W. Craw and William V. Craw to Lutz and Seelig recited that "said sub-lots 1, 2, 3 and 4 are situated on the west line of Craw avenue and the Cleveland & Pittsburgh Railroad." They doubtless owned to the railroad, and might have conveyed all their interest in the land up to the railroad right-of-way.

What, then, was the intention of the parties? What land was intended to be conveyed by the deed to Lutz and Seelig?

A deed should be construed according to the intention of the parties, and if its language is clear and unambiguous, and does not require a construction, the court will look only to the deed to ascertain the intention of the parties; but in case of doubt, the court may and should consider not only the language, but also the circumstances surrounding the transaction and the situation of the parties. *Develin on Real Estate,* Section 839.

In *Beardsley* v. *Nashville,* 64 Ark., 243, it is said:

"A deed is to be construed according to the intention of the parties, as manifested by the entire instrument, although such construction may not comport with the language of a particular part of it. When a deed contains two descriptions of the land conveyed which are not consistent with each other, that description must control which best expresses the intention of the parties, as manifested by the whole instrument and the surrounding circumstances."

In *Snook* v. *Wingifeld,* 52 W. Va., 446, the court quoted approvingly from *Jones on Real Property,* Section 339:

"The construction of the terms used in a deed, aside from extrinsic evidence, is for the court. The question of the application of a description to its proper subject-matter is for the jury, who may have the aid of all competent extrinsic evidence. The question of the identity of the location is always one of fact for the jury."

Again, in the same opinion, the court say:

"Parol evidence is admissible to apply the description to the parcel intended to be conveyed. When the terms used in the deed leave it uncertain what property was intended to be embraced in it, such evidence can not be used to enlarge the scope of the descriptive words, but only to fit them to the lands intended to be described."

In *Sharp* v. *Thompson,* 100 Ill., 467, it is said:

"The mortgage under consideration described the several lots conveyed by number, with the additional clause 'being all of Block 25.' Block 25 did not contain the lots mentioned in the deed, but they were in another block. It appearing, however, that it was the intention of the mortgagor to mortgage the block in which he resided, and that he resided in Block 25, it was held

that Block 25 was, and the lots named were not subject to the mortgage."

In *Park Commissioners* v. *Taylor,* 133 Ia., 453, it is said:

"Where a conveyance describes certain lots with reference to a plat, then the plat, for the purpose of the description, becomes part of the conveyance, and where the plat describes the lots as extending to a navigable stream, such stream constitutes an identified monument which will control the distance indicated by the figures of the plat and the owner takes the land to high water mark."

Where the meaning of the description contained in a deed is doubtful, evidence as to the acts of the parties may be admitted to show the intent, and generally in the construction of every doubtful and ambiguous deed, the intent can not be obtained by the application of one rule alone; all should be considered and to each should be given the proper weight. *2 Develin on Real Estate,* Section 840.

In *Salsbury* v. *Andrews,* 19 Pickering, 250, the language of Mr. Chief Justice Shaw is peculiarly pertinent as illustrating the manner to be adopted in arriving at the intent of the parties:

"The same individual owning two tenements adjoining, may carve out and sell any portion that he pleases, and the terms of the grant, as they can be learned, either by words clearly expressed, or by just and sound construction, will regulate and measure the rights of the grantee. In construing the words of such a grant, where the wording is doubtful or ambiguous, several rules are applicable, all however designed to aid in ascertaining what was the intent of the parties, such intent, when ascertained being the governing principle of construction.

"And first, as the language of the deed is the language of the grantor, the rule is that all doubtful words shall be construed most strongly against the grantor, and most favorably and beneficially for the grantee. Again, every provision, clause and word in the same instrument shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, of covenant or description, or words of qualification, restraint, exception or explanation. Again, every word shall be

presumed to have been used for some purpose, and shall be deemed to have some force and effect, if it can have. And further, although parol evidence is not admissible to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, water-courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were properly used by the parties, especially in matters of description."

Therefore, under the facts of this case as disclosed by the record, we think the court should have submitted the question of the application of the description contained in the deed of Margaret W. and William V. Craw to Lutz and Seelig, and from them to the stove company, to its proper subject-matter, to the jury. Not to have done so, we think, was error.

Now briefly, on the question of whether or not under the facts disclosed by the record, to some of which attention has been called, the stove company acquired title to the disputed strip by what is known in the law as adverse possession.

From May 17, 1881, until January 20, 1903, when this action was brought, the stove company, without let or hindrance of anybody, occupied and used the strip in conjunction with sublots Numbers 1, 2, 3 and 4, to store ashes, cinders, slag and moulding flasks. During all of this time the land was enclosed by fences. Nobody attempted to interfere with or interrupt the stove company's possession of the land and during all of these years its possession was actual, visible, exclusive, hostile and continuous.

In *Yetzer* v. *Thomen*, 17 O. S., 130, the court said:

"We think that under our statute of limitations, if a party establish in himself or in connection with those under whom he claims an actual, notorious, continuous and exclusive possession of land for a period of twenty-one years, he thereby, except as to persons under disability, acquires a title to the land; and this is irrespective of any question of motive or mistake."

Later in the opinion the court further said:

"It seems to us that the correct doctrine on this subject is laid down by the Supreme Court of Errors of Connecticut, in *French* v. *Pierce,* 8 Conn., 439, and except that the period of limitation prescribed by the statute of that state is fifteen years instead of twenty-one, as in Ohio, what was said in that case is as applicable in cases arising under our statute as it was to the case before that court. In that case the court says: 'The possession alone, and the qualities immediately attached to it, are regarded. If he intends a wrongful disseizin, his actual possession for fifteen years gives him a title; or if he occupies what he believes to be his own, a similar possession gives him title. Into the recesses of his mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason that it is the visible and adverse possession, with an intention to possess, that constitutes its adverse character, and not the remote views or belief of the possessor.' "

In *McAllister* v. *Hartzel,* 60 O. S., 69, this doctrine is affirmed, and in that case the court announced the further rule that "Where the statute of limitations is interposed in an action of ejectment, and it is shown that the original seizure was a disseizin, any subsequent act or declaration of the claimant, or his predecessor in title which does not estop the claimant to plead the statute, nor suspend the right of the holder of the title to prosecute an action to recover possession, will not be sufficient to arrest the running of the statute. Neither a mere offer to buy within the twenty-one years, nor an acknowledgment by the claimant within that time that the title is in another, or that the claimant does not own the land, will have that effect."

Reference is made to this rule for the reason that the railroad company offered in evidence at the trial a contract between it and the stove company, made March 25, 1901, for the building of a switch from the railroad company's tracks into and upon the stove company's land, by the terms of which each was to bear the expense of building on its own land. In the plat, which was prepared by the railroad company and approved by the stove company, the ten foot strip was included in the railroad company's land, and this fact was apparently overlooked by the

stove company and was not called to its attention.

By the act of giving its approval to this plat, the railroad company claims that the stove company relinquished whatever right or claim which it had to the title to the land by adverse possession. In the light of the above doctrine, however, we are unable to see the logic of this contention.

Without further reviewing the facts as disclosed by the record, we are of the opinion that the claim of the stove company to title to the disputed strip by adverse possession, regardless of the state of the record title, was clearly established, and that the verdict of the jury to the contrary was against the weight of the evidence.

Accordingly the judgment of the court of common pleas is reversed and the cause remanded for further proceedings according to law.

STATUS OF AN ADDITIONAL ASSESSMENT TO COMPLETE A STREET IMPROVEMENT.

Circuit Court of Cuyahoga County.

ANNA M. STUART v. THE VILLAGE OF LAKEWOOD ET AL.

Decided, December 30, 1912.

Statutes—When in Effect—Special Assessments—Additional Assessment Governed by Same Law as Original Assessment.

1. Where an act providing a new form of government for municipalities provided that, for the purpose of carrying into effect the powers and duties conferred and imposed upon present councils, the act should take effect at a certain date and for all other purposes, including the repeal of existing laws, at a later date, the powers and duties referred to are new powers and duties conferred and imposed by the act and not new methods or a different manner of exercising powers and duties previously conferred: hence a special assessment, levied after the first mentioned date and before the last mentioned date, will be enjoined to the extent that it exceeds the limit allowed for such assessments by the pre-existing laws.

2. An additional assessment, levied under Section 2300, Revised Statutes, to complete an improvement for which the original assessment proved insufficient, is an incident of the original assessment and governed by the law in force when the improvement proceedings were begun.

Thompson, Hine & Flory, for plaintiff in error.
T. J. Ross and *J. A. Cline*, contra.

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

This action was brought to enjoin the collection of certain special assessments levied upon the premises of plaintiff, located in the village, now city of Lakewood, and was tried upon an agreed statement of facts.

Plaintiff's petition contains five causes of action and the trial court found against the plaintiff upon all of them.

This court is requested to review the decision of the trial court only with respect to the fourth and fifth causes of action.

The fourth cause of action is upon an assessment levied to pay for an improvement provided for under an ordinance adopted December 29, 1902, the assessment ordinances proper not being adopted until July 6 and August 16, 1903.

The situation is complicated by the adoption of the municipal code on October 22, 1902. If the act of 1902 applies, the assessment complained of in the fourth cause of action is illegal, because it violated Section 53 of that act, which provides that in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes within a period of five years exceeding 33 per cent. of the *tax value* thereof.

If the act of 1902 does not apply, then part of this assessment is illegal, because it exceeds, by $175.49, twenty-five per cent. of the *actual value* of the premises, as provided by Section 2264*a* of Bates' Revised Statutes, 1902, which was in force until the act of 1902 took effect. *Toledo* v. *Marlow*, 28 C. C., 298; affirmed without report, 75 O. S., 574.

Part of the act of 1902 took effect November 15, 1902, and the remainder did not take effect until the first Monday in May,

1903. The proceedings here involved were commenced between the said dates on December 29, 1902.

Section 231 of the act of 1902 provides:

"For the purpose of carrying into effect the powers and *duties* conferred and *imposed* upon present councils, boards of legislation, or other legislative bodies, by the provisions of this act, and for the purpose of conducting the first election to be held in every municipality hereunder, and of preparing for the change in the organization of municipalities herein provided for, this act shall take effect from and after the fifteenth day of November, 1902; and for all other purposes this act, and every portion of the same, including the repeal of existing laws, shall take effect on the first Monday in May, 1903, and the following sections of the Revised Statutes of Ohio are hereby repealed."

The "powers and duties conferred and imposed upon present councils, boards of legislation, or other legislative bodies, by the provisions of this act," must refer to *new* powers and duties conferred and imposed by the act (and there were many such) and not to a different manner or method of exercising powers and duties.

The power to levy special assessments and the duty to levy them, when necessary, was conferred and imposed upon city councils many years before the act of 1902 was adopted; Section 53 of the act merely placed a different limitation upon the amount of such levies than had previously been the rule under Section 2264*a* of the Revised Statutes. That section was one of the "existing laws," mentioned in said Section 231, the repeal of which should not take effect until the first Monday in May, 1903. It was therefore in effect on December 29, 1902, when these improvement proceedings were begun and under it the assessment complained of in the fourth cause of action is excessive to the extent only of $175.49, and the collection of that amount should be enjoined.

We do not understand that it is claimed that plaintiff signed any petition for this improvement which would bar her right to this relief.

The assessment complained of in the fifth cause of action is one levied after 1902, to make up a deficiency in an assessment levied to pay for improvements made before 1902.

The municipality claims the right to make this assessment under Section 2300 of the Revised Statutes, which was specifically retained in full force and effect by Section 94 of the act of 1902. Said Section 2300 reads as follows:

"If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitations prescribed for such assessments, make an additional *pro rata* assessment to supply such deficiency; and in case a larger amount is collected than is necessary, the same shall be returned to the person from whom it is collected in proportion to the amounts collected from such persons respectively; but this section shall be subject to the limitations contained in other sections of this chapter."

The original assessment being governed by the limitations of the law in force before 1902, and the improvement proceedings having been begun before that year, the right to collect an additional assessment for the *same improvement* must be governed by the law in force when the improvement proceedings were begun. The additional assessment is an incident only of the original proceeding.

The argument that the theory of construing all assessments by the law in force when the proceedings for improvement were begun works out a hardship when the additional assessment is made, perhaps several years after change in ownership has occurred, has no force in this case, for no such change in ownership has occurred, and, we apprehend, a person buying property on a street with improvements is bound to know the law and can inquire at the proper place for information as to whether all improvements on the street have been paid for in full.

There was no illegality in the assessment complained of in the fifth cause of action.

For the reasons stated, the judgment of the common pleas court is modified so as to enjoin the collection of $175.49 of the assessment mentioned in the fourth cause of action, and in all other respects the judgment of the common pleas court is affirmed.

CONVEYANCE OF LAND HELD TO HAVE BEEN A MERE SECURITY FOR A LOAN.

Court of Appeals for Hamilton County.

OTTO KRIPPENDORF v. HELEN M. ORMSBY; THREE CASES.

Decided, July 19, 1915.

Embarrassed Owner of Land—Desiring to Free it from Liens Executes a Deed which is Held to Have been a Mortgage—Trust Relation Between Attorney and Client—Action for Recovery of Land an Action in Equity.

1. A suit to construe and enforce a contract, with an accounting thereunder, a reconveyance of land and general relief, is an action in equity, triable to the court and not to a jury, and the reference of such a case to a master commissioner is within the discretion of the court.
2. Where it appears that the whole purpose of a contract for the conveyance of land was to raise money for the relief of the owner, with a provision that upon its repayment there should be a conveyance back, the contract will be treated as security for the loan and the deed of conveyance as a mortgage; and where the petition sets out the salient terms of the contract, and in effect states that it is one for a redemption although in terms it asks for a reconveyance of the land, and the trust relation of attorney and client also appears, a court will not hesitate to decree a reconveyance of the land.

J. M. Dawson, for Krippendorf.
J. C. Martin and *Wm. M. Fridman,* for Helen M. Ormsby.
Young & Young, for Geo. S. Ormsby.

JONES (Oliver B.), J.; JONES (E. H.), J., and GORMAN, J., concur.

Three proceedings in error have been brought in this court, growing out of an action in the Superior Court of Cincinnati in which the defendant in error was plaintiff, and the plaintiff in error was defendant, and in which plaintiff sought to require the defendant to reconvey to her certain real estate which she had conveyed to him under a certain contract in accordance with the

terms of which he was to advance certain money and out of it to pay certain liens upon said real estate, and to hold and rent same and out of the income pay taxes, make repairs and improvements, and at the end of three years, upon repayment to him of the amount advanced, to reconvey said real estate to her.

The University of Wooster was made party defendant and filed a cross-petition setting up a mortgage made by the defendant below to it to secure a loan of $5,000 upon lot 49, which was the improved portion of said real estate, and a judgment was afterwards entered on said cross-petition finding the amount due under said mortgage and ordering the foreclosure of same and sale of the premises covered by the mortgage on the failure to pay the amount so found due.

The case proceeded as between the original plaintiff and defendant, and was heard upon her second amended petition, the answer of defendant thereto, and the reply to said answer. Upon said hearing the court decided in favor of the plaintiff and found upon the evidence that the allegations of her second amended petition were true, and that she was entitled to have the contract performed by the defendant and its provisions enforced against him, and that she was entitled to have a reconveyance of all the property mentioned in said contract, and, excepting the mortgage to the University of Wooster, free from all encumbrances, upon the payment by her of such sums with interest as had been advanced by defendant upon her account under said contract; and for the purpose of stating an account showing the amount so due from plaintiff to defendant the court appointed Murray M. Shoemaker as a master commissioner with all the power of a referee, to take such an account and to ascertain and report to the court the amount so due to the defendant.

The first proceeding in error, No. 304, seeks to set aside this judgment as being erroneous and invalid, and questions the power of the court to appoint a master commissioner as therein provided.

The cause is one in equity, being a suit to construe and enforce a contract and for an accounting thereunder, for a decree for the re-conveyance of land and for general relief. These are all matters triable to a court and not to a jury, and come within

the provisions of Section 11490, General Code. Under this section reference to a master commissioner is discretionary with the court, and in this case the court has in no way abused its discretion.

The second proceeding in error, No. 461, was brought for the purpose of reviewing the final judgment and decree of the superior court which was entered in said case upon the report and finding of the master commissioner and referee appointed therein and which fixed the amount ordered paid by the plaintiff to the defendant in full satisfaction of all amounts advanced and paid by him under said contract, and provided that upon such payment by the plaintiff said defendant should reconvey all of said real estate free and clear of all incumbrances.

In this proceeding in error a complete bill of exceptions was filed, but the original pleadings and papers having been filed in the first case, No. 304, were not refiled herein but only such papers as had been filed in the lower court subsequent to the original proceedings in error. And the transcript of the docket and journal entries in the lower court filed in this second case included only those subsequent to Feb. 2, 1914—being a continuation of the transcript filed in case No. 304. As each of these proceedings in error is technically distinct from the other, there might be a question as to the power of the court to consider one case as merely a supplement of the other, but as the main question involved is the same in both cases, they will be treated together and considered as one.

The third proceeding in error, No. 577, involves the right of a judgment debtor in a foreclosure suit to insist upon a sale under decree of foreclosure and order of sale, contrary to the wishes and right of the judgment creditor who is the owner of said judgment and mortgage.

A decree in foreclosure was taken upon the cross-petition of the University of Wooster under its mortgage made to Otto Krippendorf upon Lot 49, part of the real estate involved in said contract, and an order for sale had been issued upon the precipe of the attorneys for the University of Wooster and the property was advertised thereunder for sale by the sheriff, whereupon George S. Ormsby, the father of Helen M. Ormsby,

for her protection and assistance purchased from the University of Wooster all its interests under said mortgage and judgment and recalled said order for sale. Afterwards, Otto Krippendorf, the judgment debtor in said decree of foreclosure, without authority from or notice to said George S. Ormsby or the University of Wooster, filed a precipe for a second order of sale, which was issued by the clerk, and sale was advertised thereunder by the sheriff. Upon motion George S. Ormsby was made party defendant, and he made application to the court for an order to set aside and recall the second order of sale which had been issued at the instance of said defendant Otto Krippendorf; which motion upon hearing the court granted, and made an order setting aside and recalling said second order of sale. Said defendant Otto Krippendorf also moved the court to require said George S. Ormsby to give security for costs, he being a non-resident of Hamilton county, Ohio. This motion was denied by the court on the ground that it appeared to the court that Ormsby was the owner of the mortgage and judgment interest in said real estate, which afforded ample security for costs. To this order the defendant Krippendorf also excepted.

The third proceeding in error was brought to secure a reversal of these two orders. In the opinion of this court the action of the court below upon both of said motions was both proper and legal. But neither of said orders is a final order which can be reviewed by proceedings in error by this court, and the petition in error in case No. 577 will therefore be dismissed at the costs of plaintiff in error.

The main question in the first and second proceedings in error is as to the correctness of the judgment below finding the equities in favor of the plaintiff.

The evidence shows that Mrs. Ormsby being the owner of a handsome dwelling on the lot known as No. 49 of the Foote Subdivision, was in embarrassed circumstances, a decree of foreclosure having been taken upon the mortgage on said property by the University of Wooster, and it was about to be sold to satisfy the judgment of such foreclosure; that other judgments had been taken against her for money; and the taxes on said

property were unpaid. When in search of assistance towards the raising of money necessary to adjust her financial difficulties she met Otto Krippendorf, who is an attorney at law and who agreed to act for her as such and to advance money necessary to prevent the sacrifice of her home. To effect this purpose it was agreed that Krippendorf would raise money to the amount of $7,500; that a conveyance of said Lot No. 49, together with three other lots, would be made to him by Mrs. Ormsby; and that out of the $7,500 he was to pay all tax claims on lot 49, the court costs and judgment in said foreclosure case brought by the University of Wooster, and certain improvements to the premises on lot 49; and the form of contract to this effect was drawn by said Krippendorf and executed by Mrs. Ormsby and Krippendorf in the presence of two witnesses, and duly acknowledged by both of them before a notary public.

It appears from the evidence that by virtue of this contract, and a deed made at the same time as a part of the same transaction by Mrs. Ormsby to Mr. Krippendorf, her title in said four lots was vested in Krippendorf who was then acting as her attorney and trustee under the terms of said contract. The sheriff's sale in the foreclosure case of the Trustees of the University of Wooster was confirmed and a deed was executed by the sheriff conveying lot 49 to the Trustees of the University of Wooster, who, carrying out an arrangement previously made with Mrs. Ormsby, received at the hands of Krippendorf sufficient money to pay the court costs and tax claim and to reduce their indebtedness from Mrs. Ormsby down to $5,000 for which Krippendorf executed a mortgage to them upon said lot 49.

By the terms of said contract Krippendorf agreed to reconvey to Mrs. Ormsby, upon the termination of said term of three years, to-wit, on the 6th day of May, 1912, the same interest in said four lots provided she pay to him in gold coin the principal sum of $5,000 and interest and $2,500 and interest, together with all incidental sums by way of taxes, assessments, interest on mortgages, charges for improvements or otherwise, and interest at 6% per annum from the date of maturity. The contract further gave to Mrs. Ormsby during its existence a

right to accelerate a reconveyance of said property providing she assume and take subject to the mortgage of $5,000 and all other claims and demands growing out of the contract.

A careful consideration of this contract in connection with the evidence given shows that its whole purpose, and the purpose of the conveyance made by Mrs. Ormsby to Krippendorf, was simply to furnish the means for securing money, which he agreed to raise and advance on her account. In other words, this so-called contract was in fact a mortgage. The conveyance was undoubtedly made to him by her and at her request by the Trustees of the University of Wooster, for the purpose of vesting title in him as her trustee for her benefit, and at the same time to secure him in the repayment of any money necessary to be advanced by him. Although the contract is drawn in an involved and extremely vague way, it shows evidence of having been prepared either by a lawyer who was without sufficient experience to clearly state what was intended to be contained in it, provisions to furnish proper security for himself in advancing funds and at the same time protect the rights of his client who was to be the beneficiary of such advancement—or else it was the product of a crafty and unscrupulous lawyer, who, seeking to take advantage of a confiding client ignorant of such documents, at the end of her resources and eager to find a way out of her financial difficulties, created a document under which he might, if occasion arose, claim to be the absolute owner of the property and hold her to the exact time fixed for reconveyance under the strict letter of the contract in the manner of an historical Shylock.

The fact that Krippendorf failed in any way to report his expenditures to Mrs. Ormsby or to furnish to her an account of the amount of his advancements under the contract, and that he failed to keep the property rented or in repair, and the further fact that the value of the property has largely appreciated, taken in connection with his testimony as given in this case, places him in anything but a favorable attitude before the court. He had hardly signed the contract under which he appeared as the friend and benefactor of Mrs. Ormsby until he laid plans to

repudiate it, and his testimony indicates a constant effort on his part to retain for himself the property which he obtained as a trustee for a client, and, failing to hold it, to require her to pay the largest sum possible to him in excess of all advancements and interest.

There is no question but that this contract was drawn as a security for a loan or advancement to be made by Krippendorf on behalf of Mrs. Ormsby and, under the doctrine of the case of *Wilson* v. *Giddings*, 28 O. S., 554, it must be held to be a mortgage. As was stated in the opinion of the court in that case, at page 565:

"There is no principle in equity more firmly settled on authority than that every contract for the security of debt, by the conveyance of real estate, is a mortgage, and that all agreements of parties tending to alter, in any subsequent agreement, the original nature of the mortgage, is of no effect. * * *

"The rule is general that where a contract and conveyance are made upon a negotiation for a loan of money, a court of equity will always construe the conveyance to be a mortgage, whatever may be the form of the contract. * * *

"Whatever form the transaction assumes; whatever covenant there may be in the conveyance, or in an agreement accompanying it, if it was founded upon a loan of money, and intended by the parties to be a mortgage, courts of equity will always so construe it."

It is not necessary to multiply authorities to sustain the principle that once a mortgage is always a mortgage.

Nor is it necessary to cite cases that a party occupying a trust relation can not take advantage of his position.

Counsel for plaintiff in error concedes both of these propositions, but he relies upon a criticism of the pleadings and insists that a technical meaning be placed upon them. It is true that the petition does not in terms declare the so-called "contract" to be a "mortgage," but it does set out the salient terms of the contract, and does in effect state a cause of action for a redemption of a mortgage although in terms it asks for a reconveyance of real estate under the terms of the contract, praying for specific performance, and at the same time praying for general relief.

It is true that the petition does not set out the relation of attorney as existing between Mr. Krippendorf and Mrs. Ormsby, but it does set out enough of the terms of the contract to show that he held this real estate as her trustee with an obligation to reconvey to her.

It is also true that the reply undertakes improperly to set out this relation of attorney and client as between these parties. Such an allegation in the reply can not be considered as enlarging the case of the plaintiff as made by the petition. *Hilsinger* v. *Trickett*, 86 O. S., 297.

But as stated above, the trust relation sufficiently appears from the allegations of the second amended petition.

The action being in equity and the prayer for relief being a general one, the court has jurisdiction to grant relief warranted by the facts as proven. 195 U. S., 427; 143 Fed., 22; 208 Fed., 295; 210 Fed., 696; 16 Cyc., 106 C.

The defendant below contends that under a strict construction of the contract upon which he relies Mrs. Ormsby failed to perform her obligations to convey to him, as provided by paragraph 8, said real estate, free and clear of all claims, demands and incumbrances. From the fact that he drew the quit-claim deed, which she executed, at the same time as the contract and that he did not ask for any other deed or further conveyance from her, it must be held that the quit-claim deed then executed by her was substituted in place of the deed referred to in paragraph 8. It is natural to believe that, in her harassed and helpless condition she relied upon him to free her property from its incumbrances, and clearly did not intend to obligate herself to first free it from incumbrances for the privilege of conveying it to him in order that he might hold the title entirely free except for the mortgage to be placed on it by him for $5,000 to the University of Wooster.

The construction of the contract claimed by the defendant is contrary to the evidence and contrary to its own terms. The unreliable and contradictory statements given by the defendant in his testimony with regard to the $2,000 consideration named in the deed from Mrs. Ormsby to himself lead us to give doubtful credence to his testimony, and to feel that he will be amply

repaid in the amount found by the court below to be due him for advancements.

In this amount was included a $500 attorney fee, as fixed by paragraph 5 of the contract. It should be observed that nowhere in the contract does Mrs. Ormsby agree to pay this fee, nor is it in any way made a charge upon said real estate or considered as one of the advancements to be made by Krippenlorf under the contract. The evidence shows that his fee was only for services rendered in connection with this real estate and the making and performance of this contract. It is extremely doubtful whether, under all the circumstances of the case, such an allowance should be made, but as no objection was made by plaintiff below to its allowance and as there is no cross-petition in error in this case on behalf of Mrs. Ormsby, we have concluded not to disturb the finding as made by the master commissioner and confirmed by the trial court.

A careful consideration of the numerous points of error relied upon by plaintiff in error convinces us that there is no prejudicial error shown by the record as against him, but that substantial justice has been done.

The judgment below is therefore affirmed.

AS TO WAIVER OF A CONDITION PRECEDENT UNDER A POLICY OF FIRE INSURANCE.

Court of Appeals for Highland County.

ABRAHAM WEIL AND ISAAC WEIL, PARTNERS, v. THE CONNECTICUT FIRE INSURANCE COMPANY OF HARTFORD, CONN.

Decided, December 30, 1914.

Fire Insurance—Non-Performance of a Condition Precedent as to Appraisal—Intention to Rely on a Legal Excuse Must be Pleaded—Insured Can Not Rest on the Silence of the Insurer with Reference to a Proposal to Arbitrate—Waiver—Estoppel.

1. A plaintiff who intends, in an action on a policy of fire insurance, to rely on a legal excuse for non-performance of a condition of the policy, should plead such excuse in the first instance.

2. Where an insurance company by letter informs a policy holder who has suffered loss by fire that it disagrees with him as to the amount of goods destroyed and also as to the value of the goods which were destroyed, there is a sufficient disagreement to require the plaintiff to comply with the contractual provision in the policy regarding appraisal; and it is not the law of Ohio that the company must first make a *bona fide* investigation of the loss sustained and make a definite ascertainment of the amount and submit the same to the insured.
3. A telephone conversation between the insured and an adjuster for the company, in which the insured told the adjuster they would each pick an man "and the two pick a third, or settle the matter in any way at all," to which proposition the adjuster made no reply, does not constitute an estoppel against the company or a waiver of its right to insist upon the provisions of the contract with reference to an appraisal.

J. L. Kohl and *D. Q. Morrow,* for plaintiffs in error.

J. W. Mooney, R. M. Edwards and *Smith & Morrow,* contra.

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

This case is here on error from the Court of Common Pleas of Highland County, Ohio.

In the lower court the plaintiffs in error filed a petition, seeking damages for the loss by fire upon an insurance policy. The policy was one of the standard forms, and was attached to the petition.

The petition contained an allegation,

"That said plaintiffs have duly performed all the conditions on their part to be performed," etc.

The insurance company filed its answer, containing five defenses.

It is not necessary to allude to these various defenses, except to say that the first defense, with the exception of some admissions therein contained, was in effect a general denial of the allegations in the petition.

The real question involved in this case arises upon the allegations of the third defense. That defense contains a number of the provisions contained in the policy of insurance sued on, among which are the following:

"In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire."

The following provision was also contained in the third defense:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

A reply was filed. Upon the pleadings the cause went to the court and jury. At the conclusion of the entire evidence the defendant moved the court for a directed verdict, which, upon due consideration, the trial court sustained and directed the jury to return a verdict for the defendant.

I. The error relied upon in this court is: that the court below erred in directing the jury to return a verdict for the defendant.

It is conceded by counsel in argument and it is also evident from the record, that the action of the trial court was based upon the fact that the evidence adduced upon the trial failed to show a compliance upon the part of the plaintiffs below with the provisions relating to the procurement of an appraisement of the property, as set forth in the third defense of defendant's answer.

It appears from the record that on September 5, 1912, nearly two months after the loss by fire occurred, the insurer wrote a letter to plaintiffs in error, acknowledging the receipt of the proofs of loss. That letter contained the following statement:

"Beg to advise that we can not accept the above mentioned document as a satisfactory proof of loss for the reason that the terms and conditions of the policy have not been complied with by yourself.

"That we disagree with you as to the amount of wool alleged to have been destroyed, in pounds and value per pound and as a whole, and as to the amount of loss claimed thereon.

"Therefore, we advise you that for the reasons set forth above and others not herein set forth, we reject said document as not satisfactory proof of loss to this company." * * *

It has been held by the courts of this state that the provisions thus contained in the third defense of defendant's answer constitute a condition precedent, imposing an obligation upon the insured, in the event of disagreement as to the amount of loss, to procure an award or ascertainment by appraisement, or to show legal excuse therefor, before he can maintain an action upon the policy. *Graham* v. *Ins. Co.*, 75 O. S., 375; *Ins. Co.* v. *Carnahan*, 63 O. S., 258.

It was incumbent upon the plaintiffs in this case, under the allegations of their petition, to show affirmatively that they had performed this condition contained in the policy. If they had intended to rely upon a legal excuse for its non-performance they should have pleaded such excuse in the petition in the first instance. This they did not do. At the close of the trial, when the court was asked to direct a verdict for the defendant, the plaintiffs asked permission to amend their reply, which permission the court granted. This amendment to the reply, made at the close of the case, contained an allegation that:

"Said plaintiffs offered to bring about and made every effort on their part to secure an appraisement, adjustment, award and ascertainment of said loss as provided for by said policy, but said defendant refused to confer with said plaintiffs as to said appraisement, adjustment, award or ascertainment, and by their refusal prevented, any appraisement, adjustment, award or ascertainment of said loss."

It is urged by counsel for plaintiffs in error that there was no disagreement as to the amount of loss shown by this record which would become a predicate for the demand for appraisal and award.

This disagreement is evidenced by plaintiff's exhibit No. 12 and is contained in the letter of September 5, 1912, above referred to.

It is urged by counsel for plaintiffs in error that good faith required that the insurer, itself, should have made an investiga-

tion, and upon the facts thus revealed it should have ascertained a fixed or definite sum upon which a disagreement could arise.

The letter of September 5, 1912, shows that the insurer disagreed with the insured "as to the amount of wool alleged to have been destroyed, in pounds and value per pound and as a whole, and as to the amount of loss claimed thereon." Prior to this letter the insured had submitted to the insurer their proof of loss.

We are of the opinion that this was a sufficient disagreement upon the part of the insurer as to require the plaintiffs in error to comply with the contractual provision in their policy relating to the appraisal.

While there are some authorities holding otherwise and which would seem to require the insurer, itself, to make a *bona fide* investigation of the loss and a definite ascertainment of the amount and submit such to the insured, we are of the opinion that this is not the law of Ohio. Upon this point we think that the following cases are decisive: *Everett Co.* v. *Ins. Co.*, 9 N.P. (N.S.), 241; *Ins. Co.* v. *Carnahan*, 63 O. S., 259.

In neither of these cases does it appear that a definite ascertainment of any sort was made by the insurer and submitted to the insured.

The case of *Everett Co.* v. *Insurance Co., supra,* which was later affirmed by the Supreme Court of Ohio without report, upon this subject is very similar to the case at bar. In that case the disagreement arose over the amount claimed in the proofs of loss, and it does not appear that any other sum was submitted to the insurance company to the insured as a basis for agreement.

In view of these authorities, therefore, we conclude that there was such a disagreement as to the amount of loss which required the insured to act under the provisions of the policy relating to appraisal, which was a condition precedent to their bringing a suit for the loss sustained.

II. The most serious question involved in this case, however, arises on the allegations of the amended reply and the evidence disclosed in the record in relation thereto.

In this connection the contention of the plaintiffs below is, that upon the pleadings, as amended, the insured had shown a

legal excuse for non-compliance with the provisions relating to appraisal.

Some question was made by counsel for defendant in error as to the right of the court to permit the amended reply to be filed at the close of the case. But in view of the fact that the parties, upon the trial, tried the issue that was raised by the amended reply, and in view of the further fact that the record does not disclose that the defendant below was taken by surprise, we think that there was no abuse of discretion upon the part of the trial court, under the statute permitting amendments to be made at any stage of an action, in permitting the amended reply to be filed at that time. We, however, think that the matters contained in the amended reply should have been properly included in the petition, as they tended to show a legal excuse for non-compliance with one of the provisions of the policy, and the burden of showing the allegation therein contained remained throughout the entire case upon the plaintiffs below.

The evidence, if any, tending to justify the action of the insured in not complying with the provisions of the policy is contained on pages 26-7 of the record. Abram Weil, one of the plaintiffs, after testifying with relation to a non-waiver which had become the subject of dispute between the parties, testified that he went to the Chittenden Hotel, at Columbus, and called up Mr. Parsons, the adjuster of the insurance company, and found that he was at home sick. The only portion of Mr. Weil's testimony relating to this question of the adjustment and ascertainment of the loss is found in the following questions and answer:

"Q. What did you say to him about arbitration of it by anyone, or ascertainment of loss?

"(Objected to.)

"Q. I asked you as to what you said? A. I told Mr. Parsons over the phone if he had anybody in Columbus, he could pick a man and we pick one, and the two pick a third, or settle the thing any way at all."

The record does not disclose affirmatively that Mr. Parsons made any answer to the statement of the witness, and does not

disclose affirmatively that any reply whatever was made, and it only inferentially appears that Mr. Parsons may have heard the statement of Mr. Weil.

It was incumbent on the plaintiffs below to show that they had complied with the condition precedent in the policy above referred to, or to furnish some legal excuse, under the authority cited, as to why they had not complied with the same. In order to recover on this theory it was necessary to show that the defendant had, by its conduct or otherwise, done something which was tantamount to a waiver of this contractual provision in the policy.

The statement of Mr. Weil, above referred to, only shows that he stated to the adjuster over the phone that he could pick a man and the insured would pick one, and the two pick a third, and that they would settle it any way at all. There was no reply upon the part of Mr. Parsons. So far as this evidence discloses, his silence may have been an acquiescence in the proposition of Mr. Weil; in which event it would be necessary for Mr. Weil to proceed under the provisions of the policy and demand an appraisal and name an appraiser. There was nothing said or done by Mr. Parsons which is equivalent either to an estoppel or a waiver.

As was said by Davis, J., in *List & Sons Co.* v. *Chase*, 80 O. S., 49:

"A waiver is a voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where one is not bound to speak."

And in *Insurance Co.* v. *Carnahan, supra,* the same judge says:

"The insured can not rest upon the silence of the insurer as to arbitration, when a difference arises as to the amount of the loss. It was therefore incumbent on the insured, not the insurer, to perform this condition as a condition precedent to his right of recovery, whenever a difference should arise, as to the amount of the loss whether a demand was made by the insurer or not."

* * *

Applying these rules in this case we see nothing done or said upon the part of the insurance company, or its adjuster, that would preclude its right from relying upon the provisions of its contract. Mere silence will not constitute such an estoppel or waiver as would deny it the right to insist upon its compliance.

If Mr. Weil made the statement he claims to have made over the telephone to Mr. Parsons and Mr. Parsons made no reply thereto, Mr. Weil could have as well taken his silence to mean his acquiescence with the statement that he would procure an appraiser, and thus rely upon carrying out the stipulations of the contract between them.

We are, therefore, inclined to the opinion that, in view of the facts disclosed by this record, the plaintiff below did not furnish sufficient proof to obviate the necessity of complying with the provisions of the policy and that the court did not err in directing a verdict for the defendant below.

The judgment of the lower court is affirmed.

DIVISION OF THE COST OF CONSTRUCTING A HIGHWAY CROSSING OVER A RAILWAY.

Court of Appeals for Hamilton County.

CITY OF CINCINNATI v. THE CINCINNATI, LEBANON & NORTHERN RAILWAY COMPANY AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; TWO CASES.

Decided, July 19, 1915.

Crossings Over Railway Tracks—Provision Dividing the Expense Between the Railway and Municipality Construed—Notice and Hearing Not Required—Sections 8895 *to* 1902.

1. Section 3 of the act approved May 3d, 1904, charging railroad companies with one-half the cost of constructing a highway across an existing railroad, is not rendered unconstitutional by the failure to provide for a notice and hearing in respect thereto.
2. Where a railway over which it is sought to carry a highway otherwise than at grade has passed under the control of another company which has acquired its privileges and assumed its liabilities and duties, the one-half of the cost of obviating such grade crossing which the law imposes on the railway becomes a liability of both companies.

Walter M. Schoenle and *Carl M. Jacobs, Jr.*, City Solicitors, for plaintiff in error.

Lawrence Maxwell and *Jos. S. Graydon*, contra.

KUNKLE, J.

The petition in case No. 5742 states in brief that plaintiff is a municipal corporation, organized under the laws of Ohio; that the the council of said city has authorized the bringing of this suit; that defendants at all the times mentioned in the petition were and now are corporations, organized under the laws of Ohio for the purpose of owning, maintaining and operating railroads; that subsequent to the 3d day of May, 1904, the date of the passage of the act, "To provide how railroad and highway crossings may be constructed," the plaintiff built the highway known as Whittier street, across a certain railroad which had existed theretofore and is still in existence; that said railroad

did at all times herein mentioned, and does now, belong to the defendant, the Cincinnati, Lebanon & Northern Railway Company; that prior to the building of said highway, the defendants entered into a contract whereby the defendant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company secured entire control of the privileges, tracks and property, and assumed all the debts, liabilities and duties of the defendant, the Cincinnati, Lebanon & Northern Railway Company; that under the existing conditions, and because of the topography of the highway, railroad and surroundings, it was impossible to construct the said highway below the grade of the said railroad, and the said highway was, therefore, constructed above the grade of the said railroad and was carried over the said railroad by means of a re-enforced concrete bridge or viaduct.

The petition also contains an itemized statement showing that the total cost of the said bridge was $6,438.50, and states that the said bridge was fully built and paid for in October of 1910, and that no part of the cost thereof has been paid plaintiff by defendants or either of them, although demand has been made therefor, and asks judgment against the defendants in the sum of $3,219.25, with interest.

A demurrer was filed to the petition.

Error is prosecuted to this court from the judgment of the lower court sustaining such demurrer.

Plaintiff in error claims that the petition states a cause of action under Section 3 of the act approved May 3, 1904 (97 O. L., 546, General Code, Sections 8895-8902).

The title of said act is as follows:

"An act to provide how railroad and highway crossings may be constructed."

Sections 1 and 3 of said act read as follows:

"Section 1. Except as in this act elsewhere provided, all crossings, hereafter constructed, whether of highways by railroads, or of railroads by highways, shall be above or below the grade thereof."

"Section 3. Every municipality or other authority hereafter constructing a highway across an existing railroad, shall con-

struct the same above or below the grade thereof, unless permitted in the manner hereinafter provided, to construct the same at grade, and the cost of said work shall be paid, one-half by said municipality, and one-half by the railroad company owning said railroad."

Defendants in error in brief claim that the statute in question, if properly construed, requires a condemnation proceeding, or, if such proceeding is not required, then the statute is in contravention of the Fourteenth Amendment of the Constitution of the United States, and of Sections 1, 16 and 19, Article I, of the Constitution of Ohio.

We have carefully considered the very exhaustive briefs which have been filed by counsel in support of their respective contentions, but shall not attempt to discuss or review in detail the various authorities therein cited.

From a careful reading of this act, we have reached the conclusion that the provisions of Section 4 apply only to a case where a grade crossing is sought to be established, and do not apply to crossings which are not constructed at grade.

We find no statute providing for notice and a hearing in respect to the construction of a crossing such as the one in question.

This brings us to a consideration of the constitutionality of Section 3 of the act in question.

The authority of the Legislature to enact Section 3 under the police powers possessed by the state, is not seriously disputed by defendants in error, but they contend that the Legislature should have provided for a notice and hearing in respect to the improvement before the obligation provided in Section 3 can become effective.

The case of *Railway Company* v. *City of Troy,* 68 Ohio State, page 510, is relied upon by counsel for defendants in error. We think this case is distinguishable from the case at bar. In the Troy case there was no statute imposing liability.

The last sentence of the decision of the Supreme Court, in such case, is as follows:

"Since the legislative department of the state has not attempted to exercise the supposed police power in a case of this

character, we have no occasion to consider whether it would be a proper subject of its exercise."

In the case at bar the obligation is expressly imposed by statute.

The question as to whether such a statute, in addition to imposing a liability, should also provide for notice and a hearing, has not been expressly determined by the Supreme Court of this state.

We find, upon an examination, that the decisions in other states are in conflict, but we think the weight of authority sustains the view that such notice and hearing are not required and that statutes imposing a liability such as that contained in Section 3 of the act in question, are constitutional and valid.

We call attention particularly to the following authorities, wherein this question is discussed, namely:

In the case of *State, ex rel City of Minneapolis,* v. *St. Paul, Minneapolis & Manitoba Railway Company,* reported in the 98th Minnesota Reports at page 380, the first three paragraphs of the syllabus are as follows:

"The state may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways laid out after the construction of the railroad, the uncompensated duty of constructing and maintaining at such crossings all such safety devices as are reasonably necessary for the protection of the traveling public.

"Such a requirement, being referable to the police power, is not a taking of private property for public use in violation of the Constitution.

"A bridge over the railroad tracks, when necessary to make the crossing safe for public use, is a 'safety device,' within the meaning of that expression."

This decision is affirmed by the Supreme Court of the United States, in the 214 U. S. Reports at page 497.

See also case of *State, ex rel City of Duluth,* v. *Northern Pacific Railway Company,* 98 Minnesota Reports, page 429, and which case was affirmed by the United States Supreme Court. in the U. S. Reports, Volume 208, page 583.

In the case of *Missouri Pacific Railway Company* v. *City of Omaha,* reported in the 235 U. S. Reports, at page 121, the first three paragraphs of the syllabus are as follows:

"A railway company may be required by the state, or by a municipality acting under the authority of the state, to construct overhead crossings or viaducts over its tracks at its own expense; the consequent expense is *damnum absque injuria* or compensated by the public benefit in which the company shares and is not a taking of property without due process of law.

"In the exercising of the police power, the means to be employed to promote the public safety are primarily in the judgment of the Legislature, and the court will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished and does not arbitrarily interfere with private rights.

"If the state court has held that a municipality has power to pass ordinances requiring railway companies to build viaducts, this court can only declare such an ordinance unconstitutional under the Fourteenth Amendment as an arbitrary abuse of power in a clear and unmistakable case."

In the Lawyers' Reports, Annotated, Volume 28, page 298, there is also found an extended discussion of this question and a review of the authorities.

Counsel for defendants in error, in their brief, also claim that no cause of action is stated against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, for the reason that the petition alleges that the said railroad belongs to the Cincinnati, Lebanon & Northern Railway Company.

The petition does contain an averment as suggested by counsel for defendants in error, but it also contains an averment to the effect that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company has, through contract, secured entire control of the privileges, tracks and property, and assumed all the debts, liabilities and duties of the defendant, the Cincinnati, Lebanon & Northern Railway Company.

Under the averments of the petition, we think both of the defendants in error are liable. We think such liability is determined by the decision of our Supreme Court in the case of *Baltimore & Ohio Railway Company* v. *Walker,* 45 Ohio State Re-

ports, page 577, the first two paragraphs of the syllabus of which case are as follows:

"A railroad company which has the possession and control of a railroad in this state, and is managing and operating the same, as the lessee thereof, is one 'owning the tracks' of such railroad, within the meaning of Section 3333 of the Revised Statutes, which provides that: 'When the tracks of two railroads cross each other, or in any way connect, at a common grade, the crossings shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks.'

"The necessity for keeping the crossing in repair, and maintaining watchmen thereat, grows out of the use and operation of the railroads crossing each other at a common grade, and the benefits thereof accrue to the companies using and operating the roads; and, as such lessee company, while operating its road receives the benefit and security resulting from a safe crossing and the services of the watchman, it takes them subject to the burden of their expense, as provided by the statute."

The necessity and reasonableness of the cost of the improvements in question are not now before the court, and we express no opinion as to whether the same can be questioned in this proceeding by way of defense.

It therefore follows that the judgment of the lower court should be reversed and the cause remanded, with instructions to overrule the demurrer, and for such further poceedings as may be authorized by law.

We do not have the papers in case No. 5743 before us, but it is agreed that the averments of the petition in that case are similar to those above quoted, except that the petition in the latter case asks for judgment in the sum of $6,897.85, the one-half of $13,795.71, the cost of the bridge referred to in that case, and the same judgment will be rendered in this case as in case No. 5742.

Judgments reversed.

FERNEDING, J., and ALLREAD, J., concur.

PRIORITY OF A FRANCHISE TAX.

Court of Appeals for Cuyahoga County.

CHARLES R. MORLEY v. THE CLEVELAND HIPPODROME COMPANY ET AL.

Decided, March 9, 1914.

Taxation—Franchise Tax Does Not Lose its Preference—Where It Accrues After Appointment of a Receiver—Section 5506.

A franchise tax accruing after the appointment of a receiver for a corporation is entitled to preference and should be first paid out of the fund finally realized from a sale by the receiver of the assets of the corporation.

Tolles, Hogsett, Ginn & Morley, for plaintiff.

R. E. Morgan, contra.

WINCH, J.; MEALS, J., and GRANT, J., concur.

Appeal from the court of common pleas.

The question in this case is whether a franchise tax accruing after the appointment of a receiver for a corporation is entitled to preference and should be first paid out of the fund finally realized from a sale by the receiver of the assets of the corporation.

The question is answered affirmatively by Section 5506, General Code, which provides:

"The fees, taxes and penalties required to be paid by this act shall be the first and best lien on all property of a public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business, or is in the hands of an assignee, trustee or receiver, for the benefit of the creditors and stockholders thereof."

It is claimed by the creditors of the corporation in this case, however, that the section quoted intends only that the franchise tax which accrues *before* the appointment of a receiver shall be a lien upon its property and be first paid out of the assets thereof when the receiver disposes of them. In this connection it is pointed out that as the tax is upon the right of the corporation

to exercise its franchise and not upon its property and is computed upon its issued and outstanding capital stock, without reference to whether it has any property, the tax would not be a lien upon the property of the corporation unless made so by the statute quoted, for no other law makes it a lien, and from this premise is deduced the conclusion that the sole purpose of the Legislature in enacting said statute was to create this lien and require it to be recognized by assignees, trustees and receivers who take charge of property upon which the tax has already become a lien, but not to create a lien upon the property in the hands of a receiver not exercising the franchise of the corporation, but only conserving its assets until sale thereof.

In this connection it is suggested that only the corporation can stop the accrual of this franchise tax by taking certain steps and filing certain certificates as provided by law, and that neither the receiver nor the creditors can either require such corporate action or themselves stop the renewal of the tax from year to year. It is said that this failure of the Legislature to authorize the receiver or creditors to stop the annual assessment of the tax upon property sequestered for the benefit of the creditors produces a situation so unjust to them, where litigation over the assets and the priority of liens is involved and protracted, that this injustice requires an interpretation to be given to the statute which obviates such injustice.

Answering the latter suggestion first, it is sufficient to say that this injustice should be pointed out to the Legislature and not to the court. If the statute is clear and unambiguous, its mandate is to be obeyed by the court no matter how unjust the result may seem to the creditors. Taxes are a burden in any form, and those who deal with corporations and extend them credit, do so with full knowledge of the right the Legislature has reserved to burden the property of a corporation with taxes, even after its property has passed into the hands of a receiver appointed for the benefit of its creditors. These remarks assume, of course, that the statute under consideration is clear and unambiguous. Let us see if that is so.

If the contention of counsel for creditors is sound and the sole purpose of the Legislature in enacting the statute was to

make the tax a lien upon the corporate property, then the last half of the statute is surplusage and it would have been sufficient to have enacted the first part alone, to-wit:

"The fees, taxes and penalties required to be paid by this act shall be the first and best lien on all property of a public utility or corporation."

Being thus made a lien upon the corporate property, when that property afterwards passes into the hands of an assignee, trustee or receiver, it passes subject to that lien as well as to all other liens lawfully upon the property.

But the Legislature saw fit to say something more and meaning must be given to the additional words, if they mean anything.

Having by other sections required said fees, taxes and penalties to be paid so long as the corporation continues to be a corporation and to have issued and outstanding capital stock, the Legislature first made these fees, taxes and penalties a first and best lien upon all property of the corporation and then, specifying with regard to the corporate property, added: "whether *such* property is employed by the public utility or corporation in the prosecution of its business, or is in the hands of an assignee, trustee or receiver, for the benefit of the creditors and stockholders thereof."

The words "*such* property," here used, refer to the words "property of a public utility or corporation," which appear in the first part of the section.

So the only question remaining in this case is whether property in the hands of a receiver appointed for the benefit of creditors and stockholders of a corporation, is the property of the corporation or of the receiver, or of the creditors and stockholders for whose benefit the receiver was appointed. In other words: Where is the title to corporate property after a receiver has been appointed and taken charge of the property under the orders of a court?

This precise question has been twice answered by the Supreme Court of Ohio.

In the case of *Lafayette Bank* v. *Buckingham*, 12 O. S., 419, on page 424, it is said:

"The appointment of a receiver is only a provisional appointment for the more speedy getting in of the estate or assets, in relation to which the appointment extends, and for the better securing the same for their safety and the benefit of those who may be entitled thereto. A receiver, however, whether appointed by a court, or by a board, as in this case, is the ministerial officer and servant of those from whom he receives his appointment; and he is responsible for the exercise of good faith and reasonable diligence in the discharge of his duties. But it can not be said that a receiver by virtue of his office in any case, nor by the provisions of the statute in this case, becomes vested with the title to the property or assets which he administers. His relation to the property, like that of a constable, sheriff or master in chancery, is merely that of a ministerial officer."

In the case of *Cheney* v. *The Maumee Cycle Co.*, 64 O. S., 205, at page 214, we read:

"The relation of an assignee and receiver to the property of an insolvent debtor is in many respects similar. The one obtains title to and authority and power over the property by reason of the joint act of the debtor and the court; the other obtains like authority by the act of the court alone, *not having the title,* but standing as the ministerial officer of the court, his relation to the property being much like that of a sheriff or master in chancery. *Bank* v. *Buckingham,* 12 Ohio St., 419. His appointment is an equitable remedy, bearing the same relation to courts of equity that proceedings in attachment bear to courts of law, the appointment being treated as an equitable execution. The purpose is to secure the means for satisfying the final order and judgment of the court in the action, and the effect of the seizure is to place the property seized in the custody of the court. "

In the light of these two decisions the Legislature enacted the statute here under consideration, and knowing from them that the "*equitable execution*" levied upon the corporate property by the appointment of a receiver does not divest the corporation of its *title* to said property until sale is made by the receiver under orders of the court appointing him, it provided that the franchise tax required to be paid by the corporation shall be the first and best lien upon "such property," to-wit, the property of the corporation, whether employed by it in the prosecution of its busi-

ness, or in the hands of a receiver for the benefit of creditors and stockholders.

The statute thus appears to be clear and unambiguous, requiring no aid from rules of construction invoked by the creditors, and under it the relief claimed by the attorney-general in behalf of the state, to-wit, the payment of the state's claim for the Willis tax for three years during which time the property of the corporation was in the hands of the receiver, must be allowed, to be first made out of the fund realized by the receiver's sale, before the claims of mortgagee or other lienholders are paid.

The result here reached is the same as that reached under a similar statute in the state of New Jersey, where the same questions were raised. *In re West Car Company,* 60 N. J. Eq., 514.

Judgment for the state; see journal.

DAMAGES ON AN INJUNCTION BOND.

Circuit Court of Erie County.

ED. H. ZURHORST v. C. A. JUDSON ET AL.

Decided, September 27, 1912.

Judgment for Damages on an Injunction Bond—Can Not be Supplemented by a Second Judgment on a Second Bond, Unless Separate Damages are Shown.

Where bond is given by a plaintiff in the common pleas court in an injunction proceeding, and judgment having been rendered against him a second bond is executed on appeal to the upper court where a like judgment against plaintiff was rendered, and thereafter an action was brought by the defendant on the first bond and judgment recovered for the full amount named therein, and a second suit is then brought on the bond executed in the upper court, it will be presumed that all damages sustained were suffered before the first action was brought and were assessed by the jury in that action, and the burden being on plaintiff to show separate damages under the second bond and no such damages being shown, a judgment for five cents in the action on the second bond will be affirmed.

H. C. DeRan, for plaintiff in error.

H. L. Peeke, contra.

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

Error to the Common Pleas Court of Erie County.

This is a proceeding in error to reverse the judgment of the court of common pleas. The defendants in error filed a cross-petition in error. In the year 1905, Judson brought suit against Zurhorst for the purpose of enjoining him from circulating a certain pamphlet entitled "A Biographical Sketch of a Few Short Skate Politicians." A temporary injunction was granted in the court of common pleas upon the execution of a bond in the sum of one hundred dollars. On the trial of that case in the common pleas court, judgment was rendered in favor of Zurhorst. Thereupon Judson appealed the case to the circuit court, in which court one of the judges granted a temporary injunction upon the execution of an injunction bond in the sum of $250. The circuit court on the trial of the case found in favor of Zurhorst, which judgment was affirmed by the Supreme Court. Thereafter Zurhorst brought an action in the Common Pleas Court of Erie County on the $100 injunction bond given in the court of common pleas, and recovered a verdict and judgment on said bond in the amount of $100, which judgment was affirmed by this court.

The present action was brought in the court of common pleas by Zurhorst upon the $250 bond given in the circuit court. In the court of common pleas, in this last case, a jury was waived and the court found the issues with the plaintiff and assessed the amount of his recovery at five cents, and ordered that each party should pay his own costs.

The bill of exceptions contains all the evidence offered on the trial, and includes also the evidence which was offered on the trial of the action brought upon the $100 bond. It appears from the evidence that in the action on the first bond the plaintiff introduced evidence tending to show all of the damages sustained by him, not only in the common pleas court but in the circuit court and in the Supreme Court, and it is insisted by counsel for the defendants in error that the adjudication in that case is conclusive upon the rights of the plaintiff that he was entitled to recover the sum of $100 and no more, and that said amount is the entire damage suffered by him.

It may be somewhat difficult to state any sufficient reason why this contention is not well taken. Clearly all damages which the plaintiff had suffered were incurred before that action was brought, and may have been found and assessed by the jury in that action, and for aught that appears all damages suffered were assessed in that action.

The burden of proof rests on the plaintiff to show any separate damages suffered by him after the execution of the bond in the circuit court, but the evidence gives the amount of damages in a lump sum, so that the trial court was not furnished with evidence which would enable it to ascertain any amount of damages recoverable under the second bond, if there were such damages.

We find no error in this case to the prejudice of the plaintiff in error.

So far as the cross-petition of the defendants in error is concerned the amount adjudicated against them is the nominal sum of 5 cents, and the costs made by them amounting to some two or three dollars, a sum which would be too trifling to justify the court in reversing the case and remanding it for further proceedings by reason of that portion of the judgment.

We affirm the judgment on the ground that on the whole, substantial justice has been done by the trial in the court of common pleas.

OFFICIAL DUTIES WHICH ARE NOT DISCRETIONARY.

Court of Appeals for Cuyahoga County.

W. H. McGANNON v. STATE OF OHIO, EX REL W. H. DENNIS.

Decided, October 11, 1915.

Mandamus—Lies to Compel the Issuing of Warrants by a Municipal Court Judge—Proper Test as to Whether Duties are Discretionary or Ministerial.

1. When an official duty does not belong inherently to the office itself, but may be devolved upon some other officer to perform, it is ministerial and its performance may be required by mandamus.

2. The duty assigned by statute to a municipal court judge of issuing warrants, where the complaint and affidavits are sufficient, is ministerial and one which may be controlled by judicial power, and mandamus lies to compel the issuing of such warrants.

J. N. Stockwell, for plaintiff in error.

A. T. Holmes, contra.

CARPENTER, J.

Error to the court of common pleas.

It is admitted in this case that the complaint and affidavits required by law for the issuance of a warrant for the arrest of the person accused were sufficient in every respect, and that said chief justice, the plaintiff in error, refused and still refuses to issue or cause to be issued the necessary process or warrants for the arrest of the persons accused in said complaint and affidavits.

Whereupon the relators having demanded the prosecuting attorney to take the steps necessary to bring the person so complained of before the criminal branch of the municipal court of Cleveland for trial on said complaint, and said prosecuting attorney having refused said request, filed his petition in common pleas court for a writ of mandamus to issue compelling said chief justice to issue or cause to be issued warrants for the arrest of said accused persons. A demurrer to the petition was filed, and upon hearing was overruled, to which ruling plaintiff in error excepted, and now asks this court to reverse said ruling.

In the case of *State* v. *Salmon P. Chase, Governor of Ohio,* 5 O. S., 529, the distinguished judge in his opinion at page 535 says:

"Under our system of government no officer is placed above the restraining authority of the law, which is truly said to be universal in its behests—all paying it homage, the least as feeling its care, and the greatest as not exempt from its power. And it is only where the law has authorized it that the restraining power of one of these co-ordinate departments can be brought to operate as a check upon one of the others. The judicial power can not interpose and direct in regard to the performances of an official act which rests in the discretion of any officer, whether executive, legislative or judicial. It is not by the office of the

person to whom the writ is directed, but the *nature of the thing to be done*, that the propriety or impropriety of issuing a mandamus is to be determined."

In the celebrated case of *Marbury* v. *Madison*, 1 Cranch, at page 166, Justice Marshall says:

"In cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than their acts are only politically examinable. But where a specific duty is assigned by law and individual rights depend upon the performance of that duty, it seems perfectly clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

And on page 165:

"The acts of such an officer as an officer can never be examinable by the courts. But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law; is amenable to the laws for his conduct, and can not at his discretion sport away the vested rights of others."

Again, in the case of *State* v. *Chase, supra*, the question was whether Chase, as governor, should be compelled by order of the court to issue his proclamation that a branch of the State Bank of Ohio was authorized to commence and carry on the banking business in Cincinnati. The statute required that if the secretary, upon the requisite examination, report a statement that the company has complied with the provisions of the law and is lawfully entitled to commence the business of banking, the same shall be certified to the governor, who shall, if he be satisfied that the law has in all respects been complied with, issue his proclamation. The governor having refused to act, suit in mandamus was instituted. The court held that such duty was a ministerial act, for the reason that its performance was not a part of the inherent nature of the authority in regard to many of his duties as governor, but might have been devolved on another officer of the state.

And this is the true criterion in mandamus: Does the duty belong inherently to the office itself, so that it can not be relegated to some other officer to perform? By applying this test, we are able to discriminate between duties which are discretionary and those ministerial, and which lie at the very foundation and fix the distinction between duties of a peremptory or mandatory nature, and those which are discretionary in their character involving the exercise of some degree of judgment on the part of the officer against whom the mandamus is sought.

To constitute a ministerial act it does not follow that the officer may not exercise his judgment, but the duties must be so clear and specific that no element of discretion is left in their performance. Even so, an officer who refuses to act, for example, refuses to try a suit properly in his court, may be compelled to perform that duty and exercise his discretion, but not be controlled in its exercise. This is evident from the case of *State* v. *Chase, supra,* where he was compelled by the statute to investigate and examine until he should be satisfied that the law has, in all respects, been complied with. It required the exercise of the governor's judgment whether the statute had been complied with. It was a duty cast upon him outside of his inherent duties, and therefore could have been performed by any other officer.

Applying these principles to the facts of the case at bar, Judge McGannon was elected by the people to perform those duties which inherently belong to the office of any judge of the court constituted for the trial of causes. It is clear that the duty assigned to him by the statute to issue warrants is not one of those which may, from the nature of his authority, give him a discretion which can not be controlled by judicial power. And it is not one that can not be devolved on any other proper officer of that court. Therefore it became and was a ministerial act which he was asked to perform, and his refusal to perform it warranted the institution of this suit to compel him to issue the processes asked for.

The demurrer was properly overruled, and the judgment of the common pleas court is affirmed.

MEALS, J., and GRANT, J., concur.

GRANT, J.

I concur in the judgment of affirmance in this case. I dissent from the reasoning upon which, as to its material consideration, that judgment purports to proceed.

In the opinion read as that of the court, if it is comprehended, the thing which the affirmed judgment compels the respondent to do, is the performance of a ministerial act, to-wit: the act of issuing the warrant asked for.

I do not so understand the law.

In my opinion, when the affidavit preliminary to a warrant is presented to the magistrate—in this case the respondent—his function thereupon is to examine the paper, and if upon such inspection he finds that it alleges a crime, he is to issue the warrant, of course and in sequence.

The duty thus cast upon him, the duty of inspecting and considering the affidavit for the single purpose of determining whether it states an offense, is a judicial duty. It requires the exercise of discretion—this examination of a paper to see if on its face it charges a violation of the statute.

How the discretion shall be exercised as to finding the paper sufficient or insufficient in the respect named, is not a thing that a court can by mandamus compel. That is to say, the exercise of the discretion can not be coerced by mandamus in one way or another. And it can not be so compelled because it is a judicial and not a ministerial act.

The writ allowed below and there made peremptory by the judgment under review, and by us here affirmed, proceeded, not on the ground that the respondent had exercised the discretion lodged with him, wrongly, but upon the quite apparent fact that he had not exercised it at all. From the record it is too plain for dispute that the refusal to issue the warrant was not because the affidavit was insufficient on its face and did not charge a crime, but because the magistrate substituted for the affidavit his own independent and individual fiat that the writ should not issue at all. If in reaching that conclusion he re-

sorted to knowledge *dehors* the affidavit, his act in so doing falls under the same condemnation. That is not exercising jurisdiction; it is ignoring entirely the duty to exercise it. The issuing of the writ at least is of course a mere clerical, and therefore a ministerial act. But discretion, in the way I have tried here to make plain, must precede it. While the effect to which judicial discretion shall be exercised can not be controlled by mandamus, mandamus may compel it to be exercised. If the law confers jurisdiction upon a magistrate, he must take it when it is properly invoked. An examination of the affidavit in this case was the first step in the discretion of jurisdiction, and that step the respondent refused to take. Our affirmance of the judgment below says to him that he *must* take it, under the compulsion of a writ of mandamus But saying *that* does not say that we say it because the thing commanded is a ministerial act, as I think.

Apprehending that if we put our judgment on mistaken ground, and if hereafter it is undertaken to be drawn in precedent, it will tend to confusion and may operate mischeviously, I deem myself guilty of no impropriety in here registering my dissent from the basic view of the opinion filed by my brethren.

That mandamus will lie to compel discretion to be exercised, one way or another, is, I think, clearly held in *State, ex rel Smith*, v. *Smith*, 69 O. S., 196. There the court say that "mandamus is allowed, not to control discretion, but to compel its exercise."

MEALS, J., concurs in the dissent.

AUTHORITY OF ONE HOLDING A RESTRICTED PROXY.

Circuit Court of Medina County.

STATE OF OHIO, EX REL ARTHUR VAN EPP, PROSECUTING ATTORNEY, v. H. P. MCINTOSH ET AL.

Decided, December 31, 1912.

Corporations—Elections—Holder of Proxy for a Particular Purpose May Not Vote on Other Questions—Directors of Corporations Must be Bona Fide Stockholders.

1. A restricted proxy, which authorizes the holder thereof to vote for certain men for directors at the annual meeting of a corporation or at any adjourned meeting, does not give the holder thereof the right to vote upon any other question coming before the meeting, and a motion to adjourn the meeting carried by counting the votes cast by the holder of such proxy is of no effect.
2. Where five persons are voted for to fill four vacancies upon a board of directors and it is impossible to determine which of the five were elected, none of them can hold office as the result of the election.
3. It is an essential qualification for holding the position of director in a corporation, that the person elected be a *bona fide* stockholder in such corporation; hence, one to whom one share of another's stock has been transferred for the sole purpose of making him eligible as a director, but who has no financial interest in the corporation, is ineligible to the position of director.

M. B. & H. H. Johnson, for plaintiff.
Henry & McGraw, contra.

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

The petition states that the following named five defendants have usurped the office of directors of the Wheeling & Lake Erie Railroad Company for the term of three years, viz: Joseph Ramsey, Jr., R. E. Slaven, F. E. Palmer, W. D. Holliday and John J. Taussig; that the following named five defendants have usurped such offices for the term of two years, viz: H. B. McGraw, George P. Rust, C. A. Henry, A. G. Webb and S. W. Carey; and that the following named five defendants have

usurped such office for the term of one year, viz: F. J. Reynolds, C. M. Spitzer, R. B. Cohen, S. P. Avery and P. A. Worthington.

The petition avers that none of the defendants are entitled to hold the office of director of said railroad company.

The petition prays that the fifteen defendants, hereinbefore named, may be ousted from the offices severally claimed by them, and that the following named thirteen defendants may be adjudged to be entitled to hold the offices of directors of the Wheeling & Lake Erie Railway Company, viz: H. P. McIntosh, E. W. Ogleby, George S. Russell, C. H. Daugherty, Wm. R. Nicholson, Clarence L. Harper, Charles C. Jackson, Myron T. Herrick, E. S. Cook, James C. Chapin, Richard Sutro, Harry Bronner and F. H. Eckers.

To this petition the defendant, Ramsey, filed an answer in which he denies that he and the other fourteen defendants, whom the petition avers are usurping the office of directors, are so usurping such office, but says that they are the lawful board of directors of the company, duly elected for the several terms which the petition avers they are usurping, at an election by a stockholders' meeting held June 4, 1912, and he prays that he and the fourteen others named in the petition as usurpers may be confirmed in said offices and that the petition be dismissed.

Twelve of the remaining defendants, charged in the petition to be usurpers, answered, adopting the answer of Ramsey and joining in its prayer. Neither the defendant, John J. Taussig, charged as usurping a three year term, nor the defendant, P. A. Worthington, charged with usurping a one year term, file an answer to the petition.

The defendants, H. P. McIntosh, E. W. Ogleby and George S. Russell, three of those averred in the petition to be legal directors, file an answer in which they state that they are no longer directors, their terms having expired and their successors elected since the commencement of this action.

The defendants, C. A. Daugherty, Wm. E. Nicholson, Clarence Harper, Chas. C. Jackson, Myron T. Herrick, E. S. Cook, James C. Chapin, Richard Sutro, Harry Bronner, F. H. Eckers, C. M. Spitzer and B. A. Worthington, file answer denying that either

Ramsey, Slaven, Palmer, Holliday, Taussig, McGraw, Rust, Henry, Webb, Carey, Reynolds, Cohen or Avery is entitled to the office of director of the company. It is not denied by this answer that Spitzer and Worthington are lawful directors, though it is denied in the petition.

Many other matters are set out in the pleadings, especially in the answer of the defendant, Ramsey, but, except as attention is called to them later on in this opinion, it is not deemed necessary to consider them for a proper determination of this case.

If those named in the petition as usurpers are entitled to hold the office of director, it is because they were lawfully elected to the position at a stockholders' meeting June 4, 1912.

Without discussing how it came about that such meeting was held on that date, we hold that there was a lawful stockholders' meeting on that day, which meeting had authority and right to elect directors, insofar as there were vacancies on the board to fill. A full board consisted of fifteen members.

At a stockholders' meeting held for the purpose of electing directors on the 14th day of June, 1911, there were elected for the period of one year, beginning May 3, 1911, C. M. Spitzer, H. P. McIntosh, E. W. Ogleby, George S. Russell and C. H. Daugherty. Without question, the meeting of June 4, 1912, it being as we hold an authorized stockholders' meeting for the purpose, had a lawful right to elect five directors to succeed the five last named, whose term of one year had expired.

This meeting of June, 1912, undertook to elect as successors to these five, the first five named in the petition as usurpers, viz: Ramsey, Slaven, Palmer, Holliday and Taussig. But it is contended on the part of those who may be denominated the McIntosh board, that is, those who claim that there should be an ouster of such as are named in the petition as usurpers, that even if this meeting had authority of law to elect directors, no election was actually had.

At the meeting a majority of the stock was represented by John H. Watson, Jr., as proxy for Walter S. Wilson.

This is said notwithstanding the claim on the part of the so-called usurpers that Wilson was not such an owner of the ma-

jority of the stock as to authorize him to vote it. We are treating the case as though Wilson were authorized to vote this majority of stock and therefore had authority to name a proxy to vote it for him. This proxy reads as follows:

"*Know All Men By These Presents*:

"That I, Walter S. Wilson, do hereby constitute and appoint George Cook Ford and John H. Watson, Jr., both of Cleveland, Ohio, or either of them, my attorney and agent for me, and in my name, place and stead, to vote as my proxy at the annual meeting of the stockholders of the Wheeling & Lake Erie Railroad Company, appointed to be held at the general office of the company, in Room 418, Perry Payne Building, in the city of Cleveland, Ohio, on Wednesday, the 1st day of May, 1912, at two o'clock P. M., or at any adjournment thereof, according to the number of votes that I should be entitled to vote if then personally present, for the following named persons, or any of them, as directors of said the Wheeling & Lake Erie Railroad Company, viz:

"For three years from May 3, 1912—C. M. Spitzer, H. P. McIntosh, E. W. Oglebay, George S. Russell, C. H. Daugherty.

"And I hereby give and grant unto my said attorneys and agents and each of them full power to substitute in his place and stead, as attorney and agent for me hereunder, any person or persons as he shall deem best; hereby ratifying and confirming all that my said attorney and agent, or his substitute or substitutes shall lawfully do in the premises by virtue hereof.

"In Witness Whereof, I have hereunto set my hand and seal the twenty-seventh day of April, in the year one thousand nine hundred and twelve.

"Sealed and delivered in the presence of W. C. Betts.

"WALTER S. WILSON."

The minority of the stock was represented by several persons. The meeting was not altogether harmonious and an effort was made by Watson, holding the proxy for Wilson, to adjourn the meeting. It is claimed that he effectually, in law, did so adjourn the meeting.

Without considering the question of whether an adjournment could be made by one person holding a majority of the stock as against several holding a minority, we are of the opinion that Watson, under his proxy, was not authorized to adjourn the

meeting. He was authorized to do one thing, to-wit, to vote for C. M. Spitzer, H. P. McIntosh, E. W. Oglebay, George S. Russell and C. H. Daugherty as directors for the term of three years from May 3, 1912. A careful examination of this proxy will show that his authority went to that extent and no further.

In Section 1262 of *Machen's Modern Law of Corporations,* it is said that a proxy "may generally do all that the principal might have done if present, and hence may vote not merely on the main question, but also on all subsidiary and incidental motions, such, for instance, as a motion to adjourn; although, of course, a proxy may be framed in such restricted terms as to confine the agent's right to vote to some one matter, such as the election of directors."

Clearly the proxy under which Mr. Watson was acting authorized him to vote on one subject only, and directed how that vote should be cast, and if a proxy can be so restricted as stated in the text just quoted, this would seem to be such a proxy.

In the case of *Cumberland Coal Co.* v. *Sherman,* 30 Barbour, 553, at page 577 it is said:

"A very large proportion of stockholders represented at that meeting were there by attorney, and the power given only authorized them to vote for the election of directors. It did not authorize them to bind their principals to acts and in reference to matters not authorized or assumed by the power."

And then the court goes on to say that any ratification of acts of the directors by one holding such a power of attorney did not bind anybody, because his authority was restricted by the terms under which he acted.

In *Cook on Corporations,* Section 610, it is said:

"The ordinary proxy being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation or to vote upon other important business, unless the proxy itself, in general or special terms, gives the proxy the power to vote on such questions."

After the effort on the part of Watson to adjourn, the meeting proceeded to elect, as successors to the five whose terms, by

limitation, had expired, the first five named in the petition as usurpers, to-wit, Ramsey, Slaven, Palmer, Holliday and Taussig.

We are of the opinion, and so hold, that the prayer of the petition for the removal of these five men must be denied, and that they must each be confirmed in the office of director of the company.

Beyond the election of these five, the meeting of June 4, 1912, had no authority to elect, except to fill vacancies not resulting from the expiration of the terms of those elected in 1911.

It is claimed that there were such vacancies because, it is said, a considerable number of those elected in 1911 were ineligible to the position to which they were chosen.

As to those who were elected for three years in 1911, we find no one of them to have been, at the time of such election, a *bona fide* stockholder of the corporation. That being true, there were five vacancies to be filled in lieu of these, and to succeed these there were elected McGraw, Rust, Henry, Webb and Carey. These men are entitled to hold the positions to which they were elected because of the vacancies resulting from the ineligibility of those who had been elected for three years.

Of those elected in 1911 for two years, we find that one of them, to-wit, Myron T. Herrick, was a *bona fide* stockholder at the time of his election, and, so far as appears from the evidence, remained such stockholder and is entitled to hold the position to which he was elected.

None of the others who were elected for three years in 1911, at the time of their election was a *bona fide* stockholder in the corporation, and hence, as to each of them, there was a vacancy; but as to those elected in 1912 to fill the vacancies claimed to have been occasioned by the ineligibility of those elected in 1911 for two years, since there were five voted for to fill such claimed vacancies, whereas there were but four such vacancies, it is impossible to say that any of those voted for in 1912 to fill these vacancies was elected. Five men were voted for; there were but four vacancies to fill. Neither we nor any one else can select from the five thus voted for, the four who are to fill these vacancies. The result is that those voted for to fill such vacan-

cies, to-wit, Reynolds, Spitzer, Cohen, Avery and Worthington, can not hold by reason of this election.

What has been said as to those who were elected in 1911 not being *bona fide* stockholders we think is borne out by the testimony of Henry B. Henson. He is the secretary of the Wheeling & Lake Erie Railroad Company. He testifies from personal knowledge and from the records of the company, and shows that the only stock held by McIntosh, Chapin, Sutro, Bronner, Eckers, Nicholson, Harper, Jackson, Cook, Oglebay, Russell and Daugherty was one share each; that these shares were transferred to them from one Wilson on the 12th day of June, 1911. Wilson is the man in whom a majority of the stock stood at the time of the election both in 1911 and 1912. Wilson held this stock in his name; it was stock which had been pledged by the owner of the Mercantile Trust Company, as security for an indebtedness of such owner of the stock to said pledgee. The said stock so pledged to said trust company was by it transferred to said Wilson, such transfer being entered on the books of said railroad company. Said Wilson had no interest in said stock except as trustee for said trust company, and it may be doubted whether Wilson had a right to sell any shares of that stock. But the earlier testimony of Mr. Henson in this same deposition shows that transfers of stock were made on the books of the company for the purpose only of enabling the transferees to be eligible as directors, and we think, in the absence of the testimony of these transferees, none of whom testify that they had autually purchased the stock, the only ones testifying showing by their testimony that their holding was only nominal, we are justified in holding that these transfers made by Wilson to the several parties named, were made for the purpose of enabling these men to hold the position of directors in this corporation.

It is significant that these several transfers were made immediately preceding the annual election of directors in 1911, and that each of such transferees was, at that election, chosen as a director.

That it is an essential qualification for one to hold the position of director in a corporation, to be a *bona fide* stockholder in such

corporation, we think is clear, first, from the language of the General Code, Section 8661, which reads:

"And a majority of such directors must be citizens of this state. All directors and executive officers shall be holders of stock of the company for which they are chosen, in an amount to be fixed by the by-laws."

That the language "shall be holders of stock" means "*bona fide* holders," is held by our Supreme Court in *Bartholomew* v. *Bentley,* 1 O. S., 37. In that case, it is true, the court found that those who claimed to be directors, not only were not *bona fide* owners of any stock, but that they had entered into a combination for the purpose of defrauding; but they were held not to be eligible because not coming within the terms of the statute, which required each director to be a stockholder at the time of his election.

Again, in the case of *The Deuber Co.* v. *Daugherty,* 62 O. S., 589, it is held that one Coburn, to whom stock had been assigned for the purpose of rendering him eligible as a director, but who had no actual interest in the stock, was therefore ineligible to the position of a director.

We can think of no valid reason for the provision in the statute, that in order that one may be a director of a corporation he must be a stockholder, except that the business of a corporation must be controlled and managed by those who have a *bona fide* interest in it. There is no greater protection to stockholders, or to those dealing with a corporation, in having a board of directors made up of those who have no *bona fide* interest in the corporation, than there is in having a board of directors made up entirely of those who are not even nominal stockholders.

The conclusion to which we come, therefore, is:

As already stated, that the petition must be dismissed as against Ramsey, Slaven, Palmer, Holliday and Taussig, for the reason that they were elected to fill vacancies occurring by expiration of term; that it must be dismissed as against McGraw, Rust, Henry, Webb and Carey, they having been elected to fill vacancies caused by the ineligibility of those assuming to act under the election of 1911; that it must be sustained as against Rey-

nolds, Spitzer, Cohen, Worthington and Avery, because, as already pointed out, they were not elected.

And so we hold, that these in whose favor we dismiss the petition, together with Myron T. Herrick, who appears to have been a stockholder at the time of his election in 1911 for the term of three years, are entitled to hold office.

GRAND NIECE RELATED BY AFFINITY TO THE INSURED.

Circuit Court of Cuyahoga County.

E. L. HESSENMUELLER, EXECUTOR, v. BARBARA SIRILO ET AL.

Decided, December 30, 1912.

Mutual Benefit Insurance—Beneficiary may be Related by Affinity after Dissolution of Marriage on Which it Depends.

The grand-niece of the husband of a member of a fraternal benefit society is a person related by marriage within the meaning of Section 3631-16, Revised Statutes, which provides that anyone so related may be the beneficiary of a fraternal insurance certificate, and such relationship continues after the death of the husband upon whom the relationship depends.

E. L. Hessenmueller and *W. J. Hamilton,* for plaintiff in error.

D. B. Stone and *J. C. Bloch,* contra.

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

Barbara Sirilo brought a suit against the Amerikai Reformatus Magyar Eygesulet, claiming to recover the sum of $750 from such defendant. The defendant in the original action is a fraternal benefit society, organized under the laws of this state. The plaintiff claimed to recover because, as she averred in her petition, she was lawfully designated as the beneficiary in a certificate for benefits which was issued to one Mary Onody, who had been a member of the society and had died prior to the bringing of this suit.

The society, by way of interpleader, set out that Mary Onody was a member of the society in good standing at the time of her death; that the association was indebted to some person by reason of the membership and death of Mary, to the sum claimed in the petition, but that one John Gedeon, and also E. L. Hessenmueller, as the executor of the will of Mary Onody, deceased, each claimed to be entitled to have the amount paid to them and asked for the direction of the court.

Hessenmueller, as such executor, filed an answer and cross-petition claiming the fund, and Gedeon also filed an answer and cross-petition claiming the fund, and it is these rival claims which were before the court of common pleas in the trial of the case.

The result of the trial was that the court ordered the money paid to the plaintiff below, the case having been tried to the court without the intervention of a jury.

The trial judge prepared an opinion in the case, which we think fully justifies the conclusion reached. We know of no rule of law which would entitle the executor of the will of the deceased to this fund.

The claim of the husband is based upon the proposition that the deceased died leaving no lineal descendant, and that he is therefore the heir at law of the deceased.

The plaintiff below shows that she is the granddaughter of a sister of a former husband of the deceased.

Under Section 3631, Revised Statutes, subdivision 16, which was in force at the time when the rights under this membership became fixed, a member of the association had a right to designate as the beneficiary any person related by blood or marriage to the member.

The question was raised in this case whether the plaintiff below was such relative of the deceased, and also whether she ever was properly designated as the beneficiary, and further, whether under the by-laws of the organization she might be designated.

Of course, no person would be entitled to the payment of the money, even though properly designated, unless the person designated was a relative of the deceased within the meaning

of the statute. The society could not, by any by-laws, enlarge the class of persons, beyond the statute, who might take as beneficiary. It might, however, restrict the classes, always keeping within the limits of the statute.

The official language of the association is declared in its by-laws to be the Hungarian language, and its laws are printed in that language.

On the trial witnesses were examined as to the meaning of certain words used in the by-laws, the contention being on the one side that the only person who could be designated must be an heir at law, as that term is used in the statutes of Ohio, but we think the evidence fairly shows, as pointed out by the trial judge in his opinion, that the language of the by-law did not intend to restrict the class of beneficiaries to those who might, under the laws of Ohio, be heirs at law. The word "heir" is frequently used in common parlance among the English-speaking people, as meaning one to whom the property of a deceased person goes either by descent or by will, and it is shown in the evidence, as we think fairly, that it was in this broad sense that the words are used in the by-law.

And so we reach the conclusion, as the court below did, that those who might legally be designated by members as beneficiaries under the certificate includes all those who, under the statute of Ohio, might be so designated; and we come to consider, therefore, the question of whether the plaintiff below comes within those enumerated in the statute as competent to be designated as such beneficiary.

If she was related at all to the deceased member, it was by marriage. There was no consanguinity between her and the deceased member, but she was, from the facts stated, a grand-niece of the former husband of such deceased member. She was related to that husband by blood; she was the granddaughter of his sister. Without question had he been a member he might have designated the plaintiff below as beneficiary and it has been so held by many authorities, as shown by the citation made in the opinion of the court below to Bacon's Benevolent Societies, at page 621.

Authorities which seem to be directly in point are:

Sinko v. *Grand Lodge,* 84 Ia., 383: The statute provided that no beneficial certificate should be issued unless the beneficiary be the husband, wife, relative, legal representative, heir or legatee of the insured, and it was held in these words:

"A stepfather is a relative by affinity, and the relationship continues after the death of the wife on whom the relationship depends."

In the case of *Spear* v. *Robinson,* 29 Maine, 531, it is said:

"By marriage one party thereto holds, by affinity, the same relation to the kindred of the other that the latter holds by consanguinity, and no rule is known to us under which the relation by affinity is lost, on a dissolution of the marriage, more than that by blood is lost by the death of those through whom it is derived. The dissolution of a marriage once lawful, by death or divorce, has no effect upon the issue, and it is apprehended it can have no greater operation to annul the relation of an affinity which it produced."

In the case of *Bennett* v. *Van Riper,* 47 N. J. Eq., at page 563, it was held:

"Under a beneficial certificate which read: 'Each beneficiary member, the person or persons designated by said member related to, or dependent upon him or her, shall be entitled, under the prescribed regulations and conditions,' etc., the words 'related to' include persons connected by affinity as well as by consanguinity."

Our statute, it will be noticed, goes further than the language of this certificate last quoted from, because it in express terms provides that a beneficiary may be one related to the member either by blood or marriage, so that the plaintiff below in the present case might be held to be a relative of the deceased member without going so far as the court went in the last case mentioned. In the case of *Bennett* v. *Van Riper, supra,* this language is used in the opinion, and it appeals to us as entitled to great weight; speaking of the word "relative" or "relations":

"When used in a contract, as in this case, I do not find that it has such a fixed and definite meaning that we must thwart the purpose of this decedent, who supposed that, by the terms of

the article giving him control of his benefit in the relief fund, he could bestow it on any one of those popularly called relatives whom he might select. It seems also that a liberal rather than a restricted meaning given to the word 'relative,' used in this article of the association, would better comport with its benevolent purpose. The construction contended for against this certificate would exclude a member's wife, unless she came within the other part of the phrase by being dependent on him for her support. The ties of affinity are often stronger than those between collateral or even lineal kinsmen by blood; and there is nothing unreasonable in saying that this certificate was made payable to one whom the holder supposed was properly classed among his relatives, and that the council so intended. Where there is no fixed legal or technical meaning which the court must follow in the construction of a contract, then 'the best construction,' says Chief Justice Gibson, 'is that which is made by viewing the subject of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention.' "

There remains only the question whether the deceased member ever did designate in a lawful way the plaintiff below as such beneficiary.

From the evidence it is clear that she intended to, and in fact that she did all that she needed to do to make such designation, and the designation would have appeared upon the records of the association but for the failure on the part of the general secretary to make the entry in the record which he should have made, and this, he says, was because he overlooked the matter. He was called upon by the member, who brought with her the plaintiff below, and said to him that she was a relative and that she was the one that was to take under the certificate. He took the name down on a slip of paper, and simply overlooked it.

By releasing the funds to the plaintiff below, the court clearly carried out the desire and intention of the deceased member, whose right it was to say to whom this fund should go. As has been pointed out, she did all that was required of her to make the designation, and the person whom she intended to make beneficiary, and whom she undertook to make the beneficiary, should not be deprived of the benefit

which the member undertook to confer upon her, unless some fixed rule of law makes it necessary to so deprive her. We find no such fixed rule of law. On the contrary, the law seems to be in accordance with what seems clearly to be just and right in this case. The court below so found, and its judgment is affirmed.

CONDUCT OF AN ATTORNEY WARRANTING SUSPENSION FROM THE PRACTICE.

Circuit Court of Cuyahoga County.

IN RE DISBARMENT PROCEEDINGS AGAINST HORACE NEFF, ATTORNEY AT LAW.

Decided, 1912.

Attorneys—Unprofessional Conduct in Interfering with Administration of Justice.

Where an attorney approves of and aids in the execution of a plan to discredit a juror and the prosecutor in a criminal case then on trial, by creating a false situation by causing the juryman, by means of a pretended message from the prosecutor, to visit the prosecutor's home at midnight, such attorney is guilty of unprofessional conduct, in interfering with the proper administration of justice, and such misconduct is not excused by an honest belief that the prosecutor had an unfair advantage in criminal trials which the attorney was seeking to expose.

KINKADE, J.; WILDMAN, J., and RICHARDS, J., concur (sitting in place of judges of the eighth circuit).

This is a disbarment proceeding commenced in this court against Horace Neff, a member of the Cleveland bar. The alleged misconduct which the committee insists justifies his disbarment occurred in connection with a criminal trial in the common pleas court in Cleveland in December, 1911, before Honorable W. A. Babcock, Common Pleas Judge.

The prosecution which involved a felony was one against J. A. C. Golner, who is now serving sentence imposed in that case.

Golner was represented in his trial in court by two members of the Cuyahoga Bar who were men of ability and unquestioned integrity, and who were fully qualified to protect the interests of their client in every respect. The trial was commenced on Monday and lasted until the next succeeding Monday, in the evening of which last mentioned day a verdict of guilty was returned by the jury. About the time the trial was begun or very soon thereafter, the accused, Golner, employed the respondent, Horace Neff, as additional counsel in his behalf. The scope of Neff's employment is not very clearly shown by the evidence. Neff's statement in respect to it is that he was employed by Golner for the purpose of aiding in securing as low a sentence as possible, if Golner should be convicted. Neff was to have nothing at all to do with the trial of the case in court. His employment was rather unusual, to say the least. About the time that Neff was employed, Golner determined that it was necessary, in order to properly safeguard his interest, to employ a detective agency to operate in his behalf. He was aware that for some time prior to that the county had employed a detective regularly to work in connection with the prosecutor in criminal trials, and Golner, it seems, decided that his interests needed a like supervision during the trial. It does not appear that Neff had anything to do with the employment of the detective. On the Sunday night, the day preceding the Monday on which the case was finished, the chief of the detective agency, a Mr. Woodward, sent a messenger by the name of Noonan, who was well acquainted and had been for many years with the respondent Neff, to the Neff residence to say to him that he was wanted at the office of the detective agency forthwith to give advice concerning an important matter. Noonan represented to Neff that he did not know what the matter under consideration was. Neff went with Noonan to the detective agency's office and on arrival he found there, Woodward, the man on trial, Golner, a brother of Golner and perhaps one or two others. The chief detective Woodward then explained to Neff that his agency had been retained by Golner some days prior, and that they had been keeping close watch of the parties connected with the trial, and particularly of the movements of the county detectives and the jurors sitting in the case, and that

his men had reported to him a situation that led him to believe that Golner was not having a fair trial but was being railroaded, regardless of the evidence, to a conviction. He stated it to be a fact that a number of the regular jurors, sitting in criminal cases in Cleveland, were employed by the prosecutor as spies to take note of how jurors voted in various cases, whether for acquittal or conviction, and to report the facts to the prosecutor in order that with this information in hand, he might excuse on challenge for cause and peremptorily challenge jurors who were known to have voted for acquittal in different cases, to the end that he might secure on each trial jury as many as possible of the jurors who were strongly inclined to vote for conviction in criminal cases, and it was there stated by Woodward that this practice was very general on the part of the prosecutor's department, and through this means, aided by an unwarranted interference with witnesses and perhaps some intimidation of jurors by the county detective, one Doran, the prosecuting attorney was given a very unfair advantage against all defendants in criminal trials, and in connection with this general statement, it was stated to Neff that one of the jurors in the Golner case, a Mr. Glass, was one of the regular spies of the prosecutor's department, and a very unfair man to sit in that case. In fact, the jury as a whole was said to have been unfairly selected and hence his anticipation of Golner's conviction which I have stated. Woodward outlined to Neff that after getting this information he had evolved a plan which he thought would aid Golner and this was his plan: He proposed to send Noonan, alone in an automobile, to the residence of Glass that night, to say to Mr. Glass that the prosecuting attorney had sent for him, and would like to have him come to his house, and if he consented to go, Noonan was to take him in the automobile to the prosecutor's residence, and there leave him. In the meantime, another automobile was to take several witnesses to a point near the residence of the prosecutor, and there await the coming of the juror with Noonan, in order that they might see the juror making a midnight visit to the prosecutor's house, all of which it was claimed, when made known, would disclose that the juror was under the complete dominion and control of the prosecutor, and consequently not

a proper man to sit in the trial against Golner. At this point, Neff was informed by Woodward that his advice was desired as to whether the proposed scheme was illegal, and was told that they had sent for him for that purpose. Neff says that he informed Woodward and his associates there assembled including Golner, that he knew of no statute that would be violated in executing the plan contemplated. That he said to them if they believed a juror to be thus biased and subject to the call at any time of the prosecutor, notwithstanding the instructions to the jury given daily by the trial judge, that Woodward and his associates had a legal right to test out whether that was a fact or not, and that they might do so without violating the law, under the plan outlined. Neff says that he inquired how it was to be made beneficial to Golner in a practical way, and that some one of the party suggested something about a new trial, but that he promptly informed them that taking a juror to the prosecutor's home and leaving him there as they planned would not be sufficient to bring about a new trial, and that Woodward then remarked that they would have something in addition to this trip of the juror. Neff says he preferred to return home but that the others insisted that he should remain and go with them to procure the witnesses and accompany the party of inspection on its trip to the prosecutor's house, and that he reluctantly acquiesced. Noonan was despatched in an automobile for Glass. Golner's brother, acting as chauffeur, took another automobile with Neff and picked up three or four other witnesses and went to a point near the prosecutor's house from which they could see the movements of Noonan and Glass at the proper time. It was definitely understood that nothing was to be said to Glass about why the prosecutor wanted him. Noonan was to state and did state to the juror that he did not know what Glass was wanted for by the prosecutor. All agreed that Golner's trial was not to be mentioned by Noonan or any one else to Glass and this was carried out as planned. As soon as Noonan arrived at the residence of the prosecutor, which was several miles from the home of the juror Glass, Mr. Glass alighted from the automobile and went up on the porch of the prosecutor's residence and rang the door bell. As soon as the prosecutor came to the door, Noonan left

in his automobile and the prosecutor called to him, as he left, to halt, which he did not heed, but returned to the city followed by the other automobile. Mr. Glass learned in a few moments from the prosecutor that he had not been sent for at all, and he took the street car and went home. No report of this occurrence was made by anybody connected with it in behalf of Golner to the trial judge until after Golner's trial was over, but the trial judge learned of the occurrence shortly after midnight and very soon after the visit of Glass to the prosecutor's residence. This information came to the trial judge through the county detective, Doran, who probably learned of it through the prosecuting attorney. Mr. Neff insists that he called at Judge Babcock's court room four times on Monday for the purpose of telling him of the occurrence, but each time found him busy, and went away without reporting it. On Monday evening the jury returned a verdict of guilty and immediately upon the coming in of the verdict, Golner had a whispered conversation with one of his counsel who immediately stepped to the bench and informed the trial judge what had taken place in connection with the visit of juror Glass to the prosecutor's residence at midnight the night before, and was then informed by the trial judge that he, the judge, knew of it soon after it occurred, and that it was on that account that he had not permitted the jury to separate on Monday. By Tuesday morning the whole matter had become public and it was stated in the newspapers. It is said, however, that Mr. Neff's name was not published as one connected with the transaction. On that day, Mr. Neff called upon the trial judge and expressed a desire to state all the facts in connection with the transaction, but was told by Judge Babcock that he understood contempt proceedings were to be instituted against several of the parties involved, and that on that account he preferred not to hear his statement until the contempt cases should be called for hearing. Proceedings in contempt were begun against four of the parties involved (not including Neff) and those cases were heard before Judge Babcock and resulted in a conviction in each case and sentence. Mr. Neff voluntarily testified at the contempt trials. Error proceedings were prosecuted

from this judgment in the contempt proceeding and judgment was affirmed by the circuit court.*

No proceeding in contempt was instituted against the respondent but the Bar Association of Cleveland made an investigation of the facts and a recommendation to the circuit court that a committee be appointed to investigate and file charges, if the investigation so justified. The committee herein named was appointed pursuant to this motion in the circuit court and presented herein formal charges covering the facts I have detailed. The committee insists that the plan as carried out was intended to interfere with the administration of justice, and that it was undoubtedly the purpose of all concerned to rely upon it, at least in a substantial part, in making a showing for new trial for Golner, and while it is not claimed that Neff was instrumental in the employing of the detective agency by Golner, or that he originated the plan of procedure carried into effect on Sunday night, that still the scheme was his by adoption and that he must be held fully responsible for it, and that his action was such misconduct in office as justifies his disbarment.

On the other hand, counsel for respondent contend that the action of Neff was entirely laudable and that he was merely seeking to expose, in order that he might correct, a long continued line of unfair conduct on the part of the prosecuting attorney's department.

Upon this hearing the committee offered in evidence a transcript of the evidence taken in the contempt case, in so far as it should be found by us to be competent, and also called and examined orally the trial judge, Honorable W. A. Babcock. The respondent testified in his own behalf.

We have been furnished with a transcript of the oral evidence of the trial judge and Mr. Neff and have read this in connection with the transcript of the contempt case.

We think it is well established by the evidence presented that Mr. Neff thoroughly believed, when counselled with concerning this detective's plan on Sunday night, that there then existed

*See 19 C.C.(N.S.), 317.

and had for a long time existed in Cleveland such conditions as gave to the prosecuting attorney an unfair advantage in the trial of criminal cases. We express no opinion as to whether any such unfair advantage did exist, because we have not heard the evidence concerning this question on the side of the prosecuting attorney, but we think it entirely clear from the testimony of Mr. Neff, the testimony of Judge Babcock and the other evidence presented to us, that Mr. Neff believed at that time that such unfair conditions did exist.

It is possible that Mr. Golner, his brother and the detectives, may have thought that this midnight visit of the juror would be entirely sufficient, standing alone, to secure him a new trial if convicted, notwithstanding what Neff says he said to them on that subject, but it is difficult to see how any lawyer could reach any such conclusion, for to do so he must necessarily assume that both the prosecutor, who was a man of experience, and the trial judge, who had been many years on the bench, could be easily imposed upon by evidence which would readily be explained so that it would have no value in securing the end designed by it. It is possible that the detective may have thought that affidavits from these witnesses that were taken to the scene would pass for their full face value, with the prosecutor and judge, without further investigation, but it must be borne in mind that these witnesses were all residents of Cleveland, easily accessible, and of course they would be called upon within a few hours, after the filing of their affidavits, by the county detective under the direction of the prosecutor and the whole matter would receive a thorough investigation. It was explained at the detective's office that what he desired in the way of witnesses was to have three or four men of high standing, in no wise connected with Golner and not connected at all with his office, in order that when their testimony was taken, it should have great weight, and it was agreed that they were not to be told anything of the plan more than to say to them that it was desired that they should take a certain position from which they might see a juror visit the prosecutor's house at midnight; the theory being undoubtedly that that single fact would be all that would be included in their affidavit, it is should be filed in aid of a new trial, and that

this fact would exactly tally with the truth. The detective emphasized the fact that he desired honorable men of high standing for witnesses, and while Neff and Golner's brother accompanied them, the plan did not contemplate taking their evidence in establishing the fact of the juror's visit. Those witnesses were selected by Golner, his brother and Neff. It is entirely clear that as soon as any one attempted to make use of the affidavits of these three or four honorable witnesses, the trial judge would insist upon knowing all the facts, and these witnesses, being honorable men, would of course not hesitate to state the facts as to who selected them, from what point they started, who accompanied them, how they went and how they returned, and all about it; and this would increase the list of honorable witnesses by two because it would immediately add Mr. Neff and Mr. Golner's brother, and then it would develop, of course, that the visit of the juror was planned by the very men who were seeking to take advantage of it, as a piece of wrong-doing, to secure a new trial for Golner, and at about this point it might be expected that the motion for a new trial would be promptly overruled, and contempt proceedings ordered, very much as happened in this case. The whole scheme was silly in the extreme. It was wholly unnecessary to send for Mr. Neff or any other lawyer to secure advice concerning it. Had its authors called in some passing laborer, whose mind had not been perverted by long continued study of the best methods of accomplishing recognized impossibilities, no doubt he would have readily applied his common sense to the situation and branded the scheme as nonsense. It was Mr. Neff's duty to have condemned the whole plan forthwith. This was not a case where a juror had been nibbling for a bribe. So far as the evidence discloses nothing irregular had occurred in the Golner trial. It is true that a vigorous effort was made by Golner's counsel to prevent Glass from sitting as a juror, but after the fullest examination he was accepted as qualified by the trial judge, and the evidence does not disclose any misconduct on the part of any juror during the trial of this case prior to this Sunday night. Even though the respondent Neff honestly believed the information which he says he did at that time as to unfair advantage being taken by the

prosecutor's department, and even though it be conceded that his sole purpose was to expose this, we can not at all sanction the methods by which he undertook to aid in correcting this alleged wrong. In fact, we think his own evidence discloses that before the left the detective's office, he had reached the conclusion himself that the proceeding was an improper one. His reluctance to go with the party which he tells of, and his haste to get away from the scene near the prosecutor's house, as he relates it, shows clearly that he was convinced of the impropriety of the entire matter.

We note a discrepancy in the testimony of Mr. Neff before us as compared with his statements made in the contempt case. In the contempt case the transcript of his evidence shows that he went to the same point that all the other witnesses went and went in an automobile with them to that place near the prosecutor's house, and that he remained there in that automobile until Noonan left his position and started down town, passing this automobile, when Neff alighted from his conveyance and got into Noonan's machine. In his evidence before us, Mr. Neff testified that he went only part way to the prosecutor's house and then alighted with a view of taking a car near there for his home, which he would have done but for the fact that while waiting for the car, Noonan came along in his automobile and picked him up. According to Mr. Neff's own evidence, he approved and aided in the execution of a plan which tended to discredit a juror and a public prosecutor, by creating a false situation that would never otherwise have existed. We are not satisfied that he made all the effort he should have made to communicate all the facts to Judge Babcock on Monday, knowing the hours of court and being as thoroughly acquainted with the judge as he was. Mr. Neff is thirty-three years of age and had been in more or less active practice of the law in Cleveland for several years prior to the Golner trial. The committee insists that he was abundantly qualified to appreciate in every respect the whole plan laid before him by the detective and to see at a glance its effect upon the administration of justice, and that no account can be taken of his inexperience which can in any way relieve him from the full measure of responsibility for what was done. If

we consider Mr. Neff as possessing the ability which the committee says he does, we must at once acquit him of the charge that he intended to use this midnight visit of the juror to the prosecutor's residence to secure a new trial for his client Golner. Exposure was inevitable, for the reasons I have stated, and when that came he would have accomplished the very opposite of what he was employed to accomplish for his client, by putting his client before the trial judge in the very worst possible light. The trick would not only have convinced the trial judge that the jury was unquestionably correct in finding Golner guilty but it would have presented Golner as willing and ready to carry out a scheme, the purpose of which was to impose upon the trial judge. No one pretends that Neff knew anything of the scheme until he arrived at the detective's office where he insists he was called upon suddenly for a decision as to its legality in order that the parties might go ahead with its execution. It is a significant fact in favor of Mr. Neff that no proceeding in contempt on account of this matter was ever begun against him.

Our conclusion, after the fullest consideration of all the facts in the case, is that the situation does not justify a judgment of disbarment, but we are unanimously of the opinion that the evidence does justify a suspension of the respondent, Horace Neff, from practice for a period of six months, and such will be the judgment of the court.

JUDGMENT AGAINST A MINOR NOT REPRESENTED BY A GUARDIAN AD LITEM.

Circuit Court of Cuyahoga County.

JOHN SCREEN, BY MARY SCREEN, HIS NEXT FRIEND, v. GEORGE LINN, AS MAYOR OF THE VILLAGE OF LINNDALE, AND IDA K. TAGGART.

Decided, 1912.

Infants—Mayor Can Not Render Judgment Against Infant Defendant Without Guardian Ad Litem.

A mayor, who has obtained jurisdiction of an infant defendant more than fourteen years of age by means of personal service, has no authority to render judgment against the infant without first appointing a guardian *ad litem* to defend the suit.

I. Grossman, for plaintiff in error.

H. C. Gahn and *George Linn,* contra.

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

Ida K. Taggart brought suit against John Screen before the defendant, George Linn, as mayor of the village of Linndale. Summons was issued and served upon said John Screen within said village, and upon a proper affidavit garnishee process was issued and served upon the proper representative of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, within the village of Linndale, said railway company being then indebted to said John Screen.

Said Screen did not appear before said mayor in answer to said summons, and the mayor, as upon default, entered judgment in said action in favor of said Ida K. Taggart, for something like $25 damages and for costs.

The railway company, pursuant to an order made by said mayor in said garnishee proceedings, paid over to said mayor about $32 of money owing by it to said John Screen, which said mayor holds in payment of said damages and costs.

The plaintiff in this action seeks to have said judgment set

aside and the money so paid into the hands of said mayor released and paid over to him.

Several grounds are stated in the petition upon which the plaintiff bases his right to the relief sought; among these is the fact that he was a minor at the time the action was commenced and at the time the judgment was taken and that the proceedings against him were irregular, in that judgment was taken as upon default, though he had no guardian and no guardian *ad litem* was appointed for him.

We find as a fact that the plaintiff in this action, at the time said judgment was found against him, was a minor above the age of fourteen years and that no guardian *ad litem* was appointed for him. As already said, service of sumons was made personally upon said John Screen. This was proper and sufficient service upon him, coming directly within the provisions of General Code, 10245, where it is aid:

"If the minor is more than fourteen years of age, service on him alone is sufficient."

On the part of the defendant in error it is urged that the service here, having been served upon the defendant in all respects as required by the statute, the court thereby acquired jurisdiction of the defendant, and that having such jurisdiction, the judgment against him was and is valid, and in support of this contention he calls attention to the case of *Walter* v. *Dr. Appl,* 8 Ohio Dec., 705. This is a decision of a justice of the peace in Hamilton county, and so is, of course, no authority whatever for us. However, an examination of the case shows that the point necessary to be determined here was not passed upon by the justice.

In that case it was held, as we hold here, that the service of summons upon the defendant, a minor above the age of fourteen years, gave the court jurisdiction over him, so that the judgment in the case was not void, and therefore could not be collaterally attacked. The case before us is a direct attack on the judgment sought to be set aside, and a ground of such direct attack is that even though the court had *jurisdiction* it had no *authority* to

render judgment against the defendant without first appointing a guardian *ad litem* for him.

General Code, 11252, reads:

"In an action against an infant, his defense must be by a guardian for the suit, who may be appointed by the court in which it is being prosecuted, or by a judge thereof or by a probate judge."

Under this section it is clear that though the mayor acquired jurisdiction over the defendant in the action by service of summons, there was no person who could have made a defense for him. *Roberts* v. *Roberts,* 61 O. S., 96:

"Appointment of a guardian *ad litem* can not be dispensed with."

In *Long* v. *Milford,* 17 O. S., 485, it is said, at page 503:

"The appointment of a guardian *ad litem* is not a mere matter of form. A suit against an infant can not be prosecuted without such guardian."

The proper thing for the mayor to have done is pointed out in General Code, 10234. That section provides that where an infant is the defendant in a case before a justice of the peace, a guardian to the suit must be appointed before the trial. That the provisions of this section are applicable to proceedings before a mayor, is shown by the reading of General Code 10491:

"So far as applicable, the provisions of this title shall govern the proceedings of mayors in the exercise of the jurisdiction concurrent with justices of the peace given to them."

Both Sections 10234 and 10491 are under the same title, to-wit, "Title 2, Procedure in Justice's Court."

Without determining whether it is necessary in making a direct attack upon a judgment, as is done in this case, the party making the attack must show that he had a valid defense, it is sufficient to say that the defendant in the case before the mayor, the plaintiff in this case having been an infant, and no allegation being made in the answer of either defendant that the judgment was obtained for necessaries furnished the defendant, it suf-

ficiently appears that he had a valid defense.

The result is that the judgment of the mayor and all orders made by him in the case are vacated, and he is ordered to pay to the plaintiff all the money received by him from the railway company under the garnishee order, together with interest from the time it was so received.

LEASE OF A CIGAR PRIVILEGE IN THE NATURE OF A GRANT.

Circuit Court of Cuyahoga County.

THE PYLE & ALLEN COMPANY v. THE HIPPODROME BUILDING CO. ET AL.

Decided, December 23, 1912.

Lease—Grant of Exclusive Right to Sell Cigars in Building of Lessor Enforceable—Recording of Lease Notice of Rights of Lessor.

1. A provision in a lease of a store room that the lessee shall have the exclusive right to sell cigars and tobacco in the building of the lessor, is not in the nature of a restriction but rather in the nature of a grant, is not against public policy, and is enforceable as against the lessor and his assignees who take with notice of the grant.
2. The recording of a lease containing a grant of the exclusive right to sell cigars and tobacco in the lessor's building is notice to the lessees of other rooms in the building of the exclusive character of the rights granted in that lease.

C. N. Fiscus and *M. W. Beacom*, for plaintiff in error.
Kline, Tolles & Morley and *Hidy, Klein & Harris*, contra.

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

Plaintiff by this action seeks to restrain the defendants, Stone and Stern, from selling cigars and tobacco in their cafe in the basement of the Hippodrome Building, on Euclid avenue, in the city of Cleveland.

Both parties are tenants of said building, which, in plaintiff's

lease, is described as "the Hippodrome Building situated on Euclid avenue in the city of Cleveland, Cuyahoga county, Ohio."

Plaintiff occupies a store room "on the ground floor of said building, just east of the main entrance thereof, on Euclid avenue," which is leased to them for ten years from May 1, 1910, to be used by them "for a cigar and tobacco store, and for no other purpose." In the lease appears the following:

"It is further agreed that said lessee shall have the exclusive right to sell cigars and tobacco in that part of said Hippodrome Building fronting on Euclid avenue."

This lease was left for record with the recorder of Cuyahoga county on March 20, 1911, and thereafter was duly recorded by him.

The lease to Stone and Stern was executed November 26, 1911, and covers the basement of the Hippodrome Building on the Euclid avenue front, the basement entrance being in the middle of the main entrance of that building. Defendants run a cafe and restaurant in the basement and claim the right to furnish their patrons cigars. It appears that about eighty per cent. of those who eat in their restaurant buy cigars.

Defendants urge several reasons why they should not be enjoined from selling cigars in their cafe.

First, they say, the basement is not "in that part of the Hippodrome Building fronting on Euclid avenue"; they claim that, as the basement extends under the sidewalk and out to the curb on Euclid avenue, it does not "front" on the avenue. This objection is frivolous; the basement is certainly in that part of the building which fronts on Euclid avenue.

Second, it is claimed that the rights granted by the plantiff's lease are not in the nature of an easement running with the land, but merely in the nature of a restriction, and on this point they cite the case of *The Apollo Cigar Co.* v. *O'Brien*, 11 C.C.(N.S.), 63, where the covenant *was* in the nature of a restriction.

In that case the lessor bound *himself* not to rent any part of his premises (not leased to the cigar company) for a cigar and tobacco business, except certain stands of specified dimensions in that part of the building used as a hotel. The court held there

was doubt as to the meaning of the covenant of restriction contained in this lease, and resolved the doubt adversely to the cigar company.

In the lease before us there is no doubt as to the meaning of the language used and it is not in the nature of a restriction, but rather in the nature of a grant; it reads: "lessee shall have the exclusive right to sell cigars and tobacco in that part of the Hippodrome Building fronting on Euclid avenue." It is not necessary to cite authorities to the effect that such covenants as this are enforceable, not only against the lessor but also against his assignees who take with notice of the grant.

While the defendants, Stone and Stern, had no actual notice of the terms of plaintiff's lease until sometime after they had concluded their lease with the lessor, still the recorded lease of plaintiff was sufficient notice to them.

That lease was an instrument entitled to record and fully describes the cigar privileges as being exclusive in that part of the building fronting on Euclid avenue. Defendants were taking a lease of part of that part of the building fronting on Euclid avenue, from the same lessor, and plaintiff's lease was in the defendant's chain of title and bound to be examined by them.

We find nothing invalid or contrary to public policy in the covenant under consideration; such exclusive rights are valuable and are frequently granted. Nearly every large office building in the city, and most of the hotels, have arrangements of this kind, where the cigar privileges are granted exclusively to the proprietor of one cigar store located in the building or hotel.

Doubtless the rent for plaintiff's small store in this theatre building was fixed with reference to the attractions which would draw the smoking public to that building, and a restaurant in the basement might reasonably have been anticipated by plaintiff as one of such attractions, as a large, popular theatre is located in the building.

Nor can the damage to plaintiff from a breach of its rights by defendants be easily estimated; doubtless, as defendants consider the right to vend cigars in their cafe very valuable, it is of considerable moment to plaintiff, but there is no accurate measure for this invasion of plaintiff's rights and so it should have

protection in equity, by injunction, restraining defendants from this daily and continuous invasion of rights.

It is said, however, that plaintiff has been guilty of laches in permitting defendant to go to the expense of $20,000 in fitting up their restaurant, before notice was given of plaintiff's claims.

This suggestion overlooks the fact that the record of plaintiff's lease, itself, was notice to defendants, and it loses sight of the further fact that defendants closed up their lease with lessor and obligated themselves to pay rent for the basement, sometime before plaintiff was aware that the defendants were going to move into the building.

We find no reason at law or in equity why plaintiff should be denied the relief it prays.

Judgment for plaintiff.

AVERMENTS WITH REFERENCE TO EXPOSED COG-WHEELS.

Circuit Court of Cuyahoga County.

D. A. DEFRANCO v. C. BIFARO.

Decided, December 16, 1912.

Pleading—What Sufficient Averment of Failure to Enclose Machinery.

In an action for personal injuries caused by a servant coming in contact with exposed cog-wheels, an averment that the defendant permitted said cog-wheels to be exposed without any enclosure and without any protection of any kind, sufficiently alleges defendant's failure to enclose with substantial railings, etc., as required by statute.

C. V. Hull, for plaintiff in error.

Howland & Moffett, contra.

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

The defendant in error, hereinafter spoken of as the plaintiff, brought suit against the plaintiff in error, hereinafter spoken of as the defendant.

The plaintiff was an employee of the defendant on the first day of June, 1910, and on said day and in the course of said employment, he was at work at a machine in the manufactory of the defendant, in mixing and stirring the material used for making macaroni. This machine consisted in part of certain cog-wheels, meshing into one another and connected with the devices for giving power to said machinery and causing the same to move in the performance of the work to be done.

The plaintiff alleges in his petition that while so in the performance of his duties the machine, which had been stopped, suddenly started, catching his fingers between the cogs on said wheels, crushing four of his fingers, necessitating their amputation. He says that the injury so sustained by him was due wholly to the negligence of the defendant and entirely without fault on his part.

In his answer the defendant denies all negligence on his part and avers that whatever injury was received on the occasion was caused wholly by the negligence of the plaintiff himself.

The result of the trial in the common pleas court was a verdict and judgment for the plaintiff.

The defendant complains that there was error to his prejudice in the trial and prays that the judgment be reversed. He says, first, that the petition does not state a cause of action against him under the statute, Section 1027, General Code, and that if the plaintiff relied on his right to recover without reference to this statute, the facts show clearly that his negligence was such that he was not entitled to recover.

Without discussing the question as to whether, under the answer, the defendant could rely for a defense upon the contributory negligence of the plaintiff, we proceed to a discussion of the other question, "does the petition state facts sufficient to bring the case within the provisions of the statutes."

It is provided by Section 6245-1 that no "employee who may be injured or killed shall be held in any degree to have been guilty of contributory negligence in any case where the violation of any statute or law of the state, or United States, enacted for the safety of employees, in any way contributed to the injury or death of such employee, unless, by the terms of his em-

ployment, it was expressly made the duty of such employee to report such violation to the employer," etc. There is no claim here that there were any such terms in the contract of employment, so that the next inquiry is whether the petition charges that the defendant violated any law of the state, which violation contributed in any way to the plaintiff's injury.

Section 1027, General Code, says:

"The owners and operators of shops and factories shall make suitable provisions to prevent injury to persons who use or come in contact with machinery therein or any part thereof.

"2. They shall enclose with substantial railings or casing all exposed cog-wheels," etc.

The language of the petition is "that on the side where plaintiff stood in so operating said machine were certain cog-wheels, the outer part thereof fitting into each other and revolving together and being a part of said machine which plaintiff was so operating; that said cog-wheels were not enclosed or incased in any manner."

And again, "that said defendant permitted said cog-wheels to be exposed without any enclosure and without any protection of any kind."

It is urged here that, whereas by Section 1028, General Code, a penalty is provided for the violation of Section 1027, said last-named section must be strictly construed and that when strictly construed the allegations of the petition fail to show that the same was violated by the defendant.

The language of defendant's brief on this question is this: "The phrase 'without any enclosure'" is not synonymous with "enclose with substantial railings." This, of course, is true, the one is negative, the other positive; but what counsel meant was that "without any enclosure" is not synonymous with "not enclosed with substantial railings," and this statement is true; the two phrases are not synonymous, but the former includes the latter. To say "John has one eye" is not synonymous with saying that "John has two eyes," but if the last statement is true, the first is necessarily true. If one is by law bound to maintain a stone bridge at a given point, an averment that he

maintains no bridge whatever at that point is an absolute denial that he maintains a stone bridge at that point.

The case referred to in defendant's brief in support of his contention that there is no allegation in the petition showing a violation of the statute, viz., *Boiler Works* v. *Shuck,* 13 C.C.(N. S.), 118, comes very far short of sustaining the position claimed for it. The syllabus reads:

"A petition for damages on account of injuries alleged to be due to exposed cog-wheels, does not state facts sufficient to constitute a cause of action, where the petition merely avers that the wheels complained of 'were not covered,' and does not allege that no railing had been placed around them."

In the opinion, at page 121, the court uses these words, speaking of the petition:

"It does not allege at all that there was no railing."

The entire opinion shows that if there had been an allegation that the cog-wheels were not enclosed by any railing, the petition would have been good.

The complaint made as to the admission of evidence, as shown on page 13 of the bill of exceptions, is not sound, for the reasons already given on the question of the sufficiency of the petition. The question asked was:

"Was there any enclosure or railing or casing about the cog-wheels when you got your fingers hurt?"

The answer was: "No."

When the objection was made at the outset of the trial to the introduction of any evidence, the court was clearly right in overruling such objection, because the petition was sufficient, even if the allegations did not bring it within the statutes. When, however, a motion was made at the close of all the evidence, to direct a verdict for the defendant, the question was raised whether it was clear that under the evidence no case had been made outside of the statute; but if the question was so raised, the court reached the proper conclusion.

We find no error in the record to the prejudice of the defendant and the judgment is affirmed.

AS TO USE OF AFFIDAVIT IN SUPPORT OF AGENCY.

Circuit Court of Cuyahoga County.

ADAM HERIG ET AL v. H. B. HARVEY ET AL.

Decided, July, 1912.

Trials—Affidavit Introduced to Establish Plaintiff's Agency Not Evidence of Facts Stated Therein.

In an action to recover a real estate commission alleged to have been earned in securing a lessor for certain property, an affidavit of the lessee, executed at the time of making the lease and in which it was stated that the lease was the result of direct negotiations with the owner and not as a result of an interview had with plaintiffs, when introduced by the plaintiff as evidence of an agency, can not be used by defendant as evidence of the facts contained in the affidavit.

J. J. McCormick, for plaintiffs in error.
Hitchcock, Morgan, Fackler & Cross, contra.

NIMAN, J.; MARVIN, J., and SHIELDS, J. (sitting in place of Winch, J.), concur.

The defendants in error were plaintiffs and the plaintiffs in error defendants, in the court of common pleas.

The action was for the recovery of a commission for negotiating a 99-year lease on property belonging to the defendants. The jury returned a verdict in favor of the plaintiffs against all the defendants, on which judgment was duly entered after the overruling of the defendants' motion for a new trial.

A reversal of this judgment is sought in this proceeding upon several grounds.

The first claim of error that challenges our attention is that the verdict is not sustained by sufficient evidence.

The defendants were the joint owners of the real estate covered by the 99-year lease which the plaintiffs claimed to have negotiated and for the negotiation of which they recovered their judgment. The plaintiffs, who are in the real estate business, claimed that the property was listed with them for leasing pur-

poses by the defendant, Albert Herig; that said defendant was the agent of the other defendants; that through their efforts a 99-year lease of the premises was made to one H. D. Squire; that while their efforts were the moving cause in inducing Squire to take the lease, the defendants executed the lease to him without informing them of the matter, and that they did not discover the fact until sometime after the lease was made.

The defendants denied all of these claims and asserted that Squire was their own customer. The only one of the defendants who seems to have had the matter of leasing the premises up with the plaintiffs at all, was Albert Herig; and the other defendants dispute any agency given Albert Herig to list the property with the plaintiffs and deny all knowledge that it ever was so listed.

Within the limits of this opinion it would be impossible to enter into any extended review of the evidence. It is sufficient to say that there was evidence tending to sustain all the claims of the plaintiffs, and therefore a submission of the case to the jury was necessary. The jury, with the opportunity to observe the witnesses and with all the circumstances of the transaction laid before them, found in favor of the plaintiffs on the matters in dispute, and we are not able to say that the verdict was against the weight of the evidence.

The agency of Albert Herig was a question that rested largely upon inference, but there were sufficient facts in evidence to support the inference arrived at. If the right to recover against the defendants Adam Herig and Eva Herig, were denied because of insufficient evidence to support the finding of agency on the part of Albert Herig to represent them, it would not relieve Albert Herig from liability, because the entire property was listed, not merely his interest therein.

Another claim of error is based upon the limitation placed by the court upon the use in the case by the defendants and their counsel of a certain affidavit introduced in evidence by the plaintiffs.

At the time the lease was signed the affidavit in question was given by H. D. Squire. It states that about one year prior to an interview the affiant had had with Harvey & McClure on the

subject of the Herig lease, he had made offers to bring the agreement for a lease about with Mr. Al. Herig, and not until said effort on his part did he have any talk with Harvey & McClure concerning the same; that all efforts on the part of said Harvey & McClure to secure such lease for affiant failed and were entirely abandoned; that the present lease about to be signed is the result of resumption of negotiations between Mr. Al. Herig and the lessors, and without any influence or inducement from any other person or agent than the real parties to the lease in question.

On the cross-examination of Albert Herig the existence of this affidavit was discovered by counsel for the plaintiffs, and was offered by him in evidence. Counsel for the defendants attempted to use this affidavit in his argument to the jury as evidence of the facts therein set forth, but was prevented by the court from so doing, and in the charge the court said:

"The affidavit was introduced in evidence, gentlemen, as bearing upon the question as to whether there was any deal between Squire and Harvey & McClure. The contents of the affidavit are not competent in this lawsuit to prove the fact. That is not the proper way to get evidence into a lawsuit, and therefore the court eliminated that in the argument."

We share the view of the trial court on this subject. The affidavit was competent evidence, bearing upon the question of the liability of the defendants to Harvey & McClure for a commission on account of the making of the lease. Any act or statement of the defendants tending to show a recognition of a claim for commissions could be shown in evidence against them. The facts recited in the affidavit were by no means admitted by the act of the plaintiffs in placing it in evidence. No claim of accident or surprise can be based on the refusal of the trial court to permit the affidavit to be used for an incompetent purpose, even though it appear that except for the mistaken belief that it could be used for the desired purpose, the defendants would have produced other and competent evidence in support of the facts averred in the affidavit.

Another alleged error is predicated on the action of the trial court in not permitting one of the jurors, on the hearing of the motion for a new trial, to answer the question whether or not he entertained a belief that Adam Herig, one of the defendants, was grasping and stingy.

It was set forth in an affidavit filed in support of the motion for a new trial, that the following question was put to each and every juror:

"Is there any cause or reason which would in any way influence or prejudice you against any of the defendants in this case? Is there any cause or reason why you can not sit as a juror in this case, and impartially render a verdict in strict accordance with the law and evidence as it may be given to you in open court?"

The affidavit further charges that a certain juror answered this question in the negative, but that he in fact harbored a belief that the defendant, Adam Herig, was a mean, grasping and stingy individual, and that this belief wrongfully prejudiced the juror against the defendant.

In support of the charge contained in the affidavit, the juror mentioned was called and examined by counsel for the defendants, and in the course of the examination the ruling claimed to constitute error was made.

If it should be admitted that the question was a proper one to put to the juror, which may well be doubted, it is not apparent that any prejudice resulted by the refusal of the court to permit it to be answered. The other questions put to the juror and which were fully answered, covered substantially the subject of the juror's attitude toward Adam Herig, which does not appear to have been uncomplimentary. The juror's examination was very exhaustive and disclosed nothing which would disqualify him from sitting as a juror in the case.

When the case was submitted to the jury, on request of the defendants, the jury were directed, in the event of a general verdict for the plaintiffs, to make answer to certain questions submitted to them. It is claimed for the plaintiffs in error that the answers returned by the jury are inconsistent with the general verdict, and must control.

If the special verdict is inconsistent with, or repugnant to, the general verdict, the latter must be set aside.

A careful examination of the questions submitted to the jury and the answers returned, discloses no inconsistency between the general verdict and the special findings. On the contrary, the special findings support and fortify the general verdict.

No error prejudicial to the plaintiffs in error is found in the record, and the judgment of the court of common pleas is affirmed.

INJUNCTION AGAINST CONTAMINATION OF PERCOLATING WATERS.

Circuit Court of Cuyahoga County.

IRA BASSETT AND ELLA BASSETT v. IRA OSBORN.

Decided, December 23, 1912.

Waters—Landowner Enjoined from Contaminating Percolating Waters Feeding Adjoining Landowner's Well or Spring.

A landowner is liable, if, by the accumulation of filthy or contaminating matter upon his own land, he contaminates the waters percolating therein to the injury of a neighboring landowner whose well or spring subsequently receives the percolating waters so contaminated, and an injunction will be granted to prevent such contamination.

D. E. Warner, for plaintiffs in error.

A. W. Lamson, contra.

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

The facts in this case are, that the plaintiffs own a parcel of land in the village of South Newburgh. The defendant owns a parcel of land immediately north of the land of the plaintiffs in the same village.

On the land of the plaintiffs is a spring of water which they have protected with a curb made of crocks around an excavation made about the opening of this spring, and placing a spring house over it, using the water for domestic purposes.

The defendant has built into his land, a short distance north of the line between the lands owned by the respective parties, a cesspool. Into this cesspool the refuse from his dwelling, including such refuse from the water closet and bath room, as well as from his kitchen, is conducted and held. This cesspool consists of two excavations in the earth, each extending down below the natural surface about eight or nine feet. Each is about eight feet in diameter; there is a pipe or conduit from one of these excavations to the other about four or five feet above the bottom. One of these excavations is walled up with cement or concrete, with a concrete bottom and is probably water-tight, so that any water or other liquid getting into it must remain therein, except as it may pass into the other through the conduit already mentioned, or be removed from the top. The refuse from defendant's house is conducted directly to this tight pool.

The second of these excavations is lined with brick a part of the way up and with cement the balance. It has no bottom other than the earth itself. This is designated a leeching pool, and the term indicates what its purpose is and what it accomplishes. The water or liquid which enters the first pool passes into the second and leeches through the wall and bottom of that pool into the surrounding earth.

The spring is about 325 feet southwest from the cesspool.

Each of the parties has a house used as a family homestead, the one about a hundred feet and the other about fifty feet west of the west line of Osborn avenue, on the west side of which both properties front. Between the two properties and about on a line extending from one house to the other, is a depression, extending westerly beyond this spring, and opposite to the spring the bottom of this depression is about fifteen feet below the surface on either side. The water from the spring comes out in the south bank of this depression some feet above the bottom of the depression.

There is dispute in the evidence as to the nature of the soil along the north side of this depression, some of the evidence tending to show that there is a vain of gravel in the earth along this line, and other tending to show that the earth is composed exclusively of clay.

The cesspool was in process of construction when this action was begun on the 18th day of June, 1912. The work was suspended because of a restraining order granted by the court of common pleas at the beginning of the action and was not resumed until such order was vacated on the 16th day of July, 1912, when the work was resumed and the double pool completed and in connection with the house made soon thereafter.

The prayer of the plaintiffs is for an injunction restraining the defendant from constructing and maintaining this cesspool, for the reason that the water of the spring is contaminated and rendered unfit for use by reason of deleterious matter escaping from said pool, and flowing into said spring. It is not claimed and surely is not shown that the defendant has constructed this pool carelessly. On the contrary, he took pains to have it done to the satisfaction of the acting health officer of the village, and not only violated no law in its construction, but seems to have done all that could be done to prevent injury to the plaintiffs in error or others, if he is to have a cesspool, out of which the contents could leech into the ground.

Unfortunately, however, the contents do leech through the earth, to such an extent as to render the waters of the spring unfit for drinking and for culinary purposes. We find this as a fact.

It is urged by the defendant that the contents of the cesspool can not, by percolation or otherwise, reach this spring; that the altitude of the spring opening, as compared with the bottom of the depression of the ground between the spring and the side of the depression on which the pool is located, renders this impossible. But notwithstanding this, the fact remains that somehow the contents of the pool do reach the spring. This is shown by the testimony in regard to the analine dying matter which was cast into the pool and was found to have caused a discoloration of the water in the spring, and also by the analysis of the water of the spring made by Mr. Tate, the chemist. He found the water to be pure and sweet before the pool had been used, and to be contaminated with the kind of filth in the pool after the pool was used. We must find either that the plaintiff, Mr. Davis, Mr. Tate and others committed perjury, or that the water of the

spring is contaminated by the pool. We think the testimony as to the facts completely outweigh the reasoning as to the improbability of the facts being as testified to. We think the contamination, too, must come from the percolation from the pool, and we are brought, therefore, to the question of the right of the plaintiffs to an injunction to prevent the defendant from permitting the filthy matter to percolate through the earth, to the injury of the plaintiffs.

Counsel for both sides of the case call attention to the case of *Frazier* v. *Brown*, 12 O. S., 294.

In that case suit was brought charging the defendant with having diverted the percolating waters upon his own lands from finding their way into the lands of the plaintiff and supplying a spring on the premises of the plaintiff. To the petition a demurrer was filed which was sustained and the Supreme Court affirmed the sustaining of such demurrer. The first clause of the syllabus reads:

"In the absence of express contract and positive legislation as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing or filtrating through the earth; hence, where a land owner digs a 'hole' on his own land for purposes connected with the use of his own land, thereby cutting off or diverting the underground waters which have always been accustomed to percolate and ooze through his land to the land of an adjoining proprietor, and there to form the source of a spring and rivulet, any damage thereby occasioned to such adjoining proprietor is *damnun absque injuria.*"

At the close of the opinion, at page 312, the court used the following language:

"It is hardly necessary to add, that this case does not include, and, in deciding it, we by no means intend to preclude, questions which may arise in a class of cases in which a land owner, by positive acts, poisons or corrupts the waters which percolate from his lands to those of his neighbor. Such cases are clearly distinguishable from this, and to them the considerations of public policy which govern this case do not necessarily apply."

A large number of cases are cited and many of them quoted from in the opinion in this case. An examination of such cases

shows that in each case the matter decided was that the owner of the land through which waters percolate, has a right to use the water for his own purposes, notwithstanding the effect on the adjacent owner may be to deprive such adjacent owner of water which nature would have furnished him, and upon the hearing of this case it is urged that surely if one may wholly prevent the percolating water from escaping from his own land, and thereby deprive an adjacent owner of any use of such water, it must be based upon his right to make such use of the water on his own land as to him shall seem best, notwithstanding such use of such percolating water may send a poisoned or contaminated flow of water upon the land of his neighbor.

We think a distinction can clearly be made between the two propositions. In the one case, the lower proprietor is wholly deprived of the water which would by nature have percolated through the lands of the defendant and into the lands of the plaintiff. In the other, the water is not prevented from going upon the plaintiff's land, but is allowed to go in a state wholly unfit for use, and, in fact, prejudicial to health, if thus used.

Attention is called by counsel for the defendant in this action to the case of *Upjohn* v. *The Board of Health,* 46 Mich., 542. In this action the purpose of the suit was to enjoin the location of a burying ground near the residence of the plaintiff, for the reason, among others, that it would destroy his well. Injunction was denied, and the reasoning of the court in denying it is considered in the case of *Brady* v. *Steel & Spring Co.,* 102 Mich., 277, as a distinction made between the two sets of facts. In this latter case suit was brought against one upon whose premises was kept for use fuel oil, which escaped and percolated through to the premises of the plaintiff. The first clause of the syllabus in this case reads:

"The percolation of deleterious matter, from the premises of the party who suffers it, through the soil, upon the lands of an adjacent owner, to the injury of the latter, is an actionable nuisance."

Without stopping to further discuss this case, we call attention to the Second Edition of Am. & Eng. Enc. of Law, Vol. 30, page 319, where this language is used in the text:

"In some few cases it has been held that as a landowner has the absolute right to appropriate the water percolating under his land, he is not liable for contaminating or polluting such water in the reasonable use of his own land, though thereby a well or spring upon the land of a neighboring landowner is polluted or contaminated. Still, since one who collects filthy or offensive matter upon his land is required to prevent its escape therefrom, and is liable in damages to neighboring landowners who are injured by the percolation of such matter through the soil, and since this liability does not depend upon negligence, but the reasonable precautions which the law requires must be such precautions as will effectually exclude the filth from the neighbors' land, it is generally held that a landowner is liable in damages if, by the accumulation of filthy or contaminating matter upon his own land, he contaminates the waters percolating therein to the injury of a neighboring landowner whose well or spring subsequently receives the percolating waters so contaminated, and injunctions have been granted to prevent such contamination."

Numerous cases are cited in the notes fully sustaining the text.

Again on page 321 of the same work, this language is used:

"The artificial collection of waters into large reservoirs has frequently caused injury to neighboring landowners by reason of the percolation of such waters through the ground, and it has been held that the owner of the reservoir is liable for the injuries so caused, without regard to the question whether he was or was not guilty of negligence in the construction of the reservoir."

We call attention also to Section 288 of *Gould on Waters,* which reads:

"The foregoing rules do not apply to cases where a person poisons or corrupts the water which percolates from his land to that of his neighbor. 'To suffer filthy water,' says Foster, J., in *Ball* v. *Nye*, 'to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and with the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances, the reasonable precaution which the law requires is effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence. In the present instance,

there was no pretense of a sudden and unavoidable accident which could not have been foreseen or guarded against by due care. The percolations appear to have been constant and their existence to have been known to defendant.' In the absence of negligence or knowledge, the same rule of liability would, it seems, apply, he whose filth it is being required to keep it on his premises at his peril. Fouling an underground stream, which flows into the plaintiff's mill stream or colliery, is an actionable injury. When it is clearly proved that a place of spulture or such a structure as a gas reservoir or privy vault will corrupt wells or springs, a court of equity may grant relief by way of injunction, and it appears to be immaterial that the nuisance was existing and noticeable, when the plaintiff dug or built upon his land. If the water of a well is rendered impure by an escape of gas therein, the fact that other causes contributed to make it unfit for use is not a bar to an action, but may be shown to affect the amount of damages."

This is in accord with the holding of this court in the case of *Krazeweski* v. *The Village of Berea,* decided November 12, 1906, in which the following language was used:

"But it is said on behalf of the village that the mere percolation or seeping or sewage through the soil to and into another's premises is not an actionable wrong, for the rule is analogous to that of the interception or diversion of percolating natural waters. This question is, however, expressly reserved in *Elster* v. *Springfield,* 49 O. S., 82, 94 and 101, and the clear weight of authority is against the contention made. *Meare* v. *Dole,* 135 Mass., 508; *Beatrice Gas Co.* v. *Thomas,* 41 Neb., 662; 43 Am. St., 611; *Wheatley* v. *Baugh,* 64 Am. Dec., 729; *Kinnaird* v. *Standard Oil Co.,* 89 Ky., 468; 25 Am. St., 545; L. R. A., 451.

From these authorities, and from what seems to us the better reasoning, we hold that the plaintiff in this action is entitled to an injunction perpetually restraining the defendant from permitting any part of the contents of the cesspool upon his land to percolate into and upon the premises of the defendant.

Upon motion for new trial it was shown that the filth from defendant's cesspool did not and could not percolate through the soil into plaintiff's spring; that the evidence in the original trial was manufactured for the occasion and false, and so the petition of plaintiff was dismissed.

WHEN LIEN ATTACHES ON A CREDITOR'S BILL.

Circuit Court of Cuyahoga County.

THE CITIZENS SAVINGS & TRUST COMPANY ET AL v. MARY O. PALMER ET AL.

Decided, December 23, 1912.

Judgment Liens—Lien of Creditor's Bill Dates from Service of Summons.

A lien upon equitable interests, resulting from an action in the nature of a creditor's bill brought under favor of Section 11760, General Code, dates from the date of service of summons upon the trustees, and is prior to liens of creditors who have secured judgments and instituted proceedings in aid of execution while the first mentioned action was pending.

H. D. Messick, for plaintiffs in error.
Ingersoll & Vandemark and *D. M. Bader,* contra.

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

On February 3, 1911, Mary O. Palmer commenced an action in the nature of a creditor's bill, in the Court of Common Pleas of Cuyahoga County, against D. T. Palmer and the Citizens Savings & Trust Company, upon a judgment previously recovered in the court of common pleas of said county against said D. T. Palmer, in which she sought to enjoin the Citizens Savings & Trust Company, trustee, from disposing of any funds in its hands which were then due or which would become due and payable to the said D. T. Palmer and to subject the same to the payment of her judgment.

The Citizens Savings & Trust Company, trustee, was duly served with summons in said case on February 3, 1911, and in the April term of said court, in 1912, to-wit, on June 7th, 1912, a decree was entered in said suit which enjoined said trust company, trustee, from paying any funds in its hands as aforesaid to the said D. T. Palmer, and in which it was ordered to pay any funds which were then due or thereafter became due to the said D. T. Palmer, to the clerk of the court of common pleas, in

satisfaction of the judgment and costs in favor of Mary O. Palmer.

On June 4, 1912, the defendant D. M. Bader recovered a judgment, by confession, in the municipal court of the city of Cleveland, against the said D. T. Palmer, in the sum of $1,000, and on June 5, 1912, an order in aid of execution was issued out of the court of common pleas of this county and served upon the said Citizens Savings & Trust Company, trustee; and on the same day, to-wit, June 5, 1912, the defendant, S. H. Herbeson, trustee, who had theretofore also secured a judgment against the said D. T. Palmer, procured an order in aid of execution from the court of common pleas of this county, which order was also served upon the said trust company, trustee, on the 7th day of June, 1912.

Whereupon, to-wit, on the 12th day of August, 1912, the Citizens Savings & Trust Company filed in the court of common pleas of this county, a petition in interpleader praying that all of said defendants be required to interplead together, asserting their claims in said funds, and be enjoined from taking any proceedings against it in regard thereto, and that it be allowed to pay over said funds to the clerk of the court of common pleas, or to such other person as may be designated by the court of common pleas to receive the same, and that it thereupon be discharged from all further liability in relation to said funds, amounting to $1,187.50.

In this state of the case the defendant, Mary O. Palmer, claims to have the first and best lien upon said fund. The defendants, D. M. Bader and S. H. Herbeson, trustee, also claim liens upon said fund and assert that their liens have priority over the lien of Mary O. Palmer.

The sole question, therefore, to be determined in this aspect of the case, is the date or dates on which these respective liens attached.

Mary O. Palmer claims that her lien dates from the 3d day of February, 1911, when service was had on the Citizens Savings & Trust Company, trustee, in her suit commenced on that day in the court of common pleas, heretofore referred to. On the other hand, Bader and Herbeson claim that inasmuch as the or-

der in aid of execution, issued at their instance on June 5, 1912, and June 7, 1912, respectively, were served upon the Citizens Savings & Trust Company, trustee, before the entry of a decree in the court of common pleas in favor of Mary O. Palmer in her suit, that their liens first attached and have priority over the lien acquired by her.

Section 11760 of the General Code provides:

"When a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he has in real estate as mortgagor, mortgagee or otherwise, or any interest he has in a banking, turnpike, bridge or other joint stock company, or in any money, contract, claim or chose in action, due or to become due to him, or in a judgment or order, or money, goods or effects which he has in the possession of any person or body politic or corporate, shall be subject to the payment of the judgment by action."

In pursuing this fund Mary O. Palmer proceeded under this section. Her suit was in the nature of a creditor's bill and doubtless was properly brought. It is also clear that by this proceeding she acquired a lien upon the fund. When did this lien attach?

In *Meyers et al* v. *Zanesville & Marysville Turnpike Co.*, 13 Ohio, 197, it is said "that a creditor, on filing his bill to reach equitable assets, acquires a preferable equity to other creditors, which attaches and becomes a specific lien by the filing of the bill," service, of course, having been duly made, and we believe that the rule as here expressed obtains in this case. It is our conclusion, therefore, that the lien of Mary O. Palmer dates from the 3d day of February, 1911. Antedating the liens claimed by the defendants Bader and Herbeson, she undoubtedly has the first and best lien.

The defendants Bader and Herbeson claim that Mary O. Palmer, by virtue of her judgment in the court of common pleas, acquired a lien on a one-third interest in a farm in this county, held by D. T. Palmer; and ask that she be required to exhaust her remedy against this land before looking to the fund in the hands of the Citizens Savings & Trust Company, trustee.

The evidence discloses that the legal title to this land is in R. L. Palmer and that D. T. Palmer owns the equitable title only. This being true, Mary O. Palmer did not acquire a lien on the land as claimed by Bader and Herbeson. *Kemper* v. *Campbell*, 44 O. S., 210.

The evidence also shows that prior, valid and subsisting liens against the interest of D. T. Palmer in this land already exceed the value thereof. For these reasons the application must be refused.

Decree accordingly.

DETERMINATION AS TO AMOUNT OF ESTATE COVERED BY A DEVISE.

Court of Appeals for Hamilton County.

WILLIAM SADLER ET AL, EXECUTORS, v. CATHARINE SADLER ET AL.*

Decided, May 24, 1915.

Wills—Construction of the Words "All the Rest, Residue and Remainder"—Provisions of Will and Codicil Harmonized.

The provision of the codicil of the testatrix's will that "all the rest, residue and remainder of my estate I desire to be converted into money by my executors," did not by implication revoke the clear and certain devise of real estate contained in Item 3 of the will, but refers to the real estate not covered by Item 3 and remaining to be disposed of.

J. T. Rhyno, for executors and for Mary Sadler.

DeCamp & Sutphin and *Frank H. Williams,* for Catharine Sadler.

JONES (Oliver B.), J.

This is an action brought by the executors at the written request of Catharine Sadler, a legatee, to secure a construction by the court of the will and codicils thereto of Abigail Sadler, deceased, under the provisions of Sections 10857 and 10858 of the General Code.

The will and codicils, omitting the introduction, testatum and attestation clauses, are as follows:

Will dated September 27, 1906.

"*First.* I will and direct that all just debts that may exist against me at my decease may be settled.

"*Second.* To my daughter-in-law, Mary Sadler, wife of my son, William Sadler, I give and bequeath all my personal property of every kind.

"*Third.* To my daughter-in-law, Mary Sadler, wife of my son, William Sadler, I give, devise and bequeath the farm on

*Motion for an order directing the Court of Appeals to certify its record overruled by the Supreme Court October 19, 1915.

which she and my son, William Sadler, and family now reside, being all that certain lot of ground lying next to and on the east side of the Pippin Road, Colerain Township, Hamilton County, Ohio, containing about twenty-one 75/100 (21.75) acres, more or less, to her, her heirs and assigns forever.

"I also give, devise and bequeath to my said daughter-in-law, Mary Sadler, wife of my son, William Sadler, the following real estate, to-wit:" (description of 10 and 75/100 acres of land on the west side of Pippin Road omitted).

"*Fourth.* All the remainder of my real estate, wheresoever the same may be located or situated, I give, devise and bequeath to my son, Charles W. Sadler, for and during his natural life.

"*Fifth.* Upon the death of my son, Charles W. Sadler, I give, devise and bequeath the remainder of the realty conveyed in Item Four, to my grand-daughter, Edith Sadler, now intermarried with one Oscar Lyman, to my grand-daughter, Mabel Sadler, to my grand-daughter, Gladys Sadler and to my grand-son Chester Sadler, share and share alike, to them, their heirs and assigns forever.

"*Sixth.* I hereby nominate and ask the court to appoint my son, William Sadler, and my attorney, J. T. Rhyno, joint executors of this my last Will and Testament.

"I hereby revoke all former wills by me made."

First Codicil, dated August 31, 1910.

"Whereas, I, Abigail Sadler of Colerain Township, Hamilton County, Ohio, did on the 27th day of September, A. D. 1906, make my last will and testament of that date, do hereby declare this to be a codicil to the same.

"I hereby ratify and confirm said will in every respect, save so far as any part of it is inconsistent with this codicil.

"To my husband David Sadler I give, devise and bequeath in lieu of dower all my real estate wheresoever the same may be located or situated, to have and to hold for and during his natural life.

"I hereby revoke Item Fifth of this my last will and testament.

"Upon the death of my son Charles W. Sadler, I desire that the real estate so devised to him in Item IV of my last will and testament shall be converted into money by my executors, who also shall act as joint trustees for this purpose, and out of the proceeds of said sale, I give and bequeath to my grand-daughter Mabel Sadler one undivided one-third interest, to my grand-daughter Gladys Sadler one undivided one-third interest and to

my grandson Chester Sadler one undivided one-third interest, to them, their heirs and assigns forever."

Second Codicil, dated March 18, 1911.

"Whereas, I Abigail Sadler, of Colerain Township, Hamilton County, Ohio, did on the 27th day of September, A. D. 1906, make my last will and testament of that date, do hereby, declare this to be a codicil to the same.

"I hereby ratify and confirm said will in every respect save so far as any part of it is inconsistent with this codicil. I hereby revoke the codicil to my will, said codicil made on the 31st day of August, A. D. 1910.

"I hereby revoke item fourth (4th) of this my last will and testament.

"I hereby revoke item 5th of this my last will and testament.

"To my husband, David Sadler, I give, devise and bequeath in lieu of dower all my real estate, wheresoever the same may be located or situated, to have and to hold for and during his natural life.

"All the rest, residue and remainder of my real estate, I desire to be converted into money by my executors and after the payment of all my debts, funeral expenses and costs of administration, I give and bequeath to my grand-son, David Sadler and to Catherine Sadler, the wife of my son Chas. Sadler, share and share alike, to them, their heirs and assigns forever."

The question to be determined is what real estate was intended to be included by the language contained in the last paragraph of the second codicil in the following words:

"All the rest, residue and remainder of my real estate, I desire to be converted into money by my executors," etc.

It is contended on behalf of Catharine Sadler that this language includes all of the real estate of which testatrix died seized, subject only to the life estate therein devised to her husband, David Sadler, and that in effect it operated as an implied revocation of Item Third of the original will which devised two tracts, aggregating more than thirty-two acres to Mary Sadler.

On the other hand, the executors and Mary Sadler insist that Item Third remains in full force unrevoked, and that the clause in question is a residuary clause and applies to and includes

only that portion of testator's real estate which remains after taking out the devise to Mary Sadler covered by Item Third, and the life estate given to the husband.

Abigail Sadler died August 6, 1912, at the age of eighty-five years, leaving her husband, David Sadler, ninety-seven years of age, who has died since the hearing of this case in the common pleas court. They had two sons, William and Charles W. William lived with his wife, Mary, on the farm devised to her in item third of the will, and testator and her husband lived with them in the same house. William and Mary have four sons, all of whom are married, David, Jr., Clarence, Albert and Joseph, and William has a married daughter whose deceased mother was his first wife. Charles W. Sadler and his wife, Catharine, have four children, whose names are given in Item Fifth of the will. About 1909, Charles W. Sadler, being in financial difficulties, left his wife and family and has not been heard from since.

Plausible arguments are made by counsel on each side why the will and codicil should be construed as they desire, because of the personal relations between testator and her respective daughters-in-law, and counsel urge considerations that should move her to provide for them, and in that way for their families. It is argued on the part of Catharine that the original will practically divided the two farms into equal shares, giving one to each branch of the family; that the first codicil did not change this division as between the two families, and therefore a construction of the second codicil which would result in a practical division of the bulk of the proceeds of the property between Catharine, wife of Charles, representing his branch, and David, Jr., oldest son of Mary and William, representing that branch, would be in keeping with this idea of substantial equality between the two branches, and must be considered as the real intention of the testator.

On the part of Mary, it is argued that because she and her husband and family remained on the farm and took care of testator and her husband, who lived with them, and looked after their property, and David, Jr., was especially attentive in nursing and looking after the wants of his grandparents, that the construction sought on her behalf should obtain.

Such arguments can be of little avail. It is not for the court to consider reasons why testator might wish to favor one of her family or refrain from giving to another. She had the right to dispose of her property by her will as she saw fit under the law, without regard to moral obligations and without reference to the needs or merits of the several natural objects of her bounty. It is the duty of the court to determine her intention from the language she has seen fit to use in the will, not to speculate from surrounding circumstances as to what her real intentions might have been.

The law of Ohio as to the construction of wills has been clearly stated in numerous cases by our Supreme Court, and in none more so than in *Townsend* v. *Townsend,* 25 O. S., 477, the syllabus of which is as follows:

"1. In a construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.

"2. Such intention must be ascertained from the words contained in the will.

"3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear from the context that they were used by the testator in some secondary sense.

"4. All the parts of the will must be construed together, and effect, if possible, given to every word contained in it.

"5. If a dispute arises as to the identity of any person or thing named in the will, extrinsic facts may be resorted to, in so far as they can be made ancillary to the right interpretation of the testator's words, but for no other purpose."

In *Collier* v. *Collier,* 3 O. S., 369, the law is thus stated:

"A will and codicil are to be taken and construed together, as parts of one and the same instrument, and the intent of the testator gathered from the whole.

"A codicil will not be held to revoke the disposition of a will, further than is clearly expressed or necessarily to be inferred from it."

The will and the second codicil must therefore be considered together as though they were parts of one and the same entire instrument.

The first codicil having been entirely revoked by the second, it will only be considered, if necessary, for the purpose of aiding to determine the meaning of the language used in the will and the second codicil.

Items fourth and fifth of the will are both expressly revoked by the second codicil. These are the only items expressly revoked. The other portions of the will all remain operative just as they originally stood, except where modified in some respect by the codicil, unless the language used in the will should compel the court to find a revocation by implication. If the will and codicil can be construed together giving force and effect to every part, they must be so construed that all may stand, and no part will be invalidated or set aside except by clear and decisive terms.

As was stated in *Parker* v. *Parker,* 13 O. S., 95, at page 110, quoting from *Thornhill* v. *Hull*:

"'It is a rule of the courts in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument, in clear and decisive terms, such interest or estate can not be taken away or cut down by raising a doubt, upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate.' In pronouncing the opinion in that case the Lord Chancellor Brougham said: 'I hold it to be a rule that admits of no exception, in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of the instrument, by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer, or be he layman, could entertain a doubt—in order to reverse that opinion, to which the terms would of themselves and standing alone, have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument, which is as decisive the one way as the other terms were decisive the other way; and that the interest first given can not be taken away either by *tacitum* or by *dubium* or by *possibile,* or even by *probabile,* but that it must be taken away by *expressum et certum.*'"

The first item of the will stands subject only to the further direction that the debts be paid out of the proceeds of the real estate, provided for in the last paragraph of the second codicil. The second item is not changed, though it is agreed that there is practically no personal estate. Likewise it is agreed that there is no change in the sixth item appointing the executors.

The third item is clear and decisive. There can be no mistaking its purpose to devise two specific parcels out of the real estate in fee simple to Mary Sadler. There is, however, no question that this was modified by the grant of a life estate in all the real estate to David Sadler, as made in the next to the last paragraph of the second codicil. This life estate has now been terminated by the death of David Sadler pending these proceedings. But it is claimed that the entire item is revoked by the final paragraph of the second codicil, because by the words "All the rest, residue and remainder of my real estate"—there directed to be sold—it is intended to include all the real estate owned by the testator at the time of her death, subject only to the life estate of her husband.

To require this construction it is argued that the word "remainder" is used in its technical sense of a remainder of an estate in land depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately on the determination of that estate; that because the will and codicils were drawn by a lawyer this technical meaning must be supposed to have been intended, particularly so, because the paragraph in which the word is found follows immediately that in which the life estate is given to the husband, and an interest in remainder in land is most frequently made to take effect after a life estate.

If this meaning had been intended, in the nice use of language by one learned in the law, the words "all the rest and residue" would hardly have been used in connection with the word "remainder," which would have expressed the intention, alone. And he would have said "the remainder *in* my real estate," not "*of* my real estate."

The words all the "rest, residue and remainder" are general words commonly employed in a residuary clause of a will, to em-

brace every species of property (40 Cyc., 1567). The three words, "rest," "residue" and "remainder" are given as synonyms in the Century and other dictionaries, and each is defined as being "that which remains after a part is taken, separated, removed or dealt with in some other way." The Century Dictionary further states: "Rest is the most general term; it may represent a large or small part. Remainder and residue generally represent a comparatively small part, and remnant a part not only very small but of little or no account." The use of these three words "all the *rest, residue* and *remainder* of my estate" must be deemed to provide an ordinary residue clause for the disposition of so much of her real estate as had not been disposed of by other parts of the will and codicil.

It is a general rule where the same words are used in different parts of a will, relating to the same subject-matter, they must be presumed to be used always in the same sense, if the context of the will does not show a contrary intention (40 Cyc., 1402). The word "remainder" is used in the will, both in the fourth and in the fifth items, and it is not used in either in the technical sense claimed for it in the codicil, by counsel for appellants. They concede this as to its use in item fourth, but they claim that its use is technical in item fifth. With this we do not agree. The words "the remainder of the realty conveyed" used in the fifth item, devised "upon the death of my son," surely mean the same property as "all the remainder of my real estate" used in the fourth item. The word "remainder" is used in its ordinary and not in its technical sense in both these items. And applying the general rule, it must be considered to have been used in its ordinary and not in its technical sense in the last codicil, and more especially so, as before stated, because it is there coupled with "rest" and "residue."

Counsel for appellants rely upon the portion of the clause giving the life estate to the husband in the second codicil, in that it immediately precedes the residuary clause and, as they contend, aids the construction sought by them. It will be observed that this clause giving the life estate to the husband is identical with a similar clause in the first codicil, and that it was there fol-

lowed by a changed disposition of the real estate devised for life to Charles, providing for its sale, and that the real estate there ordered sold is the same real estate which is ordered sold by the second codicil, if it is so construed as to permit item third of the will to stand, thus evidencing a desire to change her will by codicils only as to that part of the real estate originally left to Charles.

The testator in her last codicil has expressly ratified and confirmed said will in every respect save so far as any part is inconsistent with the codicil. She proceeded to revoke items fourth and fifth which dealt with the real estate left originally to Charles and his family, and revoked the first codicil, which had made a change in the same property, and without revoking or changing in any way the third item, which gave the other part of the real estate to the wife of William, she proceeded to order the rest of the real estate converted into money. Can it be said if she intended to include all of her real estate she would not have expressly revoked item third and provided for the sale of all her real estate in clearer terms than "all the rest, residue and remainder of my real estate?" The use of this residuary phrase implies that a portion has been previously disposed of, and with the clear, decisive and important language of item third in full force, unrevoked, and the declaration ratifying and confirming the will, it can not be said that the gift of the life estate to her husband was alone taken out to leave this residuary estate, or that any revocation of item third can be implied.

Counsel for Catharine Sadler, in argument for the construction they seek, rely largely upon the case of *Newcomb* v. *Webster*, 113 N. Y., 191, but in the opinion of the majority of the court that case is not controlling. In that case, as said in the opinion of the court, the testatrix "so dealt with the principal real estate described in it as by sale to revoke the gifts mentioned in the second and fourth clauses. She also acquired real estate and entertained a desire that beneficiaries other than those first selected should share in her bounty. These circumstances would naturally require a redistribution of her estate, and in view of them, we think it clear that the testatrix intended to make new disposi-

tion of her entire property. Such is, at any rate, the effect of the language employed by her."

In that case also, as the court stated, "there was an express revocation of so much of the will as is inconsistent with the provisions of the codicil," while in the case at bar the will is expressly ratified and confirmed save so far as any part of it was inconsistent with the codicil. That case also, on page 197 of the opinion, construes the word "remainder" in the phrase "all the rest, residue and remainder" as we have construed it.

In the case of *Griggs* v. *Griggs,* 80 App. Div. (N. Y.), 339 (aff. 178 N. Y., 540), where the will and the language employed are more similar to the case before us than in *Newcomb* v. *Webster,* the court distinguished that case and construed the will before it as the majority of the court construe this one.

Numerous authorities have been collated in the exhaustive briefs of counsel, which might be discussed if time and space permitted, but it is sufficient to say that their careful consideration convinces us that the will and codicil should be construed to give full force and effect to item third in the devise there contained to Mary Sadler, and that the residue of the real estate should be sold by the executors under the provisions of the last paragraph of the second codicil, and a decree may be taken accordingly.

GORMAN, J., concurs; JONES (E. H.), J., dissents.

JONES (E. H.), J., dissenting.

The second codicil disposes of all the real estate owned by testatrix. This is my understanding of the language there used.

The devise to Mary Sadler made by item third of the will is therefore inconsistent with the codicil and is revoked by it. This construction is supported by the Court of Appeals of New York in *Newcomb* v. *Webster et al,* 113 N. Y., 191, in which the precise question before this court was determined.

INSURANCE POLICY VOIDED BY FACTORY REMAINING IDLE.

Court of Appeals for Brown County.

A. R. WATSON AND G. E. KRATZER v. THE NORWICH UNION FIRE INSURANCE SOCIETY.

Decided, December 12, 1913.

Fire Insurance—Manufacturing Plant Permitted to Remain Idle—Provision of Policy Making it Void Under such Conditions Held Valid—Rider Permitting the Closing of the Establishment Not to Exceed Thirty Days Construed.

1. Where a policy of fire insurance covering a manufacturing establishment contains the provision that the entire policy shall be void if the establishment cease to be operated for more than thirty consecutive days unless consent thereto shall be endorsed on the policy, and a fire occurred after the establishment had been idle for more than thirty consecutive days, the insured is not relieved from this contractual provision by a rider attached to the policy, reading: "privilege of temporarily ceasing operations, not exceeding thirty days at any one time, without notice to the company."
2. Nor does it avail the insured that the agent who wrote the policy knew that the establishment was idle at the time the policy was written and remained idle until the occurrence of the fire, where there was a further provision in the policy that no agent should have power to waive any condition of the policy except as such waiver is endorsed thereon.

O. E. Young and *J. W. Bagby,* for plaintiffs in error.

J. W. Mooney and *J. R. Moore,* contra.

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

Error to Common Pleas Court of Brown County.

This was an action brought by the plaintiffs in error in the court below to recover of the defendant upon an insurance policy alleged to have been issued to them, insuring certain property therein described, which property had theretofore been destroyed by fire.

The insurance company, in its third defense, alleged that there was a provision therein that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the subject of insurance be a manufacturing establishment and it be operated, in whole or in part, at night later than ten o'clock, or if it cease to be operated for more than thirty consecutive days."

It is also alleged in said third defense that said policy also contained the following:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. * * *

"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, 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 agreement 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 this policy exist or be claimed by the insured unless so written or attached."

It is further alleged that the subject of insurance was a manufacturing establishment, and the same was not being operated at the date of the fire and had ceased to be operated for more than thirty consecutive days prior thereto, and that no agreement was endorsed upon said policy or added thereto consenting that said manufacturing establishment should cease to be operated for more than thirty days, or providing that said policy should not, as provided by the foregoing provisions contained in said policy of insurance, be void.

The reply of the plaintiffs to the third defense alleges that they deny the policy contained the provisions as therein set forth, and they deny that no agreement was endorsed upon said

policy or added thereto consenting that said manufacturing establishment should cease to be operated for more than thirty days or providing that said policy should not become void.

The case proceeded to trial, and at the close of plaintiffs' testimony the defendant moved the court to direct the jury to return a verdict for the defendant, which the court did. Thereupon, a petition in error was filed in the court of appeals, to which was attached a bill of exceptions containing all of the evidence and proceedings in the court below, asking a reversal of the case chiefly because the court erred in directing a verdict on the issues presented by the third defense and the reply thereto.

The evidence, pleadings and record show that the insured property was a manufacturing establishment; that at the date of insurance it was not running, nor was it at the date of the fire, nor had it been in operation at any time from the issuance of the policy up until the fire.

The question presented is: Does the language set up in the third defense constitute a bar to the right of the insured to recover at the time plaintiffs rested their case?

There was a slip or rider attached to the policy which is as follows:

"Privilege of temporarily ceasing operations, not exceeding thirty days at any one time, without notice to the company."

Counsel for plaintiffs in error contend that no proof was in evidence that a notice had not been given.

The policy itself was in evidence and it provided that—

"* * * nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

No written permission to cease operations during the time of the fire was written on or attached to said policy.

It is further stated in the policy that:

"* * * no 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 agreement endorsed hereon or added hereto."

The policy, itself, provided how permission should be given to cease operations and required that it should be endorsed on the policy or added thereto; and the policy not disclosing any such privilege entered thereon or added thereto, it follows that as no notice was legally given to the company, as disclosed by plaintiffs' evidence, the policy became void and the defendant was not required to do any affirmative act declaring a forfeiture. *Betcher* v. *Ins. Co.* (Minn., 1889), 80 N. W., 971; *Johnson* v. *Ins. Co.*, 43 N. W., 59, 143 S. W., 703; *Reduction Co.* v. *Ins. Co.*, 121 Fed., 937; *Day* v. *Ins. Co.*, 70 Iowa, 710.

The fact that the establishment was not in operation to the knowledge of the agent at the time the policy was issued can not deny to the company the right to provide by contract that it should become void if it ceased to operate for thirty consecutive days thereafter unless privilege attached to the policy or endorsed thereon should be granted.

It is contended by plaintiffs in error that the rider or slip attached, being a part of the contract, so modified the clause in the printed or body part of the same as that it overcome the clause of forfeiture and it did not become void, by its terms, as it did in the body of the contract.

This contention we can not subscribe to. The language of the slip is:

"Privilege of temporarily ceasing operations, not exceeding thirty days at any one time, without notice to the company."

The words, "without notice to the company," must be held to apply to the privilege of cessation of operations within the thirty days and not that the non-operation in excess of thirty days should be without notice to the company.

The words "cessation of operation" means a "period of idleness—wanting in operation," and these words, and also the following, "cease to be operated," which is prohibited by the provisions of the policy, is a condition of idleness or non-operation

of a manufacturing establishment beyond the period permitted. *Reduction Co.* v. *Ins. Co.*, 121 Fed., 938.

The court in this case holds:

"Upon April 20 the first permit was issued: 'Privilege is hereby granted to cease operations for one month from date.' The effect of that was simply to extend the time of permitted idleness from ten days to one calendar month. In other words, instead of being allowed to have the plant idle for ten days plaintiff was allowed to have it idle for thirty days."

Nothing is said in the privilege rider about the effect which non-operation beyond thirty days should have upon the policy; that is contained in the policy contract proper, which provides it shall be void if the plant ceases to be operated for more than thirty consecutive days.

The printed provision in the body of the policy must be construed together with the same subject in the rider; to do otherwise would render meaningless a part of this contract. Whenever there are two constructions to be placed upon a written contract, one of which will give force to all of its provisions that one must be observed and followed.

Counsel for defendant in error has cited the case of *Happ* v. *Insurance Co.*, 85 O. S., 473, which was an affirmance of the circuit court, without opinion. In that case, however, the conditions of the policy violated were:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if illuminating gas or vapor be generated in the described building, or adjacent thereto, for use therein."

And also:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if there be kept, used or allowed on the above described premises * * * gasoline."

The insurance company in that case contended that there could be no recovery because illuminating gas was being generated and used therein. The plaintiffs in error contended that

because illuminating gas was being generated when the policy was written and the soliciting agent knew that fact, and because, in addition, the policy in that case expressly covered "gas and heating apparatus," the above quoted conditions were not violated. But the Supreme Court, in affirming the circuit court, repudiated that contention.

The case of *Gump* v. *Insurance Co.* [15 C.C.(N.S.), 428; 24 C. D., 36] seems, by the second syllabus therein set out, to hold a contrary view to this opinion. This case was decided by the circuit court of the fifth circuit, and appears to have been affirmed by the Supreme Court in 86 O. S., 325, without opinion. The facts, as disclosed by the opinion of the circuit court, do not clearly show what the conditions and circumstances were; and, therefore, we may surmise that the facts and circumstances in that case, when fully disclosed, would not warrant the second syllabus therein reported. It would seem at least, from the case in the 85 O. S., 473, which was also an affirmance of the circuit court without opinion, that that case would be in direct conflict with the affirmance in the Gump case.

At least, we are persuaded by the current of authority that the rule laid down here is the one that has been followed and should govern this action.

What we have said in respect to this proposition dispenses with a further examination or discussion of the other questions made in the case; and,

The judgment of the common pleas court will be affirmed.

RIGHT TO APPOINTMENT OF A NON-RESIDENT AS EXECUTOR.

Court of Appeals for Hamilton County.

CLIFFORD SEASONGOOD v. PHILIP L. SEASONGOOD, ALBERT SEASONGOOD, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF LEWIS SEASONGOOD, DECEASED.

Decided, November 8, 1915.

Executors and Administrators—Non-Resident May be Named as Executor, But an Administrator Must be a Resident of the State—Rules of Court Must Give Way to Valid Statutes.

A non-resident who has been named in a will as executor is entitled to appointment if he be of age and of sound mind and untainted by conviction of crime, notwithstanding a rule of court to the contrary.

Clifford Seasongood and *Murray Seasongood,* for plaintiff in error.

Paxton, Warrington & Seasongood and *Robert P. Goldman,* contra.

GORMAN, J.

It appears from the record that on November 29, 1914, Lewis Seasongood, a resident of Cincinnati, Hamilton county, Ohio, died testate, leaving a large estate, part of which was located in Ohio and part in New York. In his will he named as his executors his three sons, Philip L., Albert and Clifford, and his nephew, Murray Seasongood, and also nominated all of his executors, except Albert, as testamentary trustees. All of these were appointed as nominated in said will, by the Surrogate Court of New York, on February 8, 1915. Clifford Seasongood is now and was at the time of his father's death and when the will was executed a resident of New York City, which fact was well known to the testator at the time he nominated him as one of his executors and testamentary trustees. He had for several years prior to his father's death managed his father's realty and per-

sonalty in the state of New York and had been his father's personal advisor for many years and up to the time of his death. He is of legal age, a lawyer in good standing at the New York bar, and is in every way suitable, competent and well qualified to act as executor and testamentary trustee of his father's estate.

It appears that the Probate Court of Hamilton County, Ohio, on the presentation of said will for probate and record, and on the application of said Clifford Seasongood to be appointed as one of the executors and testamentary trustees thereof, refused and declined to appoint him solely on the ground that he, the court, could not appoint a non-resident of Ohio as executor or co-executor, however suitable and well qualified he might be, although it appears from the record that the widow and all the next of kin of the testator, as well as the other three executors, joined in the request for the appointment of said Clifford Seasongood. The court appointed the other three executors named in the will; and Clifford prosecuted error to the common pleas court to reverse the judgment of the probate court in refusing to appoint him. The common pleas court affirmed the probate court, and the plaintiff in error, Clifford Seasongood, is here asking this court to reverse the common pleas and the probate courts.

The sections of the General Code touching the appointment of testamentary trustees are 10591 and 10600 inclusive and 11029 to 11036 inclusive. The sections governing the appointment of executors are 10605 and following, of the General Code.

By the provisions of Section 10605, General Code, the probate court, when a will is duly proved and allowed, shall issue letters testamentary thereon to the executor, if any be named therein, if he be legally competent and accepts the trust and gives bond if that be required.

Section 10591 provides that every trustee appointed in a will, before entering upon his duties, must execute a bond payable to the state, to the satisfaction of the probate court, conditioned for the faithful discharge of his duties as trustee, except that when the terms of the will provide that no bond need be given the

court may grant permission to the trustee to execute the trust with or without bond; but when granted without bond the court may thereafter, upon the application of an interested party, require a bond.

It appears from the record that there has been of long standing a rule of the Probate Court of Hamilton County—not especially authorized by statute—that executors, administrators, guardians and trustees must reside in Hamilton county.

The circuit court of this county, in the case of *Sargent* v. *Corbley,* 7 C.C.(N.S.), 226, held that notwithstanding this rule of the probate court a non-resident of Hamilton county, if a suitable person, might be appointed administrator.

It needs no citation of authorities or extended argument to satisfy us that a rule of court is not binding or valid unless in accordance with the law, either statutory or the common law, or is a reasonable exercise of the court's power to make and promulgate the rule. The rule of court must always give way if in conflict with a statute. *Van Ingen* v. *Berger,* 82 O. S., 255.

If the court refused to appoint Clifford Seasongood because of this rule of court, it would appear that this refusal on this ground can not be justified in the face of the statute, Section 10605, General Code, which requires the executor named in the will to be appointed if he be legally competent and will accept.

If we were to apply the rule at common law, that is, that part of it known as the ecclesiastical law, the executor named in the will, if not incompetent, must be appointed. The wishes and will of the testator were respected and enforced whenever possible. *Slaters* v. *May,* 2 Lord Raym, 1071; *Williams on Executors,* 7 Am. Ed., 270; *Smith's Appeal,* 61 Conn., 420.

In *Borland on Wills and Administration,* page 495 Section 189, the author says:

"By the theory of the common law the executor derived his powers directly from his appointment by the testator. The ecclesiastical courts could probate the will, but the executor did not need an appointment by them and they had very little control over him. * * * The testator might appoint any one as executor, whether qualified or not."

In *Rex* v. *Raines*, 1 Lord Rayme, 361, Carth. 457, 1 Holt, 310, it was held by Lord Holt that the appointment of the executor named by the testator was mandatory, even though the person named was improvident, dishonest and suspected by the legatees.

This decision was approved in *Marriott* v. *Marriott, 1 Strande,* 666.

When we come to examine and construe our statutes we should do so in the light of the common law rules and principles in force at the time of their enactment, and bearing upon the rules promulgated by the statutes under consideration. The Legislature will not be presumed to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention. *State, ex rel,* v. *Sullivan*, 81 O. S., 79.

Our statute, Section 10605, does not expressly forbid a non-resident of the state being appointed executor. It says that the probate court "shall issue letters testamentary thereon *to the executor* * * * *if he is legally competent,*" etc.

Who are competent persons and what is meant by "legally competent?" One is legally competent if he is of legal age, of sound mind and has not been convicted of a crime which renders him infamous.

In the case of *Clark* v. *Patterson*, 114 Ill. App., 312 (affirmed by Supreme Court of Ill., 214 Ill., 533), the court, in construing the words "legally competent" in a statute providing for the appointment of an executor if he be *legally competent*, said:

> "The words 'legally competent' mean that the person named as executor must be of legal age, of sound mind and memory and untainted by conviction for crime which renders the convicted person infamous."

If the person nominated in the will as executor be not a minor, an idiot, a lunatic or insane, he is in contemplation of law legally competent. In the matter of the appointment of an administrator the statute further limits the qualification of the applicant beyond the requirements of an executor. While the probate court shall issue letters testamentary to the executor

named in the will when it is admitted to probate, if he is legally competent under Section 10605, the provisions relating to the appointment of administrators found in Section 10617, General Code, after setting out the persons entitled to administer the estate, subdivision 3 reads as follows:

"If the persons entitled to administration are incompetent or *evidently unsuitable for the discharge of the trust* * * * the court shall commit it to one or more of the principal creditors if there be any competent and willing to undertake the trust."

It will thus be seen that in the appointment of an administrator the court must take into consideration not only the competency of those entitled to administer the estate under the law, but must also determine whether or not the applicant for administration is a suitable or unsuitable person. He might be perfectly competent in law, or legally competent, so for as any legal disabilities are concerned, and yet be totally unsuitable or unfit to have the administration committed to him.

In the case *In re Ulhorn,* 12 C. C., 765, decided by the circuit court of this county in 1894, the court held that the probate court of this county in refusing to appoint a son of the testator as administrator with the will annexed, because he was a non-resident of this state, did not err, inasmuch as there was a discretion vested in the probate court to refuse or grant letters of administration to a non-resident applicant otherwise entitled to the appointment, because the removal statute, Section 10629, General Code, gave that court power to remove an administrator or executor among other grounds for removal from the state. If after appointing a person entitled to administer the estate the court could, under said Section 10629, remove him because he removed from the state, then manifestly it would not be an abuse of discretion on the part of the court to refuse to appoint him in the first instance if he was at the time of the refusal a non-resident of this state. Furthermore, in that case the applicant, the son of the testator, was not named in the will as executor, but he sought to be appointed administrator with the will annexed under Section 10612, General Code, and by the express

provisions of Section 10617, General Code, administration of the estate could be granted to residents of this state only.

Furthermore, for all that appears in the record of the Ulhorn case, the son applying for administration may have been an unsuitable person, and if so the court could refuse to appoint him on that ground. *Non constat,* but if in the Ulhorn case the son had been named as executor in the will and had been a competent person the circuit court might have held that his appointment as executor would be mandatory on the court. Indeed, the Ulhorn case can not be cited as an authority which is conclusive on this court in a case, as the one under consideration, where the testator with full knowledge of the fact of his son's non-residence names him as one of his executors. In the Ulhorn case the circuit court might with much better reason have based its decision on the provisions of Section 10617, General Code (then 6005, R. S.), which requires administrators (but not executors) to be residents of this state. No such limitation is found in the executor's statute, Section 10605.

The removal statute, Section 10629, does not require the probate court to remove an executor or administrator because of his removal from the state. This statute furnishes grounds for removal only. It says the court "may remove," etc. It is discretionary with the court to remove or not remove him because of non-residence after appointment; and even before the court may remove him on this ground the executor or administrator is entitled to twenty days' notice. We apprehend that if the probate court refused to remove an executor or administrator after his appointment because of his subsequent removal from the state, it would not ordinarily be held to be an error or abuse of the court's discretion.

In other states having provisions similar to ours with reference to the qualifications of executors and administrators and similar limitations on the appointing power, as well as removal statutes analagous to ours, the courts have in many instances held that the appointment of a legally competent executor named in the will is mandatory unless there is some statutory disqualification imposed, such as non-residence in the state.

McGregor v. *McGregor,* 40 N. Y., 133; *Berry* v. *Hamilton,* 51 Ky., 191; *In re Banquire,* 88 Cal., 302; *Halliday* v. *Halliday,* 16 Ore., 147; *Stevenson* v. *Cameron,* 191 S. W., 791.

In *Stevenson* v. *Cameron,* 191 S. W., 791, the probate court refused to appoint an otherwise competent person named in the will as executor, on the ground that he was a non-resident of the state, and the statute provided that absence from the state for three months furnished grounds for removal. The upper court on appeal reversed the lower court and held that he had a right to be appointed executor because the testator had named him as such. To the same effect are the cases of: *Corrigan* v. *Jones,* 14 Col., 311; *Fulgham* v. *Fulgham,* 119 Ala., 403; *In re Brown's Estate,* 18 Cal., 384; *Hecht* v. *Carey,* 13 Wyo., 154; *Walker* v. *Torrence,* 12 Ga., 604.

We think that our Supreme Court has at least inferentially held that it is the duty of the probate court to appoint as executor the person named in the will. In *Bank* v. *Telegraph Co.,* 79 O. S., 89, the court, on page 99, uses this language:

"When the plaintiff died, being at that time a resident of Clark county, and left a will nominating the plaintiff in error to be executor of the will, and the will was offered for probate in the probate court of that county, it became its duty to appoint the person named in the will to be executor, if there was no obstacle in the law as it then existed."

Again, in the case before us it appears that there were three other co-executors of Clifford Seasongood, all residents of Ohio, named jointly with him as executors of this estate, and surely if it were necessary to protect the executor's estate in Ohio from any mal-administration the probate court of this county would at all times have three executors out of the four citizens and residents of Hamilton county, Ohio, who would be answerable at any and all times to the beck and call and citation of the court. It appears also from the record that there is a large part of the testator's estate located in New York state, and it would appear to be eminently proper and helpful to the three resident co-executors of Clifford Seasongood that he should be a co-executor

so that he could with less inconvenience to all and with much greater facility and economy to the estate look after that part of the estate in New York. Evidently the testator carefully considered the benefits, desirability and even necessity of having his son, versed in the laws of New York, to act as co-executor of his will with the other three named by him. He saw, and we see, no legal impediment to his appointment; and from the standpoint of fitness and competency perhaps no better selection could be made. It was the testator's will that Clifford should be one of his executors, and that will should not be thwarted unless there be found some statute prohibiting this appointment or some rule of common law forbidding it. No statute disqualifies or forbids this son from acting as his father's executor or from being appointed by the court, and, as we have before said, the common law made his appointment mandatory. The mere fact that the probate court, under the removal statute, Section 10629, General Code, may remove an executor or administrator for removal from the state after his appointment, does not preclude the appointment of one named as co-executor with others in the will in the first instance. There is no irreconcilable inconsistency between the two Sections 10605 and 10629, General Code; the latter section merely rests a discretion in the probate court to remove for non-residence, whereas the former statute, 10605, appears to make the appointment of the person named in the will mandatory.

Clifford Seasongood is also named in his father's will as one of the testamentary trustees of the estate, and it would appear that the testator in law has the right to create a trust in his estate and name his trustee in his will. Indeed, the testamentary trustee does not get his authority to act by virtue of an appointment by the probate court, but through his designation as trustee by the testator in his will.

It is true the statute requires testamentary trustees to give bond before entering upon their duties unless excused from so doing by the terms of the will. But there is nothing said in the statutes about an appointment as testamentary trustee, or the issuance of letters to him as testamentary trustee, as there is in

the case of an executor under Section 10605, General Code. If the testamentary trustee fails to give bond as ordered by the court he shall be removed from the trust or be deemed to have declined it (Section 10592). The court has power to appoint only in case the testamentary trustee fails to give bond, declines to accept, dies, resigns, becomes incapacitated or is removed from the trust, and the will has made no provision for his successor (Section 10596, General Code).

Trustees created by will executed outside of this state, whether residents of this state or non-residents, are recognized by our laws, and have the right to administer their trust in this state, being required only to give bond as resident trustees are required to do where the trust is created by will in this state. It would seem unreasonable to suppose that the Legislature intended to prohibit a resident of this state from designating a non-resident of this state as a testamentary trustee, and yet permit a non-resident of this state to make a will outside of this state, and designate therein a non-resident testamentary trustee to act in this state and hold, control and dispose of property in this state. The provisions with reference to testamentary trustees recognize foreign testaments and foreign testamentary trustees, but put them on the same legal footing as resident trustees appointed under domestic wills. The probate court's jurisdiction over all testamentary trustees is regulatory only, and it may not refuse to recognize a trustee designated in a will because he is a non-resident of the state, but only if the trustee fails to accept by giving bond or declines the trust. We conclude, therefore, that Clifford Seasongood should have been allowed to give bond as one of the testamentary trustees of his father's estate, notwithstanding the fact of his non-residence. No statute forbids it any more than it is forbidden to a non-resident testamentary trustee appointed under a foreign will to act as such trustee in this state.

The conclusion of the court is that Clifford Seasongood's appointment as co-executor and co-trustee under his father's will is mandatory and should be recognized by the probate court by accepting a proper and sufficient bond and issuing to him in con-

junction with his co-executors and co-trustees letters testamentary on his father's will.

Judgment of the common pleas and probate court reversed.

JONES (E. H.), J., and JONES (Oliver B.), J., concur.

CREATION OF BONDED INDEBTEDNESS BY A MUNICIPALITY.

Court of Appeals for Williams County.

J. H. SCHIEBER, A TAX-PAYER, v. VILLAGE OF EDON ET AL.*

Decided, January 23, 1915.

Municipal Corporations—Power to Issue Bonds Not Repealed by Limitation on the Taxing Power—Debt Creating Power Distinguished from Powers with Reference to Taxation.

1. Section 3939, General Code, authorizing legislation by municipal councils for the issue of bonds for street improvements without a vote of the people, is not repealed by implication by Sections 5649-2, *et seq.*, fixing limitations with reference to taxation. *Rabe* v. *Board of Education*, 88 Ohio State, 403, distinguished.
2. The debt creating power which has been conferred upon municipalities is in nowise affected by the tax limitations which have been imposed, and an issue of bonds to meet the costs of street improvements will not be enjoined because not authorized by a vote of the people, where payment thereof can be made without violation of the tax limitation fixed by the Smith one per cent. law.

R. L. Starr, for plaintiff.

C. A. Bowersox and *Newcomer & Gebhard*, contra.

KINKADE, J.

Appeal from common pleas court.

The plaintiff brought an action in the court of common pleas to restrain the village of Edon from issuing bonds in the sum of

*Reversing *Schieber* v. *Village of Edon*, 18 N.P.(N.S.), 94.

$5,200, the proceeds of which were to be used to pay a portion of the cost of paving streets in the village of Edon.

The contention of the plaintiff is that the village council had no power or authority to issue these bonds without a vote of the people. There is no question of irregularity in the proceedings to which we need give any attention if it be found that the council had authority under the law to issue the bonds.

The claim of the village is that under Section 3939, General Code, and the following sections covering the same subject, the council had full power and authority to issue the bonds mentioned. On the other hand, the plaintiff contends that Section 3939, General Code, was repealed by implication by Sections 5649-2 to 5649-6, General Code. Counsel for plaintiff to sustain his position that Section 3939 has been repealed by implication, cites and relies upon the case of *Rabe* v. *Board of Ed.*, 88 Ohio St., 403. It is insisted that in all material respects Section 7629, General Code, relating to the power of school boards to issue bonds, is analogous to the like power conferred upon the village council in this case by Section 3939, General Code, and it is said that the authority thus conferred to issue obligations by the school board having been withdrawn by the repeal by implication of Section 7629 through the enactment of Sections 5649-2 and following, that a like result must be held here with respect to Section 3939. As has been well said by counsel for the village, we think this is a very marked difference between the scope of the power conferred upon school boards by Section 7629 and that conferred upon municipal councils by Section 3939, and, as has also been stated by counsel a careful examination of the Rabe case cited, will disclose that the court did not say that Section 7629, General Code, was repealed by implication. The court did say that Sections 7591 and 7592, General Code, were repealed by implication and added that Section 7630 necessarily fell with the other two, but the case will be searched in vain for a statement that Section 7629 was repealed by implication, and we think the omission of the court to so state is a significant fact. Section 7629, General Code, is a section conferring power on

school boards to issue bonds and corresponds with Section 3939, General Code, which is the section conferring upon municipal councils the power to issue bonds.

We think the point made by counsel for the village that there should be a clear distinction observed between the debt creating power conferred by statute and the limitations upon taxation provided by statute is well taken. This principle is ably discussed by the Supreme Court of Illinois in the case of *Coles Co.* v. *Goehring,* 209 Ill., 142, to which our attention has been called in the brief of counsel.

This case has been very fully and ably briefed by counsel on both sides with the whole history of the legislation touching every section involved set out in detail. We have examined these various enactments and given the subject the fullest attention possible. It does not seem that any useful purpose would be served by an extensive review of the various points to which our attention has been called. We will state only the conclusion at which we have arrived after a thorough consideration of the questions submitted and it is this: That Section 3939, General Code, in so far as it confers power upon the village council to issue these bonds, was not repealed by implication by Sections 5649-2, General Code, and the following sections upon the same subject, as shown by the latest amendments of these acts.

We think the evidence in the case shows that the legislation enacted by the village council with respect to this issue of bonds is in accord with the requirement of the Constitution with respect to the payment of the bonds by taxes to be levied and we see nothing to indicate that the village council may not cover the situation of payment without any violation of the statutory restrictions as to amounts that may be levied.

Repeals by implication not being favored, the claim of the plaintiff in this action that the provisions of Section 3939 are thus repealed can only be sustained if that section is found to be clearly repugnant to the later enactments of the Legislature. The provisions of Section 3939 are not necessarily in conflict with the later enactments of the Legislature with respect to the limi-

tation of tax levies. There may be many cases in which that power can be exercised by municipal councils without any violation of other statutes as to limitation.

We hold, therefore, that the village council of Edon is clothed with power to issue the bonds in question without a vote of the people and that the plaintiff is not entitled to the restraining order prayed for, and such will be the decree of the court.

RICHARDS, J., and CHITTENDEN, J., concur.

KNOWLEDGE AS TO THE CONDITION OF A FAILING BANK.

Court of Appeals for Hamilton County.

THE SECOND NATIONAL BANK OF CINCINNATI v. C. J. ENRIGHT AND THE SUPERINTENDENT OF BANKS OF THE STATE OF OHIO.*

Decided, July 12, 1915.

Banks and Banking—Check Deposited in a Failing Bank—Payment Stopped by Maker—Check Passes to Another Bank with Notice of Defective Title Against which all Defenses are Held Available.

A check on a Newport (Ky.) bank was deposited by E in the Metropolitan Bank of Cincinnati fifteen minutes before its doors were closed not again to be reopened. The check was turned over by the Metropolitan to the Second National, which credited the amount of the check on an overdraft of the Metropolitan. The president of the Second National had full knowledge of the condition of the Metropolitan. E stopped payment on the check, and the Second National sued him.

Held: That the Second National had notice of the defective title of the endorser of the check, and moreover did not take the check for value, but for collection, and its claim against the maker of the check fails on both grounds.

Jelke, Clark & Forchheimer, for plaintiff in error.

Cogan, Williams & Ragland and *H. A. Reeve,* contra.

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*Motion for an order directing the Court of Appeals to certify its record overruled by the Supreme Court October 9, 1915.

JONES (E. H.), J.

This action was brought in the common pleas court by the Second National Bank against C. J. Enright, on a check for two thousand dollars drawn by him on the Newport National Bank in favor of the Metropolitan Bank & Trust Company.

Mr. Enright deposited the check to his account in the latter bank on Saturday, September 16, 1911. At that time he had a balance in said bank to his credit of $433 and owed the bank nothing. The Newport bank was ordered by Mr. Enright not to pay the check, and payment was accordingly refused; hence this suit.

For a week or more before said day an inspector from the state banking department had been in daily conference with the officers of the Metropolitan National Bank which, on account of its impaired assets and irregular and illegal methods of business, was to be closed by the hand of the law, unless certain prescribed conditions were complied with. The time for compliance had been fixed. September 16th was Saturday, on which day of the week this bank and other similar institutions closed at noon. It had been decreed by lawfully constituted authority that the bank could not be reopened on Monday morning unless certain conditions and requirements be met. The bank officials failed to comply, and the doors were not again opened for business after noon of that day. It was 11:45 when Mr. Enright deposited his check with the teller of the bank, fifteen minutes before the bank ceased business for all time.

There probably was no design on the part of the bank or its employees to defraud Enright. But the acceptance of the check by this toppling, tottering bank at such time and under such circumstances was a fraud, and the title to the check thus secured was defective. 5 Cyc., 499; General Code, Section 8160.

On the afternoon of the day it was deposited, the check, together with other commercial paper, was deposited by the Metropolitan with the Second National Bank. On the following Monday morning the last named bank (plaintiff in this action) credited the Metropolitan Bank with $2,000 and applied same to the reduction of an overdraft of $9,000 shown to have existed against

the Metropolitan Bank at the close of business on Saturday the 16th. From this it is contended that plaintiff is a "holder in due course" as same is defined in Section 8157, General Code. This section provides that one is a "holder in due course" of an instrument when he takes "it in good faith and for value" and when "at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The evidence shows plainly that the plaintiff in error fails to meet these conditions and is therefore not a holder in due course. The condition of the Metropolitan Bank at the time it received the check was well known to Mr. Galbreath, president of the plaintiff bank, who had attended one meeting, if not more, where the condition of the bank was under discussion by its officers and Mr. Romer, representing the State Banking Department. And on September 18th, when the check was applied by plaintiff to the overdraft of the Metropolitan Bank, the latter concern had been seized by Romer on behalf of the state. This action closely followed a midnight meeting like the one above mentioned which, too, was attended by Galbreath.

These facts, it seems to us, dispose of the claim that the Second National Bank had "no notice of the defect in the title of the person negotiating" the check to it. We think the evidence establishes with equal clearness that plaintiff did not take the check "for value."

The cashier of the plaintiff bank testified that the check was received by it "for collection." This is strenuously denied by counsel for plaintiff, who contended that this evidence of their own witness is refuted by other evidence and all the circumstances of the transaction. While there may be some doubt as to the accuracy of the statement of the cashier when considered in connection with the relation between the two banks and the custom and practice prevailing between them as to similar deposits, yet we are inclined to the view that the cashier's testimony was correct, and that he truthfully could not have testified otherwise.

Under ordinary conditions and in the usual course of business we have every reason to believe that the Second National Bank

upon refusal of payment of a check received by it, as this Enright check was, would immediately upon report that the check was not honored by the bank upon which it was drawn, cancel any credit that might have been given the depositor of the check and charge same to his account.

We think, therefore, that the acceptance of the check and credit given the Metropolitan by plaintiff, were conditional. In other words, it was received "for collection" as the cashier said, and no such title vested in the plaintiff as is claimed in this case and as would entitle it to sue Enright thereon. The transfer of the check to the plaintiff was not, therefore, a negotiating of it but rather a bailment.

If, however, it was negotiated "for value," then plaintiff had notice of indorser's defective title, and took the check not "in due course," but subject to all the defenses which are available to Enright as against the original holder.

Upon the admitted or uncontroverted facts of the case the court below might well have instructed a verdict for defendant.

Its judgment will be affirmed.

JONES (Oliver B.), J., and GORMAN, J., concur.

INTEREST OF A LIFE TENANT IN A STOCK DIVIDEND.

Circuit Court of Summit County.

CHARLES B. RAYMOND, W. E. SLABAUGH AND MARY F. PERKINS, AS EXECUTORS OF THE WILL OF GEORGE F. PERKINS, DECEASED, v. MARY F. PERKINS ET AL.

Decided, December 2, 1912.

Wills—Construction of—Stock Dividends on Stock Belong to Remainderman.

1. Where a will gives the income from an estate to a certain person for life, a stock dividend issued upon certain stocks belonging to the estate is capital and not income and does not go to the life-tenant, but to the legatees in remainder.
2. A stock dividend does not increase the interests of the shareholders in the property of a corporation; it is only new evidence of their interests.

Francis Seiberling and *J. B. Huber*, for Mary F. Perkins and Mary P. Raymond.

A. H. Cummins, for L. D. Brown.

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

This action was begun in the court of common pleas by the plaintiffs, as executors of the will of George T. Perkins, deceased, to secure a construction of said will on the matters hereafter indicated.

The principal question submitted to the court relates to the disposition to be made under the will of $80,000 par value of preferred stock of the B. F. Goodrich Company, received by the executors in the form of a stock dividend on 4,000 shares of the common stock of said company held by them under the will.

George T. Perkins, the testator, was a resident of the city of Akron, Ohio. He died on the 8th day of September, 1910, leaving surviving him Mary F. Perkins, his widow, Mary B. Raymond, his daughter, and certain grandchildren, who are the children of Mary B. Raymond. By the terms of the will and a codicil thereto, both duly admitted to probate in the Probate Court of Summit County, Ohio, the widow became entitled to receive, dur-

ing her lifetime, the income on the "rest and residue" of the testator's property left after certain portions thereof were otherwise disposed of and, upon the widow's death, the daughter, if she survives her mother, is to receive such income during her lifetime. The words used in the will, descriptive of the income, are: "Use, profit and income;" and those used in the codicil are: "Income, profits and proceeds."

Upon the death of both the testator's widow and daughter provision is made for the disposition of the rest and residue of the testator's estate by dividing the same among the testator's grandchildren.

Included in the residuary estate are the four thousand shares of common stock of the B. F. Goodrich Company, of the par value of $100 per share, of which the stock dividend in question was received by the executors.

It appears from the agreed statement of facts before us that the B. F. Goodrich Company is a corporation, organized under the laws of Ohio in 1880 for the purpose of manufacturing rubber goods; that the company enjoyed great prosperity; that it has been the policy of the company since it was organized to use a large proportion of its earnings for increasing its plant and working capital and developing its business; that the surplus and profits of the company not used for cash dividends have been put into the business and from time to time stock dividends have been declared and charged against the surplus and profits; that the original capital stock was $100,000, which was increased by the sale of additional stock and the issuance of stock dividends so that in the year 1905 the authorized and outstanding capital stock was $5,000,000; that in 1906 the capital stock was increased to $10,000,000 and $5,000,000 thereof distributed among stockholders in the form of a stock dividend, out of the accumulated surplus and profits of the company; that in 1910 the capital stock was increased to $20,000,000, the increase of $10,000,000 being in cumulative preferred stock; that in October, 1910, a stock dividend of twenty per cent. was paid in the preferred stock of the company to the holders of common stock and charged against surplus profits; that in November, 1910, after the payment of this stock dividend, there remained to the company a

surplus and profit of $1,600,000; that on January 1st, 1912, the company had in its surplus and profit account $3,700,000; that on January 17, 1912, the company again declared a stock dividend of twenty per cent. upon its common stock, payable in preferred stock, and after the payment of $2,000,000 in this preferred stock dividend it still had remaining in its surplus and profit account $1,700,000.

Out of the stock dividend declared on January 17, 1912, the executors received on the common stock held by them $80,000 of preferred stock. It is this stock dividend that is in controversy in this action.

The question, therefore, presented to the court in construing the will is, whether the preferred stock dividend of January 17, 1912, or any part thereof, goes to the widow, Mary E. Perkins, one of the life tenants under the will, or whether such dividend belongs to the corpus of the trust estate and goes to the remaindermen.

In our opinion no part of this stock dividend belongs to the life tenant, but the whole should be treated as belonging to the corpus of the trust estate.

In the absence of bad faith, a corporation has power either to distribute its earnings among its stockholders, in the form of dividends, or to retain them and employ them in the conduct of the business as a part of its capital. Until distributed, such earnings are the property of the corporation and not of the stockholders.

The declaration and issuance of a stock dividend do not change the interest of stockholders in the corporate assets. Each stockholder has the same proportionate interest after the stock dividend is declared and paid, as before. As was said by Mr. Justice Grey in *Gibbons* v. *Mahon,* 136 U. S., 549:

"A stock dividend really takes nothing from the property of the corporation and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares and the proportional interest of each shareholder remains the same. The only change is in the evidence

which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones."

The testator must be deemed to have had in contemplation the power of the corporation to accumulate its earnings and employ them in the extension and improvement of its business. When he made provision in his will for the payment of the income on his investment in the stock of the B. F. Goodrich Company, his intention with respect to a stock dividend, such as is involved here, must be arrived at by considering that he acted with the lawful power of the corporation to appropriate its earnings to the enlargement of the business in mind.

The question before us has been considered in many other jurisdictions. There is great conflict in the views of the different courts which have considered the matter.

In the case of *Miller et al* v. *Miller et al,* arising in Cuyahoga county, and just decided by this court, we have considered some of these conflicting decisions and have discussed the principles involved. We therefore deem it unnecessary, in this opinion, to review the authorities, or to discuss at any considerable length the principle which we conceived should control in deciding the question before us.

The language in *Bryan* v. *Aikin,* 82 At. Rep., decided by the Court of Chancery of Delaware, April 1st, 1912, where the rule which we adopt here was approved, expresses our view. On page 823 in the opinion it is said:

"The rule here adopted has merit, not only as being concededly simple and direct, but represents a logical conclusion from established premises. It gives weight to the action of the company, because the corporation has the power to settle the premises upon which the question is to be decided. It avoids an investigation into the transactions of the company to determine the period within which the earnings were made and on numerous occasions it has been pointed out by courts which have rejected the apportionment rule of Pennsylvania that this is always troublesome, usually expensive, seldom satisfactory and sometimes practically impossible, as in the case of a foreign corporation. Of course, these references to some of the difficulties of adopting a rule as to apportionment according to when the earn-

ings were made in whole or part, during the life of the testator, or wholly or partly thereafter, do not apply in the case at bar, because it affirmatively appears that all the earnings represented by the stock dividend in question were made since the life tenancy began. Still, a plain, simple rule is sought, and one that is workable in all cases, to prevent controversies and to guide in the administration of other estates respecting other distributions of capitalized earnings. The rule has been criticized because it gives too much weight to the action of the corporation, but this is a necessary result of the character of the investment and of the necessary power of the corporation respecting the management of the assets of the company. The rule here adopted is clear, easily applied and logical, and as fair to present interests as the nature of the case will permit, in view of the corporate control of corporate property."

Another question propounded in the petition is whether the costs and expenses of a certain former suit brought to obtain a construction in certain respects of the will of the testator should be paid by the plaintiffs out of the income, profits and proceeds of the trust estate, or out of the body or corpus of the trust fund.

No argument has been devoted to this feature of the petition and we will devote no time to its consideration, beyond indicating that the same direction will be entered as to this matter that was given in the court of common pleas.

CONSTRUCTION OF AN INSURANCE POLICY OF THE FLOATING TYPE.

Circuit Court of Cuyahoga County.

THE GLOBE-RUTGERS FIRE INSURANCE COMPANY v. THE SHERWIN-WILLIAMS COMPANY.*

Decided, December, 1913.

Insurance—Policy to be Construed Liberally in Favor of Insured—Parol Evidence Admissible to Show Nature of Property and Situation and Relation of Parties.

1. Where two interpretations, each equally fair, may be given to the language used in an insurance policy, that which will give the greater indemnity to the insured must prevail.
2. Where the meaning of an insurance contract is doubtful, or capable of two meanings, parol evidence is admissible in the construction of the contract to show the nature and qualities of the subject-matter, the situation and relation of the parties, and all the surrounding circumstances, to aid the court in applying the language of the contract to the subject-matter.
3. Where a fire insurance policy of the floating type covered all merchandise of the assured "situated anywhere in the United States except while on premises occupied by the assured for manufacturing purposes"; *Held:* That the exception applied only to places where the actual work of manufacture was carried on and did not include raw materials stored in a building adjacent to, but separate from a manufacturing plant of the assured.

White, Johnson & Cannon, for plaintiff in error.
Squire, Sanders & Dempsey, contra.

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

This is an action to recover a fire loss and is founded upon a policy which insured "all buildings belonging to the assured, and all merchandise, consisting principally of paints, oils, varnishes, painters' supplies, including packages of and containing the same, empty and filled packages situated anywhere in the United

*Dismissed in the Supreme Court by consent of parties at the costs of the plaintiff in error.

States, except San Francisco and *while on premises occupied by the assured for manufacturing purposes.*

The assured, the Sherwin-Williams Company, owned and occupied a building on Merwin street, in Cleveland, which it used for the manufacture of paints. Adjacent thereto, but unconnected therewith, stood another building, the basement and first floor of which the assured leased and used as a storage house for pigments or materials, used by it in the manufacture of its various products in the adjoining and other buildings. The material so stored was destroyed by fire, and this action is prosecuted against the assurer, the Globe-Rutgers Fire Insurance Company, to recover for the loss. The principal question raised by the record is whether the property so destroyed is covered by the policy.

The answer to this question depends principally upon the construction given the words of the policy, "while on premises occupied by the assured for manufacturing purposes." Two questions, therefore, naturally arise out of this situation:

First. Was the property destroyed specifically covered by the policy; or, conversely, was it specifically excluded from the operation of the policy; and, *secondly,* Was parole evidence admissible for the purpose of showing the sense in which this provision of the policy was used by the parties?

In ascertaining the meaning of a policy of insurance, like any other contract, the language of the policy must first be regarded, and if it definitely fixes the location of the risk, the policy does not attach if the property is destroyed outside of the locality designated. The rule is that the language of the policy is first to be looked to and if by the well settled rule of construction the language is plain and unambiguous and the intention of the parties, as derived therefrom, is clear, it must control and extrinsic evidence is not admissible to affect its construction. *Wood on Insurance,* 122.

So, when the policy is specific as to the subject-matter of the risk, it can not be extended by implication, nor is evidence admissible to show that the parties intended to have it cover matters not specified or matters excluded. *Wood on Insurance,* 137.

It, however, is an invariable rule of construction and especially applicable to the construction of policies of insurance, that that construction should be taken which is most beneficial to the promisee.

"No rule," says Mr. Wood in Volume 1 of his work on insurance, at page 145, "in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to the indemnity, which, in taking the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. Indemnity is the real object and purpose of all insurance; that is what the insured bargains for and what the assurer intends to provide. The predominant intention of the parties in a contract of insurance is indemnity, and this is to be kept in view and favored in putting a construction upon the policy. Having indemnity for its object, the contract is to be construed liberally and it is presumably the intention of the insurer that the insured shall understand that in case of loss he is to be protected to the full extent which any fair interpretation will give. The spirit of the rule is that when two interpretations, equally fair, may be given, that which gives the greater indemnity shall prevail."

This doctrine is fully supported by the decisions of the Supreme Court of this state, as shown by the following cases: *Germania Life Ins. Co.* v. *Schild,* 69 O. S., 136; *Trustees* v. *Deposit Co.,* 76 O. S., 253; *Bryant* v. *American Bonding Co.,* 77 O. S., 99.

So where there are no ambiguities or uncertainties and no conflicting inferences to be drawn from the language of the policy, the construction is a question of law for the court. But no rule is better settled than that when the meaning of an insurance contract is doubtful, or capable of two meanings, parole evidence is admissible in the construction of the contract to define the nature and qualities of the subject-matter, the situation and relation of the parties and all the surrounding circumstances, in order that the court may put themselves in the place of the parties, see how the terms of the instrument affect the subject-matter, and

ascertain the signification which ought to be given to any phrase in the contract which is ambiguous or susceptible of more than one interpretation; and this, although the result of the evidence may be to contradict the usual meaning of terms and phrases used in the contract.

Illustrative of this doctrine, attention is called to the case of *Bradley* v. *The Washington, etc., Steam Packet Co.*, 13 Peters, 89. This was an action on the case by the defendant in error to recover for hire of the steamboat Franklin. The agreement of hiring grew out of the following paper:

"I agree to hire the steamboat Franklin until the steamboat Sidney is placed on the route, to commence tomorrow, 20th inst., at $35 per day clear of all expenses other than the wages of Captain Nevitt.

"W. A. Bradley.

"19 Nov., 1831."

and a written acceptance of the same signed by the president of the company.

The question was whether the plaintiff in error was bound to pay for the use of the Franklin during the term when the navigation of the Potomac was prevented by ice. Parole evidence was offered on his part and excluded and the defendant in error had judgment for the use of the boat during that period. The court reversed the judgment for this error and observed:

"Without attempting to do what others have said they were unable to accomplish, that is, to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result: that in giving effect to a written contract by applying it to its proper subject-matter, extrinsic evidence may be admitted to prove the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case.

"With this principle in view, we proceed to inquire whether the evidence offered by the defendant in this case ought to have been received by the court.

"Now, had the evidence been received, it would have disclosed the following state of facts: that the route mentioned in the contract was one on which the plaintiff in error transported passengers and also the mail; that the steamboat Sidney men-

tioned in the contract was designed to perform this service, and that the Franklin was wanted for the same purpose; that the Sidney was then at Baltimore for the purpose of being fitted with her engines and equipment; that although the transportation of passengers and the mail was carried on by the plaintiff in error in a steamboat whilst the river was open, yet when the river was closed by ice so that navigation was obstructed, the plaintiff in error then transported passengers and the mail one way overland to Fredericksburg; that when the river was thus obstructed, the plaintiff in error could not and did not use a steamboat and that all these facts were known to the defendant in error."

We think that this evidence ought to have been received because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties, and in the language of the rule which we have laid down, that the contract, without this aid, could not be applied to its proper subject-matter.

Chief Justice Shaw, in *Knight* v. *Worsted Co.*, 2 Cushing, 271, observes:

"In expounding a written contract, although parol evidence is not admissible to prove that other terms were agreed to which are not expressed in the writing, or that the parties had other intentions than those to be inferred from it, yet it is competent to offer parole evidence to prove facts and circumstances respecting the parties, the nature, quality and condition of the real and personal property which constitute the subject-matter respecting which it is made."

In *Noyes* v. *Canfield*, 27 Vt., 79, it appeared that the defendant had entered into a written agreement to transport the plaintiff's freight during the navigable season at a fixed price per ton. For the purpose of showing the meaning of this expression, as used by the parties, and that it was not intended to include hay, parol evidence was admitted to show the kind of property intended to be covered by the contract.

In another case a servant brought an action against his master for wrongful dismissal. The agreement of hiring was in writing. The defendant dismissed the plaintiff because he refused to fold lace on cards, as desired. The plaintiff offered to show by parole

that he was hired in the capacity of lace buyer, and that his refusal was therefore justifiable. The evidence was admitted, the writing being silent as to the capacity in which the servant was hired.

In *Tuttle* v. *Burgett's Admr.*, 53 O. S., 508, our own Supreme Court observed:

"There can be no doubt that in giving construction to a written instrument, regard may be had to the situation of the parties and the surrounding circumstances, and this may be shown by parol to enable the court, called on to interpret the instrument, the better to understand its terms and arrive at the intention of the parties, when not clearly expressed."

These and many other cases substantiate and illustrate the rule that conversations and acts of the parties to a contract at and about the time of the making of the contract are admissible in evidence to show what sense the parties attached to any term or phrase used in the contract, which is in itself susceptible of more than one interpretation, or which, viewed in the light of the evidence explanatory of the subject-matter, the relation of the parties and the surrounding circumstances may reasonably be susceptible of more than one interpretation

Further, in interpreting the provisions of a contract the meaning of which is doubtful, or which admit of two meanings, it is said in the case of *The Manhattan Life Insurance Co.* v. *Wright*, 126 Fed. Rep., 82, that the "practical interpretation given to their contracts by the parties to them while they are engaged in their performance and before any controversy has arisen concerning them, is one of the best indications of their true intent. The courts that adopt and enforce such a construction are not likely to commit serious error." And the doctrine of this case is amply supported by the authorities in Ohio. *Mosier* v. *Parry*, 60 O. S., 388, 389, *Kling, Admr.*, v. *Bordner*, 65 O. S., 103; *Kinney, Assignee*, v. *Commissioners*, 8 O. C. C., 433; *M. E. Church* v. *Water Co.*, 20 O. C. C., 578; *Braddock* v. *Boner*, 29 O. C. C., 300.

The policy on which this action is founded was of the floating type and was intended to cover the warehouses and their contents, of the assured, wherever located in the United States and Canada,

San Francisco excepted, and sought to exclude from the operation of the policy property on premises occupied by the assured for manufacturing purposes. The parties therefore obviously intended to include within the meaning of the policy certain property, and to exclude other property. The property they sought to exclude was property located on "premises occupied by the assured for manufacturing purposes," presumably because of the more hazardous risk thereby assumed.

Was property stored as this property was stored, on "premises occupied by the assured for manufacturing purposes" within the meaning of the terms of the policy? If so, it is difficult to see how the policy covered any property at all. Ordinarily the phrase "premises occupied by the assured for manufacturing purposes," would include not only the premises where the actual work of manufacture is carried on, but it would include the place where the raw material used in the manufacture is stored, and the "usual and necessary appliances for storing, measuring, weighing, packing and delivering the manufactured article after the process of manufacture is completed." *Memphis Gas Light Co.* v. *State,* 46 Tenn., 310.

If this meaning were to be given to the phrase "while on premises occupied by the assured for manufacturing purposes" as used in this policy, it would exclude from the operation of the policy all property stored in the warehouses of the assured, and clearly this policy was intended to cover such risk.

Manifestly this was not the intention of the parties. What, then, was the intention of the parties, and what property was intended to be covered by the policy?

The language of the policy in this regard is obviously ambiguous, at least it is reasonably susceptible of more than one interpretation. A strict construction of its terms would doubtless exclude the operation of the policy from the property which the parties themselves intended that it should cover. Where, then, shall we look to ascertain the intention of the parties? Under the rules of law above stated, it is proper that we should look for that intention and the sense in which the language of the policy was used by the parties, to the conversations and acts of the parties to the contract at or about the time of the making of

the contract, to the interpretation given the terms of the contract by the parties themselves before any controversy had arisen over it, the subject-matter of the contract, the relation of the parties and the circumstances surrounding the making of the contract.

We are of the opinion, therefore, that the trial court properly admitted evidence tending to show these facts, and that in doing so, no error was committed.

We find nothing in the record which, in our opinion, would justify the disturbance of the judgment of the court below, and the same is therefore affirmed.

NEGLIGENCE OF DEFENDANT WHERE OTHER AGENCIES OPERATED IN CONNECTION THEREWITH.

Circuit Court of Cuyahoga County.

THE SMEED BOX COMPANY v. ELIZABETH LAWSON AND THE CLEVELAND RAILWAY COMPANY.

Decided, November 18, 1912.

Trials—Torts—Amendments to Make Petition Conform to Proof—Recovery may be had Against One where Two are Sued for Joint Tort—Defendant Liable for Negligence Though Other Causes Contribute to the Injury.

1. The allowing of amendments to a petition to make it conform to the proof rests in the sound discretion of the court, and, where it does not appear that the defendant was taken by surprise, or that he was unprepared to meet the issue tendered by the amendment, he is not prejudiced thereby.
2. Where two or more are sued and a joint tort is alleged, a recovery may be had against one of the defendants only.
3. An action for injuries resulting from defendant's negligence is not defeated by the fact that other agencies operated in concurrence with defendant's negligence to put the forces in motion which resulted in plaintiff's injuries.

Guthery & Guthery, for plaintiff in error.

H. F. Payer and *Squire, Sanders & Dempsey*, contra.

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

Elizabeth Lawson brought suit against the Smeed Box Company and the Cleveland Railway Company, and recovered a judgment against the Smeed Box Company. The railway company was dismissed from the case by order of the trial court, and no claim of error is made here because of such order, as between Elizabeth Lawson, who will be spoken of in this opinion as "the plaintiff" and the Smeed Box Company, which will be spoken of as "the defendant."

The action was brought to recover for injuries which the plaintiff claimed to have received on the 5th day of June, 1911, while she was riding as a passenger on a car of the Cleveland Railway Company, a corporation, in the city of Cleveland.

In her petition she says that the defendant, the Smeed Box Company, is a corporation, and she charges, as against it, that one of its delivery wagons was in charge of one of its servants, who negligently drove the horse attached to said wagon in such wise that it collided with the car in which she was riding, breaking in the side of the car at her back and thereby causing serious injury and great pain to her.

To this petition the defendant answered admitting that the railway company operated cars in the city of Cleveland, and that on the 5th day of June, 1911, one of its wagons, in charge of one of its servants, was being driven in the prosecution of its business, upon the streets of the city of Cleveland; that it is a corporation and that the Cleveland Railway Company is a corporation, and denying every other allegation of the petition.

In this state of the pleadings the case went to trial and it was shown that on the day named there was a collision between the wagon of the defendant and a car of the railway company on Prospect avenue, in the city of Cleveland; that the plaintiff was a passenger on such car at the time of the collision; that the force of the collision was such that the side of the car, immediately at plaintiff's back, was crushed in to some extent and the windows broken; that the seats of the car ran lengthwise along the side of the car, so that plaintiff's back was against the side of the car.

It was admitted by the defendant that Prospect avenue, at the place where this collision occurred, is a down-town section of

the city and is much used and traveled, a busy section of the city. The evidence certainly tended to show that the plaintiff was injured by this collision; indeed, there could be no doubt from the evidence that she was injured to some extent, at least.

The driver of the horse testified that he was driving to the west; that his wagon for the carrying of boxes had sides extending out in a slanting manner above the wheels and beyond the wheels; that the sides extended out between two and three feet; that it was about twenty feet long; that the distance between the wagon and the car, if they had met while his wheels were in the track, would have been 6.9 inches.

The car was going to the east, not traveling fast; that he was driving to the west with the wheels of his wagon in the north track of the street railway company. There were automobiles and other vehicles in the street at the sides. As he was approaching the car, which was coming toward him from the west, his horse shied or jumped toward the south, that is, toward the track on which the car was approaching him, thereby taking his wheels out of the car track and causing the collision.

Being asked to tell just what happened when the horse jumped, he says:

"Well, no more than the exhaust came out of that automobile then he jumped into that car."

On cross-examination he said that the automobile, of which he spoke, was twenty or thirty feet away, and when they started to crank it the horse jumped over towards the street car. Then this cross-examination continued in these words:

"Q. You mean a lot of smoke came up behind the car? A. Yes.

"Q. Was there any noise? A. Just like a bullet some of them cars make.

"Q. Was it as loud as a shot gun? A. It couldn't have been quite that loud.

"Q. But there was a loud report when the auto started up? A. Yes.

"Q. But there was a cloud of blue smoke came up when the auto started? A. It went down, it didn't go up."

He says, further, he was driving toward the auto and it was standing at the curb. Clearly what he meant is that the auto was at the curb and was further west than he was.

Attention is called to this evidence, because it is urged that from this it clearly appears that the proximate cause of the accident was this noise made by the auto, and that if such is the case, the defendant can not be held liable, even if there were negligence on its part. Something will be said on this point later in this opinion.

During the introduction of the plaintiff's evidence in chief questions were asked by counsel for plaintiff as to what the characteristics of the horse, driven by defendant's servant at the time of the accident was, as to being accustomed to shy and scare at things in the street. These questions were permitted to be answered over the objection of the defendant. At this time there was no allegation in the petition as to such characteristics of the horse. In answer to these questions answers were given tending to show that the horse was what is called "scary," easily frightened and likely to shy and jump at objects frequently met with in the city streets; that in addition to being "scary" there were sores on his back and shoulders, tending to irritate him and make him more untractable than he otherwise would have been.

At the close of the plaintiff's evidence she was allowed, over the objection of the defendant, to file an amended petition instanter. This amendment added to the original charge of negligence the following:

"That the said the Smeed Box Company recklessly and negligently provided for its said employee a horse aforesaid that was vicious, unmanageable, ungovernable, uncontrollable, and liable to shy in the presence of automobiles, papers and objects of whatsoever description."

The defendant then asked leave to refile the original answer, which leave was granted. The defendant then moved the court to direct a verdict in its favor, which was overruled and the defendant, without any suggestion of being taken by surprise by the admission of the evidence as to the horse, or as to the case

made in the amended petition, proceeded to introduce evidence on its part.

The action of the court in allowing the amendment is fully justified by Section 11363, General Code, which provides that the court may, before or after judgment, allow a pleading to be amended conforming the pleading to the facts proved. The allowing of amendments to pleadings is in the sound discretion of the court and where it does not appear that the defendant was taken by surprise or was unprepared to meet the issue tendered by an amendment, there can be no prejudice (*Traction Co.* v. *George,* 13 C.C.[N.S.], 209). On this subject generally see *Clark* v. *Clark,* 20 O. S., 128, and other cases cited in note to the code section above referred to.

Earlier in this opinion attention was called to the claim made by the defendant that if the plaintiff was injured from an act to which the noise made by the automobile directly contributed, there could be no recovery against the defendant in this action.

In support of this our attention is called to *Billman* v. *R. R. Co.,* 76 Indiana, 166. This case simply holds that a petition which states that where by the reckless and careless manner in which a locomotive and train of cars are handled, a team of horses is caused to run away and injure a party not connected with the team, the railway company is liable. To the same effect is *McDonald* v. *Snelling,* 96 Mass., 290.

There is no suggestion in any of the cases cited on this proposition that there may not be concurring negligence on the part of the owner of the team. Suppose a locomotive engineer carelessly and negligently sounds the whistle of his engine and thereby causes a horse to run away and injure an innocent onlooker, and suppose the horse which thus runs away was left standing unhitched near a railroad, where trains were likely to pass, can it be doubted that both the owner of the horse and the railroad company might be liable?

It is further urged that as the petition charged both the railway company and the defendant with negligence concurring to cause the injury, that no recovery could be had against one unless the negligence of both were established. In support of this attention is called to *Railway Co.* v. *Eggman,* 71 Ill. App., 42,

and *St. Louis, etc., Co.* v. *Hopkins,* 100 Ill. App., 567. Both of these cases and other Illinois cases seem to support the proposition claimed. The same proposition is stated in *Weist* v. *Traction Co.,* 200 Pa. St., 14, and in other Pennsylvania cases, the court citing the Illinois cases in support of the proposition.

This, however, is not the general rule. *Cooley on Torts,* Vol. 1, page 156, says:

"Though two or more are sued and a joint tort alleged, the general rule is that a recovery may be had against one only, but a different rule is held in Pennsylvania."

It is sufficient to say that the rule in Ohio is that stated as the general rule by Cooley. *Mead* v. *McGray,* 19 O. S., 55; *Reugler* v. *Lilly,* 26 O. S., 48.

The defendant requested the court to give in charge to the jury seven separate propositions. There was no request, however, that any of these be given before the argument of the case.

Of these propositions the court refused the first four, and gave to the jury the remaining three. For reasons given in the discussion of the last two questions, hereinbefore discussed, the court was justified in refusing the first four requests.

The charge as given, including the three propositions given at the defendant's request, submitted the case to the jury as favorably for the defendant as it was entitled to have it submitted. There was no error to the prejudice of the defendant in the charge as given, or in the refusal to charge as requested. There was no error to the prejudice of the defendant in any admission or rejection of evidence, or in permitting the petition to be amended as hereinbefore set forth.

Within the time fixed by law the defendant filed its motion for a new trial, which was overruled. One of the grounds for the motion raised the question of the sufficiency of the evidence.

We are of opinion that the jury might well have found that the defendant was negligent both in furnishing the horse and in the manner in which the driving was done. Certainly it is a long way from being manifest that the jury came to a wrong conclusion as to the negligence of the defendant. Happily this is one of the few negligence cases where the plaintiff is not charged with any negligence, either causing or contributing to

the injury which she received, nor do we think, under the evidence, the damages allowed were excessive.

Another ground stated in the motion for new trial was that of newly discovered evidence. In support of this ground, the affidavits of two medical men were filed, to-wit, Dr. Walter H. Rieger and Dr. W. F. Hribal, and affidavits of attorneys as to how defendant's counsel had learned of these witnesses and what they knew of the case.

On this ground of the motion, this may be said:

First. It appears that both medical men were passengers in that car with the plaintiff when she was injured, and it would seem as though, by diligence, their testimony might have been produced at the trial.

Second. It nowhere appears that the affidavits attached to the bill constitute all the evidence offered on the motion.

Third. The statements made in the affidavits of the medical men are not sufficient to sustain the motion.

This motion was properly overruled, and the judgment is affirmed.

PAROL EVIDENCE IN INTERPRETATION OF A CONTRACT.

Circuit Court of Cuyahoga County.

THE BAKER MOTOR VEHICLE CO. v. ALBERT H. PRICE AND WALTER D. PRICE.

Decided, December 23, 1912.

Parol Evidence—When Conversation Preceding the Making of a Written Contract Admissible.

Where words in a written contract are susceptible of more than one meaning and are open to more than one reasonable construction, depending upon the sense in which they were used by the parties, parol evidence of conversations preceding the making of the contract, which neither alter nor add to the written contract, but merely enable the court to ascertain the subject-matter referred to therein, are admissible in evidence.

H. H. & M. B. Johnson, for plaintiff in error.
Kline, Tolles & Morley, contra.

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

Albert H. Price and Walter D. Price, partners trading in the firm name and style of Price Brothers, on or about the 22d day of May, 1905, entered into a contract with the Baker Motor Vehicle Company, as its agents for the sale of its products in the city of Cleveland. The contract provided that it should continue in force and operation for the period of five years from its date, unless dissolved as stipulated therein.

The contract provided several methods of terminating its operation, one of which gave either party the right to terminate it upon giving four months' notice, in writing, to the other party. The contract further provided that "in the event of this contract being severed by any of the clauses named therein, the Baker Motor Vehicle Company is to purchase the *new stock* of machines and parts on hand at invoice prices, and such machinery as they may have purchased specially for the conduct of this business, at a fair valuation."

Price Brothers, in the exercise of their right under the contract, terminated it by giving four months' notice, in writing, to the Baker Company, and the Baker Company thereby became obligated to purchase the new stock of machines and parts on hand at invoice prices, and such machinery as they had purchased specially for the conduct of the business, at its fair valuation.

The principal question, therefore, involved in this controversy relates to the meaning of the phrase, "new stock of machines." Price Brothers claim that the phrase was intended to include all unused machines of the Baker Company manufacture which they had on hand, without regard to how long the same had been on hand. On the other hand, the Baker Company contends that the phrase "new stock" referred only to machines of the current year which the plaintiff had on hand when the contract was terminated. No dispute was raised as to the correctness of the amount of the claim of the plaintiff in the court below, the only question being their right to recover for new machines which

they had on hand other than those of the current year, or the year in which the contract was terminated.

At the trial of the case evidence was admitted of conversations had prior to the making of the contract, which tended to show the sense in which the parties intended to use the phrase "new stock." It is contended by the Baker Company that this evidence was incompetent and should have been excluded. This leads us to a brief consideration of what is known as the parol evidence rule.

Evidence, of course, may not be received to vary, modify or contradict the terms of a written contract. This evidence, however, was not offered for that purpose, but rather to show the meaning which the parties themselves attached to the phrase "new stock" for the purpose of arriving at the intention of the parties at the time of making the contract.

The rule has frequently been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidence, except that which is furnished by the writing itself. It is obvious, however, that in numerous cases much greater latitude has been given to the introduction of parol evidence that is implied in this statement. All the authorities recognize the general rule, of course, that the written contract must govern, and that proof of the acts, situation and statements of the parties can have no other effect than to ascertain the meaning of the parties as expressed in the writing. Where the language of the writing is clear and unambiguous there is no room for construction and the language of the instrument will control; but where the language of the writing reasonably admits of more than one construction, the rule is otherwise. In such case parol evidence may be offered to show the sense in which the language was used by the parties themselves, in order that the true intention of the parties may be ascertained and not to vary, modify or contradict the terms of the contract, but rather to give force and effect to it.

Mr. Jones, in his work on Evidence, Section 456, says:

"The real difficulty arises in determining in each case whether the language of the instrument is ambiguous, as shown either by the context or by the circumstances attending the making of the same. If no such ambiguity exists, evidence can not be received

to show the secret intention of the parties, or that other than the natural and primary meaning of the language used was intended."

The first question, therefore, to be determined is whether the language of the contract, on a construction of which this case depends, is ambiguous or reasonably open to more than one construction. Ordinarily the meaning of the words "new stock," in a contract like the one before us, would be plain. It is only by reason of the circumstances attending the making of the contract that any uncertainty arises in this instance. It is claimed by the Baker Company on the one hand that the term "new stock" had a definite trade meaning, which confined the words to the stock or model of the current year. On the other hand, Price Brothers sought to offer evidence of conversations had between the parties at or about the time of the making of the contract, tending to show that the parties intended the words to include all new machines of the Baker Company manufacture, which they had on hand at the time of the termination of the contract.

In this situation the words "new stock" are clearly susceptible of more than one meaning, and are open to more than one reasonable construction, depending upon the sense in which they are used by the parties.

The object, therefore, in admitting the evidence complained of, to use the language of the Supreme Court of this state in another case, was not to vary, but to develop the meaning of the contract, by ascertaining the sense in which the words were intended to be used.

In *Quarry Co.* v. *Clements,* 38 O. S., 591, the court approvingly quotes Lord Campbell as follows:

"There can not be the slightest objection to the admission of evidence of previous conversations, which neither alters nor adds to the written contract, but merely enables us to ascertain what was the subject-matter referred to therein."

In the case which Lord Campbell had under consideration the subject-matter was shown by extrinsic evidence to be uncer-

tain, and oral evidence was admitted to fix and ascertain the meaning of the term "your wool."

So, the subject-matter of the case which we now have under consideration, as shown by the circumstances of the transaction, is uncertain, and because of this uncertainty its meaning is in dispute. It must therefore follow that parol evidence was admissible at the trial to show in what sense the words "new stock" were used in the written contract. This does not tend to vary the terms of the writing. "It simply enables the court to ascertain what its terms mean and to construe and enforce it as the parties intended."

In our opinion no error was committed in admitting evidence of this character.

There being no error in the admission of evidence to show the sense in which the parties used the term under consideration, there, of course, was no error in submitting the question to the jury.

The judgment of the court below is therefore affirmed.

WHEN A MASTER'S NEGLIGENCE IS A QUESTION FOR THE JURY.

Circuit Court of Cuyahoga County.

THE OHIO & WESTERN PENNSYLVANIA DOCK COMPANY v. ISAAC TRAPNELL.

Decided, December 23, 1912.

Negligence—Failure to Provide Proper Means of Communication Between Operatives and Those Working Around Machinery—Evidence—All Circumstances Attendant Upon an Accident Admissible—Qualification of Expert Preliminary Question for Court.

1. Where an engineer whose duty it is to oil machinery is not provided with any means of keeping the machinery stationary while oiling it, nor with speaking tubes, telephones or other means of communication with those in another room who control the machinery, and no rules are promulgated relative to such communication, and the engineer is injured while oiling a machine, whose operator to his knowledge had left the premises, but which was started by the operator of another machine; the question of whether or not the employer was negligent in failing to provide proper means of communication between the engine room and the operating room and in failing to formulate reasonable rules to protect the engineers against the starting of the machinery, is for the jury.
2. The master's negligence is a question for the jury, whenever it is warrantable to infer from the evidence that the injury would not have been received if a certain instrumentality or method had been substituted for that actually adopted by the defendant, and that this alternative instrumentality or method was one commonly used by other employers in the same line of business under similar circumstances.
3. It is not prejudicial error in a personal injury case to admit evidence of all the circumstances attendant upon the accident even though it does not tend to prove any fact in issue and presents a gruesome detail of the accident to the jury.
4. The competency of a witness to qualify as an expert is a preliminary question for the trial court and rests in the discretion of the court, and, unless founded on some error of law or on serious mistake, or abuse of discretion, the ruling is not reversible.
5. The fact that the party calling a witness did not examine him as to a usage or custom which would be material to the case on trial, does not preclude the other party from cross-examining him as to the existence of such usage or custom.

Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff in error.

Ewing, Counts & Terrel and *Harry F. Payer,* contra.

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

Error is prosecuted in this court to reverse the judgment of the court of common pleas in this case.

At the time of the injury complained of in the petition filed in this case, Isaac Trapnell was employed by the Ohio & Western Pennsylvania Dock Company as an engineer at what was known as No. 3 Engine and Hoist House, located on the company's docks on Whiskey Island, in the city of Cleveland. The engine room where Trapnell was employed at the time of the accident complained of, was separated from the hoist room where the operators of the engines were stationed. The engine room was on the ground floor, and contained three engines, called the single pier, middle pier and blind pier engines. The hoist room was located immediately above the engine room and separated from it by a distance of about twenty-five feet.

Trapnell, the engineer, had nothing to do with operating the machines. His duty consisted principally in oiling the machinery in the engine room and in keeping up steam. The engines were operated by separate operators, one for each machine, from the hoist house.

At the time of the accident only one of the machines was in operation; one of the others had been in operation but was stopped for repairs. The control of the engines was effected by means of rods running from the machinery in the engine room to the hoist house, where they were connected with levers. There were three of these levers for each machine. One of them is described in the record as "a foot brake, or foot pedal, four feet long. By pressing it down and fastening it with a pin put through a U-shaped iron, the machinery is held stationary until released."

This lever connects with the brake on the drum of the machine and when set as described above prevents the drum from turning.

Another lever is described as a hand lever, by means of which the friction gear is brought into play and the drum made to revolve.

The third lever opens and closes the steam throttle. All these levers are necessary in the operation of the machines.

On the 26th of November, 1910, the day of the accident, an operator by the name of Norton was put to work in the hoist house on what was called the single pier engine, and a man by the name of Crabowsky was put to work on the middle pier engine.

Just before the accident Grabowsky stopped the middle pier engine and left the hoist house by means of a ladder, to go to the machine shop some 600 feet away. As he descended the ladder he saw Trapnell and told him that he had broken down and that he was going to the machine shap and would return shortly, to which Trapnell said all right. Before leaving the hoist room, however, Grabowsky adjusted the drum brake by pinning it down, as above described, so that the drum would be held stationary. Grabowsky also closed the throttle of his engine and threw the friction gear out.

It was a part of Trapnell's duty to keep the drum oiled. He was in the habit of doing this two or three times a day. He says that he oiled the drum "whenever he got a chance," or when the "operator was not working." Originally the machines were oiled by means of a pipe about two feet long running through the meshes of the gear wheel into the hub, and the oil was poured into this pipe from outside the gear wheel. The pipe was taken off later and a hand oil cup, called a "dope cup," was installed instead. To reach this cup, as was necessary in refilling it or in screwing it down so as to give the required amount of oil or grease to the part oiled by it, it was necessary to put one's hand in between the spider or crab and the gear. The machine being shut down and the operator thereof having left the hoist house, Trapnell considered it an opportune time to adjust the dope cup. He saw that the brake was on and he himself shut off the steam, and, he says, "everything was fixed stationary." He then put his arm in between the spider or crab and the gear "to screw the dope cup down." At that moment Norton, who was oper-

ating the single pier engine in the hoist house above, "noticed that the counter-weight on the middle pier engine (the engine that Grabowsky had been operating) was in his way and obscured his view of the men shoveling below." He thereupon left his own levers, momentarily, and released the brake on Grabowsky's engine, as, he says, "by pulling out the pin and letting up the brake with his foot." The brake of the drum having been released the counter-weight caused the drum to revolve and Trapnell's left arm being caught between the crab and gear, was cut off. The severed portion was found, a few moments later, by Grabowsky inside the drum, "down by the dope cup at the end of the drum next to the gear-wheel."

The evidence disclosed that neither speaking tubes, telephones nor other means of communication had been provided between the engine room and the hoist house. Also that no rules had been made and promulgated by the defendant as to the method of communication between the engineer and the operators; also that no means had been provided, which were within the control of the engineer, of holding the machinery stationary while it was being oiled.

The plaintiff relied principally upon these facts and the facts surrounding the removal of the grease pipe, formerly in use, and the installation and maintenance of the dope cup instead thereof, in the manner described by the evidence, to support his claim of negligence against the defendant.

The court submitted all of these claims to the jury, to which the defendant takes exception, "not by virtue of the things said in the charge upon the given subject-matters," to use the language of the defendant's counsel, "but rather because the jury should have been told that these subject-matters were not at all for their consideration, because under the evidence in the case there was nothing to warrant the court in submitting any such subject-matters to the jury."

Specifically, counsel for the defendant object to the charge of the court, first, that the court charged the jury on the subject of defendant's failure to provide a means of direct communication between the plaintiff and the hoisters in the house above him. They say:

"It was alleged as a specific ground of negligence in the petition that the defendant failed to provide a means of direct communication between the plaintiff and the hoisters in the hoist room above him. Under the evidence this failure was not at all a proximate or contributing cause of the injuries which he received and for the very simple and all-sufficient reason that the evidence, as has been pointed out, clearly shows that plaintiff would not have used any device which had been installed."

In answer to this contention it might be observed that the issues in a case ordinarily are made up by the pleadings, as they were in this case, and in this respect we find nothing in the evidence which changed them at the trial. It is true that the evidence showed that the plaintiff was in the habit of rapping with a monkey wrench, or other instrument, on the iron rods running from the engine room to the hoist house, whenever anything was wrong with any one of the engines, or when for any reason he wanted an engine stopped, and he admits that at the time of the accident he did not rap on the rods, but gave as his reason for not doing so, that he knew that the machine on which he was afterwards hurt was stopped, and that its operator, Grabowsky, had left the hoist house.

Counsel for the defendant urge that these facts "clearly show that the plaintiff would not have used any device had it been installed."

In our opinion this does not necessarily follow from these facts. Had some means of communication been provided by the defendant, the plaintiff may have used it and he may not have done so; but had the defendant, in addition to providing such means of communication, made some reasonable rule as to its use by the engineers before attempting to work about the machinery, it is entirely probable that the plaintiff would have obeyed the rule. In any event, it is not so much a question, in our opinion, of what the plaintiff would have done under different conditions, as it is what the defendant should have done for his protection under present conditions. Certainly it can not be said, as a matter of law, that the plaintiff would not have used the means of communication or the rule prescribed as to the use thereof, had such been provided. The question, therefore, was properly submitted to the jury.

Second. Counsel for the defendant urge that the claim of negligence made by the plaintiff, that the "defendant failed to make and formulate reasonable, necessary and proper rules for protecting the plaintiff against the starting up of the machinery," had no place in the case, and that an instruction to the jury by the court thereon was erroneous.

This claim of the defendant is based, not upon the ground that the charge of the court on this subject was erroneous had it been given in a proper case, but that no instruction whatever should have been given on the subject in this case. They base this contention upon the fact that since the 80's the system of rapping upon the pipes "was in vogue and in full use upon that dock."

The fallacy of this contention is readily seen. In the first place, the origin of the system of signalling by rapping is not disclosed by the record. It may have originated under instructions from the defendant and it may have been the invention of the defendant's employees themselves, for their protection. But suppose this method of signalling was adopted and its use directed by the defendant and amounted to a rule for the guidance of the defendant's employees in working about the machinery and had been used by the defendant's employees, as claimed by defendant's counsel, since the 80's, the question of whether such rule, even if it amounted to a rule in law, was a reasonable and proper rule under the circumstances of this case, would still be open, and its submission to the jury under the evidence of this case was proper.

Third. The plaintiff's petition alleged that the defendant failed to use ordinary care in furnishing machinery with a proper oiling device. The court submitted this question to the jury for its determination.

Counsel for the defendant do not contend that the language of the court in submitting this question was improper or erroneous, but claim that the jury was not warranted in finding against the defendant on this proposition.

For anything that the record or the verdict discloses, which has come to our attention, we do not know that the jury found against the defendant on this proposition alone. The jury may have found that the negligence consisted in the failure of the de-

fendant to provide reasonably adequate means of communication between the engine room and the hoist house, or in the failure of the defendant to prescribe reasonable rules and regulations as to the method of communication between the engine room and the hoist house, or that it failed to provide the means of holding the machinery stationary while its employees were working upon it, or that it failed to use ordinary care in furnishing machinery with a proper oiling device, or based their verdict on a combination of these.

We are not unaware, of course, that counsel for the defendant claim that the subject of direct communication and the subject of rules had no place in the case, and that the jury should have been so instructed. In their brief, however, they substantially admit that if these subjects were properly submitted to the jury, there is nothing in the contention made under this heading. Having arrived at the conclusions as to these subjects above stated, we do not believe this contention is well founded.

Counsel for the defendant contend that the court erred at the trial in admitting certain evidence. First, that the court erred in permitting the witness Grabowsky to testify that while he was returning from the machine shop to his place of work, he met Trapnell being escorted away by some men, and that he continued on over to the engine room where he found the plaintiff's arm inside the drum.

Objection was made to this testimony on the ground that it did not tend to prove anything in issue in the case, and only served to present a gruesome picture to the jury to the prejudice of the defendant.

The story of the loss of the plaintiff's arm had already been told and we doubt whether the additional statement as to the finding of the severed arm in the drum heightened the color of the picture thus made in the eyes of the jurors; but whether it did or not, and although it might as well have been omitted, the fact so testified to was one of the facts of the transaction in which Trapnell lost his arm and was inseparably connected with it. We know of no rule which makes its admission erroneous, even under an admission by the defendant of the loss of the arm. We think the plaintiff had an undoubted right, at least, to show

all the facts and circumstances attendant upon the accident, and that in admitting this item of evidence the defendant was not prejudiced thereby.

It was also urged at the trial by the defendant that the witnesses Tomilty and Trapnell, Jr., a son of the plaintiff, had not qualified so as to be competent to give testimony on the subject of usage and customs as they relate to devices for holding in a stationary position the drum of a hoisting machine while working about the same.

"When a witness is offered as an expert, it becomes a preliminary question for the court to determine whether he has the requisite qualifications, and for the purpose of determining this question, the witness himself may be examined as to his opportunities and means of knowledge of the subject under inquiry.

"In determining the question in any given case, the court has first to decide whether the subject is one upon which the opinion of an expert can be received, and also what are the qualifications necessary to entitle the witness to testify as an expert. It is the prevailing rule that the decision of the trial court as to the competency of the expert, is a preliminary question resting in the discretion of the court and unless founded on some error of law or on serious mistake, or abuse of discretion, this ruling is not reversible." *Jones on Evidence*, Section 369 (371).

These objections, therefore, seem not to be well taken.

Defendants also objected that the witness Spooner, who was called by the defendant, was permitted to testify on cross-examination concerning the installation of speaking tubes on hoisting machinery as a means of communication between engineers and hoisters at various places where such machinery is used.

Counsel in their brief say that "the only thing that this evidence proved was that such devices could be installed." If it proved this much, it would at least seem not to have been erroneously admitted; but it seems to us it was clearly admissible on other grounds.

It must be remembered that the witness Spooner was being cross-examined. His cross-examination was not limited by his examination in chief. It is the settled rule of this state that "the right of cross-examination is not to be limited by the particular facts disclosed in the examination in chief, but may be extended

to whatever the party calling the witness is required to establish to make out and sustain his cause of action or his defense. Thus, a witness of the plaintiff may be cross-examined by the defendant touching all matters which it is competent for the plaintiff to prove under the issue in order to entitle him to recover, and on the other hand, the plaintiff may cross-examine the defendant's witness to all matters which the defendant may prove under the issue in order to sustain his defense." *Legg* v. *Drake,* 1 O. S., 286; *Bean* v. *Green,* 33 O. S., 144.

In cross-examining Spooner, therefore, counsel for the plaintiff were not limited by the facts disclosed in his examination in chief. They also had a right to cross-examine him as to all matters which the defendant might have proved by him under the issues made by the pleadings.

In this view of the question, it is important to remember that the defendant may have shown that it conformed to the general usage on the subject-matter prevailing among prudent and skilful employers and in well regulated concerns. *1 Labatt on Master and Servant,* Section 44, *et seq.*

The fact, therefore, that the defendant did not examine the witness as to usage did not preclude the plaintiff from examining him on that subject. Besides, it is said in *Allison Mfg. Co.* v. *McCormick,* 118 Pa., 519, that "the general rule requires of the master that he provide materials and implements for the use of his servants such as are ordinarily used by persons in the same business."

Whether or not this be the prevailing doctrine is unimportant. Suffice it to say that it is supported by numerous authorities of great weight.

Labatt, in his work on Master and Servant, Volume 1, Section 52, says:

"The master's negligence is a question for the jury, whenever it is warrantable to infer from the evidence that the injury would not have been received if a certain instrumentality or method had been substituted for that actually adopted by the defendant, and that this alternative instrumentality or method was one commonly used by other employers in the same line of business under similar circumstances."

This rule is applied both by the courts which do and by the courts which do not accept the doctrine that conformity to common usage is a conclusive defense.

In the same action the author observes that no declaration which shows a *prima facie* case of non-compliance with general usage is demurrable.

The plaintiff also was at liberty at the trial to show a non-compliance with general usage as to the subject-matter in question, and in what better way might the plaintiff show such non-compliance than by the cross-examination of the defendant's witnesses qualified to speak upon the subject? In our opinion it was not error to admit this testimony.

Lastly, counsel for the defendant complain of the conduct of counsel for the plaintiff.

While we fully recognize and appreciate the rule on this subject, as announced by the Suprem Court of this state in *Cleveland, Painesville & Eastern Railway Co.* v. *Pritschau,* 69 O. S., 438, and in *Hays* v. *Smith,* 62 O. S., 161, we do not believe that the statements and observations of counsel for the plaintiff in the course of the introduction of evidence at the trial, while they might properly have been omitted, amounted to such misconduct as would justify us in reversing the judgment in this case. We are not able to say, as a matter of law, that the jury was influenced by these statements to the prejudice of the defendant, or that they were of such a character as likely to have operated upon the minds of the jurors to the prejudice of the defendant.

We find no error in the record on which, in our opinion, a reversal of the judgment of the common pleas court would be justified, and the same is therefore affirmed.

PLEADING IN AN ACTION ON A LIFE INSURANCE POLICY.

Circuit Court of Cuyahoga County.

AMERICAN ASSURANCE COMPANY v. WALTER H. EARLY.

Decided, October 21, 1912.

Insurance—Conditions Making Policy Void Matter of Defense—Section 9391, General Code, Applies to Renewals of Policies—Not Error to Fail to Give Instructions Not Requested—Statement in Physician's Affidavit for Proof of Death Not Competent for Other Purposes.

1. In an action upon a life insurance policy, the conditions precedent, the performance of which the plaintiff is required to plead, include only those affirmative acts which are necessary in order to perfect his right of action on the policy, such as giving notice and making proof of loss, furnishing the certificate of a magistrate when required by the policy, and, it may be, other acts of like nature. Conditions which provide that the policy shall become void, or inoperative, or the insurer relieved wholly or partially from liability upon the happening of some event, or the doing, or omission to do some act, are matters of defense, and to be available must be pleaded and their breach alleged.
2. A statement in an application for a revival of an insurance policy which has lapsed is within the purview of Section 9391, General Code, and is not a defense to an action on the policy, unless the statement was wilfully false, fraudulently made, and material, and induced the company to renew the policy.
3. Error consists not in the failure, but in the refusal to give instructions to which a party is entitled.
4. Statements in a physician's affidavit introduced in an action upon an insurance policy to make proof of loss, are not competent as evidence to establish an affirmative defense, as that the disease from which the insured died existed before the renewal of her policy.

Stearns, Chamberlain & Royon, for plaintiff in error.
Wing, Myler & Turney, contra.

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

This is an action to reverse a judgment on an industrial insurance policy. It is claimed that three errors occurred on the trial; first, in not granting the motion of the Assurance Com-

pany to direct a verdict in its favor at the close of plaintiff's evidence; second, in not properly charging the jury, and third, in refusing to grant a new trial on the ground that the verdict was not supported by sufficient evidence, or was contrary to the weight of the evidence.

Early was the son and beneficiary of the assured, Martha Early, to whom a policy had been issued which she had permitted to lapse. On July 3, 1908, she applied for revival of her policy on a blank furnished by the company, as follows:

"APPLICATION FOR REVIVAL.

"Date, July 3rd.

"AMERICAN ASSURANCE COMPANY,
"Philadelphia.

"My policy No. 94244 having lapsed on the 19th day of May, 1908, I hereby make application for revival of the same, and warrant, that I am now in good health and physical condition, and there is nothing in my habits or physical condition which is likely to impair my health or shorten my life. And I agree that if this warranty shall be in any respect untrue, my policy shall be treated in the same manner as if it had not been revived, upon the return to me of the premiums accompanying this application and hereafter paid. The revival upon this application shall be in all respects under and subject to the conditions of the policy, and shall take effect as of the date of the acceptance of this application by the secretary.

"MARTHA EARLY.
"*Applicant's Signature.*

"Witness:
"JOHN Z. JONES.

"I have received from the above applicant the sum of $1.80 premiums on account of the above application for revival.
"Date July 3, 1908, Collector, Jno. Z. Jones."

She died October 22, 1908, and proof of death was duly made on November 9, 1908. This proof of death consisted of a sworn statement of the beneficiary, a sworn satement of the attending physician and one from the undertaker.

The beneficiary, Early, among other things, stated as follows:

"3. The date of begining of the disability was April, 1908.
"10. The physician first called on account of the disability which caused death, in April, 1908."

The attending physician, G. W. Stevenson, M. D., among other things, stated as follows:

"9 (a) Date of your first visit or prescription in last illness? April, 1908.
"(b) Date of your last visit? October 22, 1908.
"10. Cause of death, immediate? Cancer of lung.
"11. Cause of death, remote? Exhaustion from the suffering.
"12. State the duration of illness (a) From personal knowledge? From April, 1908, to October 22, 1908. (b) From history of case? About 8 months."

The policy, among other things, contained the following conditions:

"If this policy shall be revived after having lapsed it shall not cover death from any source originating prior to the revival thereof.
"The insured waives all legal objections to medical testimony of any and every kind, and authorizes his attending physician to make statements regarding the cause of death, which statements shall be competent evidence on behalf of the company in any suit upon this policy.
"Affirmative proofs of death must be furnished the company, and must contain full, complete and true answers to all questions on blanks furnished by the company for that purpose. Final proofs must be furnished by the company within one month from the time of death. The claimant must establish affirmatively by such final proofs that the death was such as is not excepted by the terms of this policy before indemnity hereunder is payable."

Because the proofs of death apparently disclosed that the assured died of a cause originating prior to the revival of the policy, the company refused to pay and this suit followed.

The company filed an answer to the plaintiff's petition admitting the issuance of the original policy, and that the said Martha Early died on October 22, 1908, but denying all other allegations of the petition, among others "that the said Martha Early and plaintiff have duly performed all of the conditions contained in said policy to be performed by them."

The answer then sets up the application for revival of the policy dated July 3, 1908, and states that at the time the in-

sured signed said application for revival, she was suffering from cancer of the lungs and was in ill health, which fact was known to her, and that her statements and warranties as to her health were false, were known by her to be false, were not known by the company to be false, and it relied upon them and that the policy was voided by reason thereof.

Tender back of premiums paid is alleged also.

On the trial the company admitted the payment of all premiums and the plaintiff introduced evidence showing that proofs of death had been furnished to and received by the company, and then rested.

Thereupon a motion to direct a verdict was made by the defendant, and it is urged that it should have been granted, because the plaintiff failed to prove the allegations of his petition that he and the assured had duly performed all of the conditions of the policy, particularly the condition that the policy should not cover death from any cause originating prior to its revival.

This point is not well taken.

Speaking of a fire insurance policy, and the rule is the same in life policies, the Supreme Court says in the case of *Moody* v. *Insurance Co.*, 52 O. S., 12:

"The conditions precedent, performance of which the plaintiff is required to plead in an action on such a policy, include only those affirmative acts which are necessary in order to perfect his right of action on the policy, such as giving notice and making proof of the loss, furnishing the certificate of the magistrate when required by the policy, and, it may be, other acts of like nature. Conditions which provide that the policy shall become void, or inoperative, or the insurer relieved wholly or partially from liability upon the happening of some event, or doing, or omission to do some act, are matters of defense, and to be available must be pleaded and their breach alleged."

In this case the plaintiff proved the issuance of the policy, its revival, the payment of premiums, death of insured, and the furnishing of proof of death; this made a case which was to be overthrown, if at all, by proof by defendant that the death of the insured occurred from a cause originating prior to its revival.

The motion to direct a verdict for defendant was properly overruled.

As to the charge, complaint is made that the court treated the application for revival as containing an answer to an interrogatory, and, with regard to it, charged that Section 9391 applied. That section reads as follows:

"No answer to any interrogatory made by an applicant in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, also that the agent or company had no knowledge of the falsity or fraud of such answer."

There was no error in this; the application was on a blank furnished by the company; it was in effect an interrogatory.

As the policy itself, however, contained a statement that if it should be revived after having lapsed, it should not cover death from any cause originating prior to its revival, the defendant was entitled to a charge that if the jury should find that the death of Martha Early was the result of a cause originating before July 3, 1908, then they must find for the defendant. *Metropolitan Life Ins. Co.* v. *Howle,* 62 O. S., 204; *Metropolitan Life Ins. Co.* v. *Howle,* 68 O. S., 614.

No request for such a specific charge was made. The court however, seems to have covered the point in the following part of the charge:

"This lawsuit really turns upon the question of the renewal rather than upon the question of original policy.

"Item 2 in the conditions attached to the policy which was a part of the contract, is as follows: 'If this policy shall become lapsed it may be revived by the Secretary upon written application by the insured on forms furnished by the company and the payment of all back premiums. Acceptance by the Secretary of such back premiums unaccompaned by such written application shall not be deemed a waiver of these requirements, but it shall be optional with the company to revive the policy or not. If this policy shall be revived after having lapsed, it shall not cover death from any cause originating prior to the revival thereof.'"

That is one of the conditions of the policy which is set up as a defense to this action. The question to be determined by you in this action is: What was the fact at the time this policy lapsed and was renewed? The insurance company had the right to attach such conditions to their policies as they saw fit, and when a policy is accepted by an insured these conditions become a part of the contract and are binding upon the assured and upon the company as well.

The court goes on immediately afterward to treat of the force and effect of the *application* for a revival, and does not return to the conditions of the *policy,* but both matters were properly before the court for instructions to the jury and, the defendant having left the matter without request for more specific instructions, it is too late now to complain of an omission to charge on this matter in the direct manner that doubtless would have been used by the trial judge if a proper request had been made of him.

"Error consists not in the failure, but in the refusal to give an instruction to which a party is entitled." *Whitaker* v. *Ins. Co.,* 77 O. S., 518, 522.

As to the weight of the evidence, there is more doubt.

As we have seen, it was incumbent upon the defendant to prove that Martha Early died of a cause originating before July 3, 1908. The only evidence on this subject was the statements of the claimant and the attending physician contained in the proof of loss. The proof of loss was properly before the court on the issue of whether the claimant had complied with the terms of the policy and furnished them. The statements of the physician, however, were not competent evidence of the fact that the cause of death had originated before July 3, 1908, for they were ex parte, made out of court, and he was not present for cross-examination.

The condition in the policy that the insured waives all legal objection to medical testimony of any and every kind and authorizes his attending physician to make statements regarding the cause of death, which statements shall be competent evidence on behalf of the company in any suit upon the policy, if binding upon the *beneficiary* merely unseals the lips of a physician which are ordinarily closed by his confidential relation to his patient,

and permits him to testify in court upon the cause of death; it does not make competent every statement the physician may make on the subject, on the street, or even in the proof of loss. Nor does the beneficiary so vouch for the truth of the statement made by the physician in the proof of loss that it binds him, for he is compelled to furnish a statement and can not control what the physician may state.

As to the statement of the beneficiary himself in answer to questions 3 and 10 in the so-called claimant's statement, they are evidently based upon the physician's statements to him, and while solemnly made by him in an affidavit furnished by him to the company, it may well be that the jury came to the conclusion that the company not having called him or the physician for examination before them, which it might well have done, it was doubtful of its own case and that they would have testified otherwise upon the stand.

The jury would have been warranted in drawing such a conclusion from the failure to call these or other witnesses and may have felt that there was not sufficient evidence before it to have the necessary preponderating influence in favor of the defendant's contention.

We are unable to say that substantial justice was not done in this case, and so the judgment is affirmed.

THE PLEADING OF MALICE IN AN INJURY CASE.

Circuit Court of Cuyahoga County.

THE ROYAL FURNITURE COMPANY v. FRANK S. WEIST.

Decided, November 11, 1912.

Damages—When Punitive Damages May be Awarded—How Malicious Injury Pleaded.

1. Punitive damages may be awarded where one in committing a wrong has so conducted himself with regard to another as to show a reckless disregard of such other's rights.
2. Where the facts set forth in a petition show a reckless disregard of plaintiff's rights on the part of the defendant, malice is sufficiently pleaded to support an award of punitive damages.

A. A. Benesch, for plaintiff in error.
Ewing, Counts & Terrell, contra.

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

We are asked to reverse a judgment of the municipal court in this case, which was obtained by Frank S. Weist, hereinafter spoken of as the plaintiff, against the Royal Furniture Company, a corporation, hereinafter spoken of as the defendant, which judgment was, upon proceedings in error in the court of common pleas, affirmed.

Plaintiff claimed to recover against the defendant because of the alleged trespass of the defendant, through its agent, in coming into plaintiff's home, and removing certain chattels therefrom, accompanying such removal with excessive force and violence.

The defendant admitted the entry into the plaintiff's house, by its agent, and the removal of certain rugs and carpets therefrom, but claimed a right to make such removal on the ground that the rugs and carpets were the property of the defendant.

The plaintiff claimed that there was removed from his house other property, to-wit, some pieces of jewelry, but the removal of these is denied, and there is no evidence which would justify a finding that there was any jewelry removed. However, as al-

ready said, the carpets and rugs were removed. If they were the property of the defendant, it was because the conditions of a chattel mortgage, given upon said rugs and carpets by the plaintiff to the defendant at the time the rugs and carpets were purchased, had been broken, for they were purchased by the plaintiff from the defendant on or about the 28th day of August, 1911. It is claimed the defendant was, by the terms of said mortgage, authorized to take possession of the property upon condition broken.

This court is without the original bill of exceptions which was filed in the court of common pleas upon proceedings in error in that court, and in a substitute bill the chattel mortgage is not shown, but we believe this is because of the fact that the original mortgage is with the lost bill. But as we view the case, it is not necessary that we should have that mortgage here, because we have a bill which is sufficient for us to consider the case upon another proposition.

The plaintiff recovered a verdict in the court of common pleas for $289, but, as a condition for the overruling of a motion for a new trial, the plaintiff remitted $89 from the verdict, and judgment was entered for $200.

It is urged that this judgment should be reversed first, because it is said there was no evidence introduced showing the value of the goods taken.

There was no evidence tending to show the value of the jewelry taken, and, as has already been said, there was no sufficient evidence that any jewelry was taken. The only evidence as to the value of the goods is that the defendant sold the goods to the plaintiff in August, 1911, for $53; the goods were taken on the 14th of December, 1911. Prior to the 14th day of December, 1911, the plaintiff had paid on the goods $10 and on that day while the goods were being taken from the plaintiff's house the plaintiff's wife was at the store of the defendant and paid $4 more on the purchase price. We think this is some evidence tending to show the value of the goods. But whether this be true or not this judgment is not to be reversed.

If the evidence on the part of the palintiff was believed by the jury, and it well might be when taken in connection with the

testimony of the defendant's agent who removed the goods, the conduct of the agent removing the goods was such as to justify severe punitive damages. It is said that no punitive damages would be allowed in a case like this, because punitive damages can only be allowed where the conduct of a defendant is wilful and malicious, and it is said that the plaintiff in his statement of claim does not charge that what was done by the defendant was done with malice. This would seem to imply that the counsel understand that unless the word "malice" or "malicious" is used, there can be no charge of malicious conduct.

This is not correct. If the facts set out in the plaintiff's statement of claim are true, then the conduct of the defendant's agent in the taking of these goods was malicious in the sense in which that word is used in connection with the subject of punitive damages. One acts maliciously when he so conducts himself with regard to another as to show a reckless disregard of such other's rights. The charge of malice was sufficiently set out in the statement of claim. The testimny of Daniel Barry, who was present in the home of the plaintiff when the goods were taken from the house, is to the effect that without any invitation on the part of anybody on the inside of the house to enter, an agent of the defendant entered the house and removed these rugs and carpets with the assistance of two other men, in such manner as to overset a chair in which there was a baby, throwing said baby onto the floor, disengaging the pipe of a gas stove in such wise as to allow gas in a large quantity to escape, without readjusting said pipe, so jarred or tipped a sideboard standing in part upon one of the rugs as to break dishes. In short, the whole conduct of the defendant's agent in removing those rugs, whatever rights the defendant had in the rugs, and about this we need express no opinion, showed a wanton and reckless disregard for the rights of the plaintiff's family. In his own testimony he says that he was told that the plaintiff's wife had gone to the store of the defendant at that time to pay money on the indebtedness for these rugs, and he said; "it is too late." It turned out that it was not too late, for the defendant had accepted the money when she was at the store.

Reasonable conduct on the part of this collector, or agent, would have required that he communicate with the store be-

fore he proceeded further with the removal of these things. But even if it had been too late, if there had been no possible question as to the right of the defendant to take these goods, there can be no justfication of the conduct of this agent in removing them, if the testimony of Barry is to be believed; and we are not surprised that the jury believed it as against that of the agent, when, by that agent's testimony, as already shown, he was notified that the plaintiff's wife had gone to the store to make a payment on these goods.

This man was the collector for the defendant, and it looks very much as though, in one respect, he was like the Apostle Paul, when he says: "I magnify mine office."

The judgment of the common pleas court, affirming the judgment of the municipal court, is affirmed.

LEASE SECURED BY MANAGER HELD NOT FOR BENEFIT OF HIS EMPLOYER.

Circuit Court of Cuyahoga County.

THE M. F. MASON HAT CO. v. MORTIMER MASON AND THE EAST FOURTH STREET IMPROVEMENT COMPANY.

Decided, November 11, 1912.

Agency—One About to Terminate Agency May Secure for Himself Lease of Building Used by His Principal.

A lease of a building used as a place of business by his employer, taken by one about to retire as manager of that business, will not be decreed to be held for the benefit of the employer where it was agreed between the employer and manager that upon his retirement the manager might re-engage in the same line of business, and that that particular neighborhood should be fair and free territory for both, and the landlord was fully informed as to the situation when the lease was made.

Smith, Taft & Arter, for plaintiff.

Hidy, Klein & Harris, contra.

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

The defendant, Mortimer F. Mason, for a number of years was the president anf manager of the plaintiff corporation, which conducted a retail hat store in the city of Cleveland in a room rented from the defendant, the East Fourth Street Improvement Company. The lease of said store room was to the defendant, Mortimer F. Mason, but was held for the benefit of the corporation to whom he had assigned it.

By reason of some complications in the business, the defendant, Mortimer F. Mason, on the 22d day of August, 1912, sold all his stock to Samuel Mundheim, another stockholder in said corporation, and resigned both as an officer and a director of said corporation. The lease for the store room expired on the 31st day of August, 1912.

On said 22d day of August, 1912, when said Mason sold his stock and retired from the corporation, a written contract was entered into between himself and the corporation, setting out somewhat in detail the difficulties which made it desirable that he should retire from the corporation and at the same time, and as a part of said contract, said Mason signed and delivered to the plaintiff two communications which read respectively as follows:

"CLEVELAND, OHIO, August 22d, 1912.

"In order to secure the assent of S. Mundheim personally and S. Mundheim & Company to the action this day taken by the directors of the M. F. Mason Hat Company, approving the overdraft of M. F. Mason, as shown on the books of the company and voting to him an amount equal to said overdraft as additional compensation for his services, said M. F. Mason represents that all overdrafts and claims against him appear on the books of the company, and that there are not outstanding liabilities of the company other than to S. Mundheim & Company, except small bills which will not aggregate more than One Hundred Dollars, and that said M. F. Mason has no other and further claims against said company, and that he will continue without additional compensation until the close of business on Saturday, August 24th, 1912, and that thereafter he agrees to render such assistance by way of furnishing information as may be requested by S. Mundheim or any one acting for and on behalf of him, the intention of this agreement being to make a settlement based on these statements and for him to turn over the business and assist

in any way that he can in seeing that it is carried on, except that he shall be allowed himself to go into business.

"M. F. MASON."

"CLEVELAND, OHIO, August 22, 1912.

"MR. S. MUNDHEIM,
"City.

"*Dear Sir:* In connection with the statement today made by me with reference to the business of the M. F. Mason Hat Company, I desire to state that it is my intention that the lease on the Sheriff street store, No. 2045 East 4th street, this city, shall be an open and fair field as between the M. F. Mason Hat Company and yourself, or any of your representatives and myself, and to that end, whatever moral or legal obligation the landlord of those premises may feel under to me, I hereby release. This refers to the right to those premises from and after September 1st, 1912.

"M. F. MASON."

Prior to the 22d day of August, 1912, Mason had arranged with the owner of the store building for a renewal of the lease, or a new lease on the building, beginning September 1st, 1912, but he had received no such lease, though negotiations in that regard had gone so far that he might well expect to receive the lease.

The first of the communications shows that he contemplated the carrying on of the hat business in Cleveland, and the second of the communications is a clear notification to the plaintiff that he was likely to desire to obtain a lease of this store room and prosecute his business in such store, and that he had had some negotiations with the owner of the building in regard to obtaining a lease therefor. This is clearly implied from the language:

"I desire to state that it is my intention that the lease on the Sheriff street store No. 2045 East 4th street, this city, shall be an open and fair field as between The M. F. Mason Hat Company and yourself, or any of your representatives and myself, and to that end whatever moral or legal obligations the landlord of those premises may feel under to me I hereby release. This refers to the right to those premises from and after September 1st, 1912."

On the 23d day of August, 1912, Mason obtained a lease of the premises from the 1st of September, 1912, which appears in the lease as its date, and the purpose of this suit is to have it declared that he holds such lease as the trustee of the plaintiff, and to decree that it be declared to be a lease to the plaintiff.

One of the grounds of this claim is that Mason said in the first of the communications hereinbefore quoted:

"Said M. F. Mason will continue without additional compensation until the close of business on Saturday, August 24th, 1912."

Having obtained the lease before the close of business August 24, 1912, which was Saturday, it is claimed that he was then acting for and on behalf of the company, and that he had no right to take this lease to himsef while so in the employ of the company.

Mason said to the company in his communication, which was accepted by them, that there was to be an open and fair field between them as to who should obtain the lease.

Before the lease was finally made to Mason, the landlord had notice that Mason had released him from all moral and legal obligation to give him the lease. On this same 22d day of August, 1912, the plaintiff, at the office of its attorneys, sought to obtain from the landlord a lease to it of these premises. These attorneys of the plaintiff were notified by Mr. Price, president of the landlord corporation, that there had been talk of a lease to Mason, but that such lease had not been consummated, and on this same 22d day of August, before the close of the day, Mason was seeking to have the new lease made to him. Each seems to have started out upon the idea that the field was to be clear and open for both of them and each sought to be first in the field. It was not because Mason did not leave the field clear and fair for the plaintiff, that he got the lease, for the plaintiff seems to have been in the field and seeking the lease fully as early as Mason was, but Mason turned out to be the more fortunate.

We think there was no violation of Masons' duty to the company in so obtaining the lease. The landlord knew that Mason was making no claim because of anything that had transpired between them prior to the 22d day of August, 1912, and it chose

(for it is a corporation), to give the lease to Mason, rather than to the plaintiff, knowing, through the agent of the plaintiff, that it desired the lease.

If the plaintiff was at liberty to seek this lease from the landlord prior to the close of business on the 24th day of August, and if Mason was without right so to seek it within the same time, then there was not a fair and open field between the two, which Mason said in his communication, accepted by the plaintiff, that he was willing to have, and to hold that the plaintiff might secure a lease, if it could, before the close of business on the 24th day of August, and that Mason was prohibited as between him and the plaintiff from so doing, would take away the fair and open competition to which both parties had agreed.

Plaintiff had full notice that Mason expected to go on with the hat business, and that he desired this room, and that there was to be a fair and open field between them. Suppose there had been a stock of goods which both parties knew was on sale, it would hardly be claimed that Mason might not have negotiated for the purchase of such stock of goods before the close of business on the 24th of August. Plaintiff, knowing that he was expecting to go on with the hat business, and that he desired this store, and that there was to be a fair and open field between them as to who should have it, is not entitled to have the lease, which was made on the 23d day of August, 1912, decreed to be for its benefit, and the petition is dismissed.

RIGHT OF APPEAL FROM THE INDUSTRIAL COMMISSION.

Court of Appeals for Cuyahoga County.

SAM POLICE v. THE INDUSTRIAL COMMISSION OF OHIO.*

Decided, March 22, 1915.

Industrial Commission—Injured Employee, Dissatisfied with the Award Made to Him by the Commission, Has a Right of Appeal, When—Nature of an Appeal Where from an Administratrive Board to a Judicial Tribunal.

An appeal lies from a decision by the Industrial Commission, where the award which has been made for a permanent injury of a serious character is so small as to indicate that it was intended as a mere gratuity to one not injured in the course of his employment and therefore not entitled to anything.

G. E. Romano and *C. W. Toland,* for plaintiff in error.
Cyrus Locher, contra.

GRANT, J.

By the petition in this proceeding we are asked to reverse the judgment of the court of common pleas.

The error assigned is that that court refused to entertain the appeal of the plaintiff from the final action of the defendant, the Industrial Commission of Ohio, in this case, but dismissed the same as for want of jurisdiction of the subject thereof.

In his petition in that court the plaintiff alleged—as the fact is—that the defendant is the successor in law of the former State Liability Board of Awards of Ohio, charged with the duties of the latter, to full effect, as provided by statute; that at the time when the plaintiff came to his injuries alleged, the Union Rolling Mill Company, his employer, was a contributor to the fund controlled by and subject to the award of the defendant, in the discharge of the duties devolved by law upon the latter. That in the course of such employment and arising therefrom, while in that service, the plaintiff received certain bodily hurts in the form of a double hernia, to his great and permanent injury.

*Reversing *Police* v. *Industrial Commission*, 15 N.P.(N.S.), 577.

That the plaintiff thereupon elected to pursue the remedy for his wrong in the mode provided by the statute creating the defendant and prescribing its duties and jurisdiction, and made his application to that end, in due form and as provided by the law in question. That the defendant took jurisdiction in the matter and upon a hearing had, found and awarded to the plaintiff in the sum of ten dollars and fifty cents and no more, in full satisfaction of his right to compensation at its hands for his injuries had and received. That the award was in sum so grossly disproportionate to the just claim to which the plaintiff was entitled as—the circumstances considered—to amount to a total denial of his right to participate in the fund to which his employer was a contributor and to administer which in accordance with the facts the defendant was charged, as an official duty, and that—the circumstances still considered—the award, in that amount, must be regarded as having been made either under some mistake or was moved by passion or prejudice; in any event, that it was contrary to the evidence and the law, and that the application was heard without the plaintiff being notified and out of his presence, so that he had no day in court or due process of law. The prayer of the petition was for an award in satisfaction of the injuries sustained by the plaintiff.

The defendant board answered, the substantive part of its defense being that it considered the plaintiff's claim, as it was in duty bound to do, and allowed to him only the sum named in the petition. The answer alleged that under the law this action of the board was final and conclusive as to the plaintiff's right to participate in the fund to which his employer had contributed and that he was, under the law, without further remedy.

A trial was had to the court without a jury, at which the plaintiff gave testimony tending to prove the truth of the material allegations of his petition, which were not conclusions only, and that his injuries, from whatever cause arising, were serious and permanent. He also offered evidence to prove certain allegations of conclusion in his petition, but this was rejected.

At this point the court below, of its own motion, raised the question of want of jurisdiction. After argument had the petition was dismissed on that sole ground.

A motion for a new trial was made and denied, and a judgment in favor of the defendant for costs was thereupon entered.

This action of the court below is assigned as error.

The single question to be determined here is that of jurisdiction. Did the court of common pleas have it?

Within the landmarks of the law being administered, it is the part of a good judge to enlarge his jurisdiction. So anciently said the maxim, which, we take it, means that the law is to be declared in the spirit of its creation, so that the declaration does no violence to its manifest expression in words. Applied to the statute which the defendant board is required to administer in its integrity, the principle is that the purpose of the law is to be made good and effectual. That purpose is in no way obscure or past finding out. And where the purpose is not observed by those entrusted with that service, or is plainly disregarded by employing its letter to defeat its end, the correlative duty of the courts is conceived to be to exert whatever power may reside in them to correct the evil and advance the appropriate remedy.

We are inclined to think that much of the discussion as to whether this case in its progress from the commission to the common pleas court was an appeal in strictness of words or not, has been too technical and grudging in scope to promote the ends of the law. The word appeal has different meanings in different jurisdictions, and varies widely in its application to various sets of circumstances. Of course, the appeal here was not an appeal in the sense that it brought the case up from an inferior to a superior court or judicial body; the defendant's functions are administrative. Constitutionally, they can not be assimilated to those of a court. This point has been settled, specifically, in *State, ex rel Yaple,* v. *Creamer,* 85 O. S., 40, where the predecessor of the present law in question was under review.

What really is meant by the word appeal, as applied to the right of the plaintiff to come into the court below, is a mode of removing his cause from an administrative to a judicial tribunal —he having, as he says, been denied his legal right by the action or non-action of the former. In a popular and perhaps inaccurate sense of the term, this method of passing his grievance on to a court from a board may be called an appeal, and in this

sense we think the word is used when the statute authorizes the removal. Considering the just and beneficent end sought by the entire enactment, it should not be defeated in any case by applying a mere verbal rule of strictness destructive of its plain intendment. "The letter (of the law) killeth, but the spirit giveth life."

We now come to a consideration of the statute which, if any does, confers the right of appeal in the sense we have found, in this case. It is Section 43, 103 Ohio Laws, p. 88, and is as follows:

"The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final. Provided, however, in case the final action of the board denies the right of the claimant to participate at all in such fund, on the ground:

"1. That the injury was self-inflicted, or,

"2. That the accident did not arise in the course of employment, or,

"3. Upon any other ground going to the basis of the claimant's right, then the claimant, within thirty days after the final action of such board, may be entitled to a trial in the ordinary

We are next to consider what the plaintiff applied for when he came to the defendant board invoking its action. He says:

"I hereby make application to the Industrial Commission of Ohio for the payment of money out of the state insurance fund for compensation for injuries sustained by me on the 8th of April, 1913. * * *

"(B) My injury consisted of double rupture.

"(D) My injury was not purposely self-inflicted."

Coming finally to the record of the hearing had of this application by the defendant board, it does not appear that the plaintiff was present. He says in his petition that he was not present and that he had no notice of it. And this is not controverted by the answer or otherwise. The finding of fact made at the hearing was in the following language:

* * * "That applicant's injury consisted of a hernia, *not resulting from an injury received in course of his employment.*

* * * That said injury was not purposely inflicted. * * * That proof on file is such as to show *an aggravation of said hernia, for which an award is allowed as above.*"

The award thus referred to states the injury before the board for action, as follows: "Injury; double inguinal hernia." And the award proper is in these words:

"For medical services—$3. (Dr. O. E. Biddinger, 756 Run Bldg., Cleveland, O.)
"For truss—$3.50. (Applicant.)
"For compensation—$7."

The seven-dollar item is stated to be "two-thirds weekly wage."

This finding, upon which the action of the board denominated an award is founded, affirmatively brings the case within the second exception of the statute which we have quoted—namely: that the injury passed upon "did not arise in the course of employment." So that, if all compensation was refused, the right of appeal would be established, and the plaintiff would have his day in court on that footing and "be entitled," as the statute says, "to a trial in the ordinary way."

An avoidance of this effect is sought, and apparently it was so intended by the finding, in the fact that an award of seven dollars was made as ostensible *compensation* for what is said to be an aggravation of the hernia, for causing which alone compensation was asked.

The application made by the plaintiff is in the record in full and it is in no respect doubtful or ambiguous. Specifically and without an alternative asking, it calls for *compensation* for a double rupture arising in the course of the plaintiff's employment. Just as specifically, the finding is that the injury did not so arise.

The plaintiff did not apply for any relief upon the ground that his injury was a pre-existing injury which had been "aggravated" in the course of his employment, and the finding does not say that the aggravation so arose. The award was for a thing not asked for and was in the nature of a voluntary act on the part of the commission. Whether it was regarded as a charity or

donation or something akin to that in nature or intent, does not clearly appear, but that it could have been considered as in any reasonable or just sense a thing of compensation, seems to be negatived by the measure of relief purported to be advanced by the award itself as to its amount. The injury, if there was one, occurred on the 8th day of April, 1913. The application was sworn to on the 10th day of October, 1913. It was heard, and the alleged award was made October 24th.

And yet the allowance was as for two-thirds of the man's wages for one week. That an aggravation of a double hernia should cease abruptly at the end of a week is hardly supposable. Yet the award made necessarily supposes that, if the award was made on the footing of compensation alone, which is the only basis the statute allows. And the aggravation found was found, apparently, as existing at the date of the finding, which was more than six months after the time of the injury. The language is in the present tense.

In that case the disproportion between the compensation due and that awarded reaches the vicinity of the grotesque. It is certain, to our apprehension, that the award was for something clearly that the plaintiff had not asked and did not want, and that it was not made upon his application, but by the mere flat of the defendant board. If that was done as an act of supposed charity, or was bestowed as an unearned bounty, it was an unauthorized act and beyond the power of the board to do it.

The application was for compensation for an injury arising in the course of his employment. By its finding that the injury did not so arise, the board, *for that injury,* awarded him nothing. Under the law, so finding, it could not have awarded him anything. To have done so would have been a plain contradiction in terms and a palpable misuse of the public funds entrusted to the board for distribution only to those entitled. If the disposition of the seven dollars and the price of a truss and the payment of a doctor's bill was a supposed donation or a charity proceeding on equitable grounds, it was equally a malversation of a public trust, a volunteer service to an individual, not warranted by law. In terms of his application, the plaintiff got

nothing by the award. Whatever that award was it was not compensation. Compensation is the plaintiff's right, if right he had. It would be grossly unjust to him to deprive him of his right and substitute a supposed charity in its place. It is the infirmity of far too many public agencies today to deny rights and ask men to make mendicants of themselves instead. They mistake the temper of our people altogether. We are not yet ready to be made Neapolitans of, as that nation of beggars was a century ago. Right and charity are enemies and not allies.

Shall this saving performance of throwing a sop of two-thirds of a week's wage and a truss to one however deserving, be allowed to operate as a defeat of the right the plaintiff would otherwise have to bring his case to court and wage his law there? To say yes would be doing violence to the spirit and intendment of the act which alone confers power upon the defendant board. And it would contradict its letter. As to what alone he asked, the plaintiff took nothing under the finding. Again stated, that finding was that he did not come to his injury in the course of his employment, and also again stated, this brings his contention within the second named exception to the finality of the board's action, as enumerated in the statute. And, having regard to the effect now claimed for the seven dollars and a truss allowance, namely, to defeat all right of appeal to the courts, we may not be surprised that the plaintiff reasonably fears the bounty of the "gift-bearing Greeks."

Having thus fixed the ultimate quality of the award purported to have been made, and having a proper regard to, and sense of, the operative effect expected by the defendant to be given to it, we may without impropriety, as we think, appeal to the legislative intent to be found in the act itself. through which alone the board has its being and brings its activities to bear. A part of this is as follows:

"Such board shall not be bound by the usual common law or statutory rules of evidence, or by any technical rules of procedure, other than as herein provided; but shall make the investigation in such manner as in their judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act."

We can not bring ourselves to think that this wholesome immunity from the shackles of common law rules is in any plain case to be used as a club to knock the real purpose of the act into insensibility, or as a sponge, saturated with chloroform to bring about a like condition. We do not believe that this salutary admonition to do justice, though the heaven of red-tape shall fall, can be prostituted into a letter of marque to prey upon the rights of a really meritorious claimant of its benefits. Our opinion is that this provision rests under no such scandalous reproach as that, but that it is provident of the rights of the injured as well as those who for a little while may happen to make up an administrative board. And applying it in that view, although we confess we do not see the need of it, since the board clearly denied the plaintiff the relief, and all the relief he asked, but in shaping our course upon the latitude of this beneficent and good sense provision of the act, we say, and how stands the case? "Ask and ye shall receive," is the scriptural exhortation. The plaintiff asked, but did not receive—not what he asked, but something quite different—different both in origin and as to measure. Because he was denied, shall a court deny him a hearing which the law says he shall have in case he does not receive what he asks, although he may be allowed something that he did not ask? Another injunction of Scripture is eminently suggestive of what our fit answer should be—"knock, and it shall be opened unto you." The plaintiff is knocking and the admonition is to open, *i. e.*, the way into court.

"Ye who turn judgment to wormwood," is the denunciation of the prophet of old. And the acute and excellent Bacon adds, "And surely there be also that turn it into vinegar."

We are, therefore, not without forewarning of what we think we are expected to do by joining in a judgment the effect of which will be to turn a claimant out of the only court that can be open to him, without any real meaning of the word.

That the award of seven dollars and a truss was engendered from a purposeful design to "beat the law" is not to be thought of by any man with charity enough in him to be self-respectful. If that were to be imputed to any as certainty, the poverty of the English language would be too great to fitly characterize it.

The idea could not be tolerated except upon the impossible supposition that appointive boards consider themselves irresponsible, not only at the bar of the law, but to that healthy corrective even of law itself—the power of an informed, conservative and conscientious public opinion, exerting itself through law-serving agencies, and reaching the uttermost nerve and limb of the body politic, to the healing of all their disorders. We are glad, for the defendant, to repel and resent the imputation.

But we do find as a fact that the defendant body "denied the right of the claimant to participate at all in (the) such funds, on the ground, * * * 2. That the accident did not arise in the course of employment," and that an award of something of which he was at no time or in any manner a claimant, ought not to, and can not, defeat his right to appeal, dependent only upon the denial of the claim made.

Another conclusion would, in our opinion, do manifest violence to the spirit of the act in question, be destructive of its letter and very damaging to its effect as an expression of the mature and just policy of Ohio in its relation to a matter of grave and important public concern.

We should in any case be very loth to so declare a law passed for his benefit, as that a meritorious suitor should have it to say:

> "And be these juggling fiends no more believ'd
> That palter with us in a double sense;
> That keep the word of promise to our ear
> And break it to our hope."

So finding, it follows that the court of common pleas should have entertained the plaintiff's appeal in this cause and taken jurisdiction to hear and determine the matter of his petition, as directed by law.

It was error not to do so, for which the judgment complained of is reversed, and the cause is remanded to the court from whence it came here, for such further proceedings as may be in accordance with law.

MEALS, J., and CARPENTER, J., concur.

ACT RELATING TO DELINQUENT CHILDREN REFORMATORY IN CHARACTER.

Court of Appeals for Richland County.

LEONARD, SUPERINTENDENT, v. LICKER.

Decided, September 11, 1914.

Constitutional Law—Juvenile Court—Delinquent Child—Section 1652, *General Code, Constitutional—Commitment to Reformatory—Sentence Under Section* 1681, *General Code, as to Felony Charge, Discretionary.*

1. The provisions of the General Code relating to delinquent children are reformatory in their nature and not penal; hence the provisions of Section 1652, General Code, that "where it appears upon the hearing that such delinquent child is sixteen years of age, or over, and has committed a felony" he may be committed to the Ohio State Reformatory, is not unconstitutional.
2. Section 1681, General Code, is discretionary and not mandatory, and a delinquent child, charged with a felony, may be committed as provided in Section 1652, or recognized to the court of common pleas, subject to the requirements of the general criminal laws of the state, at the discretion of the juvenile judge.

Clarence D. Laylin, for plaintiff in error.
Ezra Brudno, contra.

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

The petition in error recites that the court of common pleas for this county, in a proceeding pending therein upon an application by the defendant in error, Barnett Licker, for a writ of habeas corpus on the plaintiff in error, J. A. Leonard, as superintendent of the Ohio State Reformatory, inquiring into the cause of the imprisonment and detention by plaintiff in error of one Samuel Licker, rendered judgment and made final order discharging said Samuel Licker from the custody of the plaintiff in error, and remanding him to the custody of the juvenile court of the county of Cuyahoga, that being the county from which the said Samuel Licker had been committed to the Ohio State Reformatory. The errors complained of are:

First. That the court of common pleas erred in discharging said Samuel Licker from custody.

Second. That the judgment of said court is contrary to the law of the land.

Third. That the final order made by the said court of common pleas affects the substantial rights of the plaintiff in error as superintendent of said reformatory, in that it interferes with the plaintiff in error in the discharge of the duties imposed upon him by law and by the order of the juvenile court within and for said Cuyahoga county, as set forth in the return filed by him in said proceeding and herein referred to.

A hearing was had upon the petition in error in which two principal contentions were urged:

First. That the statute under which the said Samuel Licker was committed to the Ohio State Reformatory was unconstitutional, in that no provision is made therein for indictment by the grand jury and trial to a jury as provided by law.

Second. That the statute itself does not authorize the commitment of juvenile delinquents between the ages of 16 and 17 years to the said Ohio State Reformatory.

Upon examination of the statutes the court has arrived at the conclusions following:

First. That the statute authorizing such commitment is not unconstitutional.

Second. That the said Ohio State Reformatory is not exclusively a place for the punishment of criminals.

Third. That the proceedings under the acts relating to juvenile delinquents are not criminal in their nature, but are intended to be and are reformatory.

Fourth. That the objects of the Ohio State Reformatory, in addition to being a place of detention for criminals, and therefore a prison as to such persons, are reformatory as to any other class of persons than criminals that may be authorized by law to be committed thereto.

Fifth. That the said Samuel Licker was ordered to be confined in the Ohio State Reformatory by the juvenile court of Cuyahoga county, Ohio; that he was between 16 and 17 years of age; that he was found by said court to be a delinquent, and that

he had committed an act that would constitute a felony when committed by a person of full age, namely, that he was guilty of grand larceny.

By the terms of Section 1652, General Code, a juvenile delinquent, "where it appears upon the hearing that such delinquent child is sixteen years of age, or over, and has committed a felony," may be committed to the Ohio State Reformatory.

Section 1681 provides that:

"When any information or complaint shall be filed against a delinquent child under these provisions, charging him with a felony, the judge may order such child to enter into a recognizance, * * * for his appearance before the court of common pleas at the next term thereof. The same proceedings shall be had thereafter upon such complaint as now authorized by law for the indictment, trial, judgment and sentence of any other person charged with a felony."

This statute is not mandatory in its character, requiring the court to order such child to be sent to the court of common pleas to be there dealt with as provided by law for persons charged with crime. It is merely permissive, and its provisions are not confined to delinquent children between the ages of 16 and 17 years, but apply to any and all delinquent children who may be charged with a felony, without reference to the age of such delinquent.

This statute is not in conflict with the provisions of Section 1652. Section 1652 provides a different place for the confinement of delinquent children over 16 years of age from the places of confinement to which all other delinquent children may be committed, namely, to the Ohio State Reformatory. Section 1681 provides that delinquent children of any age charged with a felony may be indicted and subjected to the provisions of the general criminal statutes and punished as may be provided therein.

The said Samuel Licker was committed to the Ohio State Reformatory under the provisions of Section 1652, the court in that case exercising its discretion as to the place of commitment. A large discretion is given to the juvenile court in the

handling of delinquent children. This must necessarily be so because of the great variety of circumstances in which such delinquency appears.

It has been held by the Supreme Court of the state of Ohio with reference to the constitutionality of certain sections providing for the commitment of children now known in the statutes as delinquent children, that "It is neither a criminal prosecution, nor a proceeding according to course of the common law, in which the right to a trial by jury is guaranteed. The proceeding is purely statutory; and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority. The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or the penitentiary."

This language is a part of the opinion of White, J., as found in *Prescott* v. *The State,* 19 Ohio St., 184, 187, and the same was said with reference to a minor who was committed to the boys' industrial school, then called "The Reform Farm," for an act which, committed by an adult or a person beyond the age of commitment to such reform farm, would have constituted a felony for which he would have been confined in the penitentiary.

This, as we view it, is applicable to the case at bar. The Ohio State Reformatory is a prison for persons who are convicted of felonies and committed thereto upon a sentence of the court following such conviction; but for delinquent children who may be committed thereto after having committed an act constituting a felony it is only a school or place of reformation. It is what its name imports, a reformatory. The case just cited sustains the position of the court in this regard.

We think further that the Supreme Court has affirmed its view of the law relating to such matters in the case of *The Cin-*

cinnati House of Refuge v. *Ryan,* 37 Ohio St., 197. In that case it was said by Judge Johnson, page 203:

"The commitment is not designed as a punishment for crime, but to place destitute, neglected and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities, for their proper care, and to prevent crime and pauperism. As to such infants, it is a home and a school, not a prison."

This more clearly defines the nature of institutions of this kind.

We think that the distinctions drawn in each of these two cases relate equally well to the case at bar, that the Ohio State Reformatory is not intended exclusively as a place of confinement for criminals, and that upon the passage of proper statutes for that purpose it may be made a place of confinement for juvenile delinquents who may be in need of reformation, as seems to have been true in the case at bar.

For these reasons we are of the opinion that the statute is constitutional, that in proceedings under the juvenile delinquent acts there is no right to a trial by jury in which the accused should have the right to face the witnesses and such other rights as are guaranteed by the Constitution, and that they may be sent by summary proceedings to said reformatory, as a means to their reformation and not for punishment.

The judgment of the court of common pleas will be reversed, and the court, proceeding to render the judgment that should have been rendered in the court below, dismisses the application for a writ of habeas corpus and renders judgment in favor of plaintiff in error.

Judgment reversed and judgment for plaintiff in error.

TESTAMENTARY GUARDIANS OF MINORS.

Court of Appeals for Holmes County.

HENICLE, ADMINISTRATRIX, v. FLACK, GUARDIAN.

Decided, October 29, 1914.

Guardianship—Designation of Person in Will—Section 10930, *General Code—Appointment by Probate Court Necessary, When—Sections* 10492 *and* 10931, *General Code—Estates—Minors.*

A testamentary guardian of a minor, named by will, pursuant to the provisions of Section 10930, General Code, is without authority to act as such guardian until he has been appointed guardian by the probate court having jurisdiction to make such appointment.

Newton Stilwell, for plaintiff in error.
Charles R. Cary, contra.

POWELL, J.; SHIELDS, J., and GRANT, J. (sitting in place of Voorhees, J.), concur.

Suit was brought on an account by plaintiff, Ellen Lemon Henicle, administratrix, against Della Flack, as testamentary guardian of Peter Painter, a minor, without any averment in the petition that such defendant had been appointed as such guardian by the probate court of this or any other county of the state.

To this petition a general demurrer was filed and sustained and, plaintiff not desiring to amend, the petition was dismissed. A petition in error was then filed in this court to reverse the judgment of the court below.

The question presented for consideration is the *status* of a testamentary guardian of a minor, without any appointment as such guardian having been made by the probate court.

A testator may name a guardian by will for his minor children. Section 10930, General Code.

When so named "he shall be entitled to preference in appointment over all others, without reference to his place of residence, or the choice of such minor. His appointment, duties, powers,

and liabilities in all other respects shall be governed by the law regulating guardians not appointed by will, except as otherwise specially provided." Section 10931, General Code.

This would indicate that a guardian named by will but not appointed by the probate court is without legal standing other than his right to preference in the appointment of such guardian. There are two main reasons why this should be so:

1. That no unsuitable person should be appointed guardian over infants of tender years, to their detriment; and

2. Otherwise the probate court would be without authority "to appoint and remove guardians, direct and control their conduct, and settle their accounts," in cases where a guardian has been designated by will. This jurisdiction is exclusive. Section 10492, General Code.

This provision as to guardians is analogous to the appointment of executors named as such in the wills of testators. Section 10605, General Code.

An appointment must be made by the probate court or the executor so named is without authority to act, but the appointment of the executor named in the will is discretionary with the court. The authority of such executor to act is not derived from the will, but from the appointment of the court having jurisdiction over the subject-matter of the action.

The court of common pleas did not err in sustaining the demurrer to the petition, and its judgment will be affirmed.

Judgment affirmed.

BILL OF EXCEPTIONS SIGNED BY ANOTHER THAN THE TRIAL JUDGE.

Court of Appeals for Cuyahoga County.

LEICHTMAN ET AL v. STEIN ET AL.

Decided, January 26, 1914.

Bill of Exceptions—Time for Perfecting—Death of Trial Judge—Contracts—Sub-Contractor Completes Work—Verbal Promise to Pay—Statute of Frauds—Debt or Default.

1. When a bill of exceptions is *filed* within the time allowed by law and error proceedings duly instituted, neglect of the trial judge to settle the bill of exceptions and his subsequent sickness and death authorize another judge of the district to settle the bill, and it will be considered by the reviewing court though settled by such other judge long after the expiration of forty days from the overruling of the motion for a new trial.
2. L entered into a contract with K for the building of a house; K sublet the mason work to S, who entered upon his contract but discontinued his work upon K's refusal to pay him as agreed; thereupon L verbally agreed with S that if he would go on with his work and finish his contract with K, L would pay him the balance due K, for work already done and for finishing the job; S thereupon proceeded with his work, but upon the refusal of L to pay him again, discontinued work and sought to compel L to pay him for all work he had done on the house. *Held:* The verbal agreement between L and S was within the statute of frauds and unenforcible.

M. V. Emmerman, for plaintiff in error.
A. Kolinsky, contra.

WINCH, J.; MEALS, J., and GRANT, J., concur.

The first question in this case is whether the court can consider the bill of exceptions which was allowed under the circumstances shown by the certificate of the presiding judge of the common pleas court as follows:

"In this case, No. 123,577, *Samuel Leichtman et al* v. *F. Stein et al*, in signing this bill of exceptions, I deem it only

right to make this statement to accompany the bill, and then submit the whole matter to the court of appeals.

"It seems that the case was tried before Judge Babcock and a jury on the 24th of December, 1912—that is, the case was commenced on said date—and that a verdict was rendered in favor of the defendant. Afterwards a motion for a new trial was filed on the 31st of December, 1912, and on the 4th day of February, 1913, the motion was overruled. On the 14th day of March, 1913, plaintiff filed with the clerk of the court a bill of exceptions setting forth all the evidence and the charge of the court, to which bill of exceptions certain exceptions were filed by the defendant, and it seems that these exceptions never had been passed upon by the trial judge and that he did not sign the bill of exceptions within the time allowed by law; neither was there a refusal to sign, so far as the record shows. From information derived from both sides I find that there were several attempts made to secure a hearing before the trial judge and that nothing definite was done by him; that he had promised to sign from day to day and postponed doing so until, in June, he was taken ill and died, leaving the bill of exceptions unsigned. The case was taken to the court of appeals and there referred back to the trial court for the reason that the bill had not been signed. It came before this branch of the court as presiding judge of this district for the ensuing term, and, in order to get at the rights of the parties, I have had interviews with the attorneys on both sides, and the situation seems to be as above set out.

"I have been over the bill of exceptions, and it seems to be regular in form and that no serious objections are made to it. The exceptions that were filed were perhaps technically correct, but they savor of captiousness and they go mostly to matters that are immaterial—for instance, as to the statements that counsel made, and denying some things with respect to having witnesses subpoenaed, etc., which did not and could not go to the merits of the case or have anything to do with it.

"So far as I am able to see from the record the testimony was taken by a stenographer and the questions seem to be all down and the answers responsive to the questions.

"It is claimed by one side that Judge Babcock refused to sign the bill of exceptions. It is claimed by the other side that he kept on promising to sign, but neglected to do so; and in order to have the case properly reviewed and the parties have their legal rights, I have signed the bill of exceptions under the circumstances set out in the statement hereto attached.

"WILLIS VICKERY,
"Presiding Judge."

"January 2, 1914.

It thus appears that plaintiff in error filed the bill of exceptions within the time allowed by law. It further appears from the transcript of the docket and journal entries that he filed his petition in error in the court of appeals within the time allowed by law. He thus did everything required of him by law to entitle him to a review of his case on the evidence in this court.

The question is, shall he be deprived of his rights by the neglect of the trial judge to allow and sign his bill within the time specified in the statute? The question, happily, is not an open one. There are two cases in the 85th volume of the Ohio State Reports which show the progress of the law regarding these matters.

In the case of *Cincinnati Traction Co.* v. *Ruthman,* 85 Ohio St., 62, the point decided was, that where the bill is filed within time and the trial judge has allowed it within time, but has neglected to certify his allowance by his signature, he may, after time for signing has expired, sign the same, the holding being: "Such act, when omitted to be done at the time prescribed by statute by oversight of the judge, may be done by him in a proper case *nunc pro tunc.*"

The case of *Pace* v. *Volk*, 85 Ohio St., 413, goes one step further and holds:

"Proceedings in error being statutory, the requirement of Section 11564, General Code, that 'the party excepting must reduce his exceptions to writing, and file them in the cause, not later than forty days after the overruling of the motion for a new trial' is mandatory; but the provisions of the following sections defining duties of the clerk and of trial judges with respect to a bill of exceptions which a party has so filed within the time required are, as to the time of the performance of such duties, directory merely.

"A bill of exceptions, taken upon the trial of a cause in the court of common pleas, and by the exceptor reduced to writing and filed in the office of the clerk within the forty days so limited, will become a part of the record to be considered by a reviewing court if the bill is signed by the trial judge and filed in the office of the clerk in accordance with the requirement of Section 11572, General Code."

The provision of Section 11572, here referred to, is that the plaintiff in error may file his petition in error, transcript and other papers in the proper court without waiting to perfect a bill of exceptions, and may *thereafter,* within the time limited by law, prepare, have allowed and signed a bill of exceptions, which, when duly allowed and filed in the trial court, he also may file in the error proceedings; *whereupon* it shall be received and considered by the reviewing court as if filed *with* his petition in error.

Section 11568, General Code, provides that in case of sickness, death, expiration of his office, or other disability of a trial judge, on request of the party preparing such bill, it shall be presented by the clerk to any other judge of the district, who shall act thereon and dispose of the matter in the time and manner required of the trial judge.

It was under this statute that the bill in this case was allowed and signed.

From the statutes and decisions cited we conclude that said bill is properly before us for consideration.

Such being the case, we find it necessary to look to it for the determination of only one question of fact, and that is that the promise sued on by defendant in error in his cross-petition was an oral one and not in writing. Perhaps even that fact may be inferred from the language used by defendant in error who was defendant below, in his cross-petition.

Plaintiff sued to quiet his title as against a mechanic's lien filed by the defendant, which set up a claim for masonry work done on the plaintiff's premises. Defendant answered and cross-petitioned, asking for judgment against the plaintiff on the following claim:

"Defendant, for his cross-petition, says that on or about the 14th day of January, 1911, he entered into a written agreement with one A. Karanofsky by which the said defendant agreed to provide all of the materials and perform all of the work for the masonry work of a two-family, frame dwelling being built for plaintiff on the premises described in plaintiff's petition according to the plans and specifications of one S. H. Weis, architect.

"Defendant further says that said written agreement provided that said A. Karanofsky was to pay to said defendant for the masonry work described in the agreement the sum of five hundred and fifty ($550) dollars, payable as follows:

"Two hundred and fifty ($250) dollars when ready for the joists; two hundred ($200) dollars when chimney and dividing wall is completed; and the final payment of one hundred ($100) dollars when all of the work described in said written agreement is completed.

"Defendant further says that in pursuance to said written agreement, he proceeded with said work until same was ready for the joists, and that said defendant was then entitled to his first payment of two hundred and fifty ($250) dollars, but that said A. Karanofsky, disregarding said written agreement, paid to him the sum of only one hundred and fifty ($150) dollars, and that on account of said A. Karanofsky disregarding his written agreement with him, the said defendant refused to proceed further with said work.

"Defendant further says that on or about the 27th day of February, 1911, said plaintiff agreed with said defendant to pay to the said defendant the balance of four hundred ($400) dollars due on said written agreement for the masonry work, as provided for in said written agreement, in consideration of said defendant completing the work described in said written agreement with A. Karanofsky.

"Defendant further says that in pursuance to said agreement with the said plaintiffs, he immediately proceeded to complete said masonry work and worked on same until March 9, 1911.

"Defendant further says that plaintiffs made no payments to him, whatsoever, on said work, but on the contrary, said plaintiffs, on or about the 9th day of March, 1911, notified said defendant that they would not pay said defendant anything for said work, and then and there repudiated their said agreement with said defendant, and thereupon said defendant refused to proceed further with said work.

"Defendant further says that the work and materials furnished by him, as aforesaid, was reasonably worth the sum of four hundred and ninety ($490) dollars, and that said defendant has received thereon the sum of one hundred and fifty ($150) dollars from A. Karanofsky, as aforesaid, and defendant says that there is now due him from said plaintiffs the sum of three hundred and forty ($340) dollars with interest thereon at the rate of 6 per cent. per annum from the 9th day of March, A. D. 1911."

There was a general denial to this cross-petition.

It thus appears that the promise relied upon was to answer for the debt, default or miscarriage of another.

There is no allegation that plaintiff was relieved from his original promise to pay A. Karanofsky for the same work which, the pleader says, was covered by the owner's contract with the principal contractor. So far as appears, plaintiff is still liable to pay the contractor for work done under the contract by the contractor's sub-contractor. The completion of this work by Stein is referable to the contract with Karanofsky and in compliance with it. Here the statute steps in, very wisely, as the result in this case shows, for there was some tall lying done in this case by somebody; by whom we need not inquire, for the statute provides for the case.

The case of *Birchell* v. *Neaster,* 36 Ohio St., 331, is applicable here. The syllabus of that case is as follows:

"A. let a contract to B. for furnishing materials and building a house for a stipulated sum. B. employed C. to furnish materials and to perform the labor of plastering. When the building was completed, except a small part of the plastering, C., in the absence of B., informed A. that he would not finish the plastering unless A. would agree to pay him; and A. replied, 'Finish the plastering and I will see you paid.' The obligations of B. to complete the house and to pay C. not being released, *Held,* that the verbal promise of A. to see C. paid was within the statute of frauds.

"The fact that there was due from A. to B., at the time the promise was made, a sum sufficient to pay the balance to C., did not take the promise out of the statute.

"In an action by C. against A., upon such promise, issue being joined by a general denial, it was competent for A. to rely upon the statute of frauds."

The application of the law here declared was invoked by plaintiff immediately upon the close of the statement by counsel for defendant of his claims under the cross-petition, by a motion that the case be taken from the jury and a judgment entered for the plaintiff.

The reason given in support of said motion by counsel for plaintiff did not touch the real point in the case, but the motion

was well taken and should have been granted for the reasons stated in the case cited.

For error in overruling said motion the judgment is reversed and, proceeding to render the judgment which the court below should have rendered upon the conceded facts of the case, the cross-petition of the defendant is dismissed and judgment is rendered for the plaintiff in error on his petition.

Judgment reversed, and judgment for plaintiff in error.

PROSECUTION FOR CAUSING MISCARRIAGE.

Court of Appeals for Wayne County.

WYLIE WAITE v. STATE OF OHIO.*

Decided, September Term, 1915.

Criminal Law—Venue—Where a Miscarriage Was Caused in One County But Occurred in Another—Testimony of the Woman is that of an Accomplice.

1. Where a woman is induced to submit to and does submit to a criminal operation in one county and the resulting miscarriage occurs in an adjoining county, the venue is properly laid in the county in which the inducement took place and the operation was performed.
2. A woman who voluntarily submits to an operation for the purpose of causing a miscarriage is an aider and abettor of the crime, and in the prosecution of the one who caused the operation to be performed her evidence should be regarded as that of an accomplice.

A. D. Metz and *G. W. Smith,* for plaintiff in error.

G. S. Starn, Prosecuting Attorney, contra.

SHIELDS, J.

The indictment herein was returned by the grand jury of Wayne county, Ohio, at the April (1915) term of the court of common pleas of said county and charges that—

*Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, November 9, 1915.

"Wylie Waite on the 23d day of November in the year of our Lord one thousand nine hundred and fourteen, at the county of Wayne aforesaid, unlawfully, wilfully and knowingly, did use a certain instrument, the name of which instrument is to the jurors aforesaid unknown, in and upon the body and womb of one Margaret Hogue, she, the said Margaret Hogue, being then and there a pregnant woman, with intent then and there and thereby to procure the miscarriage of said Margaret Hogue, the said miscarriage not being then and there necessary to preserve the life of said Margaret Hogue, and then and there not being advised by two physicians to be necessary for said purpose, and by means and in consequence of the use of said instrument, by the said Wylie Waite, with the intent aforesaid, she, the said Margaret Hogue afterwards, to-wit, on the 26th day of November, 1914, miscarried and was prematurely delivered of a child."

A plea of not guilty was entered to said indictment by the accused and upon trial had he was found guilty. A motion for a new trial was overruled and he was sentenced according to law.

Numerous grounds of error were assigned in the petition in error filed herein for the reversal of the judgment of the court below, but the principal error alleged and urged was that the court below had no jurisdiction of the offense charged in said indictment for the reason that said offense, if committed, was not committed in said Wayne county, but in Medina county, Ohio, and therefore the venue was improperly laid in said Wayne county.

That venue is one of the essentials in an indictment is not open to question, for the rules of criminal pleading require that the time and place of every act essential to the offense charged shall be stated. This necessity arises from various reasons, among which is that it must appear that the court taking cognizance of the case had jurisdiction of the same, and, further. that the offense charged was committed in the county where the defendant was indicted and tried for the same.

As stated, it was contended on behalf of the plaintiff in error that the offense charged, if committed, was committed in Medina county and not in Wayne county. From the evidence introduced upon the trial, on the part of the state, it appears that after an intimate association between the plaintiff in error and one Mar-

garet Hogue for a considerable period, followed by acts of sexual intercourse, the latter became pregnant with child, which fact was communicated to the plaintiff in error, who advised that she submit to an operation to effect a miscarriage, to which she assented. Accordingly, and soon thereafter, as appears by the record, the plaintiff in error arranged for such operation to be performed by one Dr. J. W. Lehr in Wooster, Wayne county, Ohio, and in pursuance of such arrangement and by special appointment with said Lehr, the plaintiff in error accompanied the said Margaret Hogue to said Lehr's office in the evening of November 19, 1914, when an operation by the use of an instrument in the hands of said Lehr, at the instance, by the procurement and in the presence of the plaintiff in error, was caused to be performed by the said Lehr upon the said Margaret Hogue, with the intent and for the purpose of procuring a miscarriage. It further appears by the record that it became necessary for the said Margaret Hogue to make a second visit to the said Lehr's office for said unlawful purpose, whereupon the said Margaret Hogue, accompanied by the plaintiff in error, in pursuance of a prior appointment made by the plaintiff in error with said Lehr, again went to said Lehr's office in the evening of November 24, 1914, and at the instance, by the procurement, and in the presence of the plaintiff in error, said Lehr again performed an operation by the use of an instrument upon the said Margaret Hogue, with the intent and for the purpose of procuring a miscarriage, and that on the 26th day of November, 1914, the said Margaret Hogue, as a result of said operation, had a miscarriage and was delivered of a child in Medina county, Ohio.

Under the foregoing state of facts it was contended that the venue was in Medina county, and that the Court of Common Pleas of Wayne County had no jurisdiction of the case. In this contention of counsel we do not agree. Under the foregoing statement, if true, the physical act of using an instrument for the purpose and with the intent to destroy a vitalized foetus, prohibited by Section 12412 of the General Code, was performed in said Lehr's office in Wayne county, and said act so performed and prohibited was then and there completed, the premature delivery of the child being an incident to or the result of such un-

lawful act. Said statute seeks to prohibit and punish the unlawful act described therein; namely, the prescribing or administering of medicine or drug, or the use of an instrument with intent to procure a miscarriage of a woman and a miscarriage follows "in consequence thereof." It will thus be seen that said statute aims to prohibit and punish the act—the act of using an instrument in this case for the purpose and with the intent to procure a miscarriage. Here such act was performed for the purpose and with the intent aforesaid and rendered complete in contemplation of law, in our judgment, before the victim left the office of said Lehr in charge of the plaintiff in error in the evening stated, leaving as she did only to await the "consequence" of the unlawful act then already performed in Wayne county. Counsel for plaintiff in error seem to rely with no little confidence upon and refer us to the case of *Robbins* v. *State,* reported in 8 O. S. Reports, as sustaining their contention herein. We find nothing in the holding in that case, under the facts therein stated, in conflict with the holding here. In that case it appears that a poison was prescribed in one county and taken in another, as a result of which death ensued, and the court held that the offense was not completed until the poison was actually taken, and in the opinion in said case it is stated that:

"It is not the place of the death, but the place where the criminal act is performed or consummated, to which jurisdiction to try the case is given."

In the case at bar the criminal act consisted in the plaintiff in error causing said operation to be performed upon the person of Margaret Hogue for the purpose and with the intent of procuring a miscarriage on the evening stated *in Wayne county.* Obviously, the criminal act was then and there *perpetrated.* Other cases were also cited by the learned counsel for the plaintiff in error, but running through all of them is the principle that the unlawful act prohibited by the statute is the gist of the offense. If under the evidence here jurisdiction of the Wayne county court did not attach it is apparent that the provisions of said statute designed to afford protection to society against commercial traffic in human life are meaningless and a dead letter,

thereby rendering escape easy from the punishment prescribed for a violation of said section by the convenient removal of the victim to a foreign jurisdiction. As tending to show the action of the Supreme Court of this state in a case involving a principle closely analogous to the principle involved here, we cite the case of *Studer* v. *State,* reported in 19 C. D., 33 (9 C.C.[N.S.],185), which said case was affirmed by the Supreme Court without opinion in 74 O. S., 519, wherein it was held that:

"In Revised Statutes, 7023 (now Section 13027, General Code), the gravamen of the offense is the decoying, the procuring and inducing, which being done in one county, while the house of ill-fame entered is in another, the venue to prosecute is properly laid in the county where the decoying, etc., was done."

And the court in discussing the facts in said case on page 37, say:

"At the close of the state's testimony a motion was made to direct a verdict on the ground that the record then showed that the house of ill-fame that was entered by these two girls was in Stark county and not in Tuscarawas county, and that, therefore, the crime, if any crime was committed, was committed in Stark county. It is well known that a person shall not be held to answer for a charge except in the county where the crime was committed, and thus venue is important.

"It is claimed in this case that the proof shows this crime was committed in Stark county. This woman was charged with inducing, decoying or procuring these girls to enter a house of ill-fame for the purpose of prostitution. We think the gravamen of this offense is the decoying, the procuring, the inducing; and when there is the decoying, the procuring and the inducing, followed by the entrance to the house of ill-fame for this immoral purpose, you will then have the crime complete, the venue being where the decoying was laid, where the persuasion was exerted or where the inducement was held out."

Without further extending the discussion of this feature of the case, we are of the opinion that the venue herein was properly laid in Wayne county and that the court below committed no error in so holding.

It was also urged that the court below erred in its instruction to the jury as to the necessity of the prosecutrix being corrobo-

rated herein. On behalf of the plaintiff in error the following written request was asked to be given by the court in its charge to the jury, which was so given:

"That a woman who voluntarily submits and permits an operation to be performed upon her for the purpose of procuring a miscarriage is an aider and abettor of the crime described in Section 12412 of the General Code, and being the crime charged in the indictment in this case, and that her evidence should be regarded as that of an accomplice."

In addition to giving said request the trial court also instructed the jury on this subject that—

"The testimony of an accomplice should be very cautiously received and suspiciously scrutinized, and it would be unsafe to convict the defendant on her uncorroborated testimony alone as to some or all of the material facts necessary to establish said crime. And in this case Margaret Hogue is recognized as an accomplice by the law, having admitted her part in procuring said miscarriage. * * * It is not necessary that the crime charged in this case be proven independently of the testimony of Margaret Hogue, the accomplice, or that her testimony be corroborated in every particular in order that it may be said to be corroborated, but only that there is circumstantial evidence or testimony of some witness other than said Margaret Hogue tending to connect the defendant with the crime charged, and prove some of the material facts as testified to by the said Margaret Hogue."

As tending to show the plaintiff in error's guilty connection with the offense charged, testimony in the nature of confessional statements alleged to have been made by the plaintiff in error to sundry witnesses at different times and places was introduced, all of which was proper to be considered by the jury with reference to the evidence of the prosecutrix in determining whether or not the same corroborated her in some material matter and tended to connect the plaintiff in error with the offense charged. The foregoing instruction we understand to be in harmony with the rule laid down by our Supreme Court in the case of *State* v. *Robinson*, 83 O. S., 136.

Other grounds of error are also alleged in said petition in error, among them, the improper admission and rejection of evi-

dence upon the trial, and that the verdict is against the manifest weight of the evidence, all of which we have examined into and find no such error in either of the respects mentioned as to justify the reversal of the judgment of the court below.

Finding no error in the record prejudicial to the plaintiff in error, the judgment of the court of common pleas will be affirmed, and said cause is remanded to said court for execution.

POWELL, J., and POLLOCK, J. (sitting in place of Houck, J.), concur.

ENFORCEMENT OF MAGISTRATE'S JUDGMENT ENJOINED.

Circuit Court of Wood County.

BENJ. F. JAMES ET AL v. VINCENT D. P. FILDES AND CLAUD WYANT.

Decided, May 3, 1912.

Justice of the Peace—Injunction Against Enforcement of Judgment of—Failure of Justice to Enter Judgment on Docket—Parties—Variance.

1. In an action to enjoin enforcement of a judgment rendered by a justice of the peace, the only party which good practice requires should be made a defendant is the plaintiff who is seeking to enforce the judgment.
2. In such an action, in which it was alleged that the judgment was fraudulently obtained, the testimony disclosed that while a judgment appeared on the transcript of the proceedings before the justice no judgment was ever entered upon his docket. *Held:*

That the variance was immaterial and the defendants had not been misled thereby, and that the plaintiff should be given leave to amend his petition forthwith and judgment thereupon entered enjoining proceedings for enforcement of the alleged judgment.

James & Kelly and *Edw. Beverstock*, for plaintiffs.
Claud Wyant and *Earl D. Bloom*, contra.

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

This action, which is pending here on appeal from the court of common pleas, is brought to enjoin the enforcement of an alleged judgment of Vincent D. P. Fildes, a justice of the peace of this county, in an action brought by Claud Wyant against Benj. F. James and Edward Beverstock.

It appears from the evidence that Wyant sued before the justice of the peace to recover upon an account that was claimed to be due him from the defendants, and that at the time his action was brought Benj. F. James, one of the defendants, was in Spain. Certain correspondence ensued between the justice of the peace and J. E. Kelly, who was acting as attorney for the defendants, relative to the continuance of the case until Mr. James should return. In a letter written by the attorneys to the justice of the peace under date of May 13th, 1907, the justice is informed that counsel desired to make a defense to the action and that unless the cause could be continued until the return of Mr. James, so that his testimony might be had, it would be necessary for the defendants in the case to appeal to the court of common pleas, in which event they asked that the justice inform them of the amount of the appeal bond. On the next day, May 14th, 1907, the justice answered by mail giving the information that the case would be continued until the return of Mr. James and that it must be taken up as soon as possible on his arrival home. It appears from the evidence that he did in fact return home on or about June 12th, 1907. On June 15th, 1907, without any communication having been made to either of the defendants or their attorney by either the plaintiff or the justice of the peace, the plaintiff Wyant appeared in the justice court and asked that the case be heard, and it appears to have been done. It seems that the justice found from the plaintiff's evidence that the defendants were indebted to him in the sum of $50.18 debt and $24.20 costs. Neither James nor Beverstock nor their attorney had any knowledge of the claimed judgment until some six weeks thereafter, when Mr. James was notified by letter from Wyant that judgment had been rendered Shortly thereafter this action in injunction was brought to prevent the enforcement

of the judgment, the plaintiffs in their petition claiming that they had and have a valid defense to the claim and that they were deprived of an opportunity to make a defense and that they should have been advised in some form of the time when the case was to be heard by the justice of the peace.

The petition alleges in effect the rendition of the judgment, but that it was obtained through the fraudulent conduct of Fildes and Wyant. Upon the trial of the case in this court a transcript was offered in evidence, which, with some interlineations made at a date which does not clearly appear, shows a judgment in the amount stated. The justice of the peace, Mr. Fildes, however, was called as a witness. Upon cross-examination he was asked to account for the fact that a discrepancy existed between the transcript and the original docket, and he answeed: "The difference is with the last four lines; they are not in the docket." Later, he said in answer to a question as to why that language is not on the docket, "Probably I forgot to put it in," and he states that he may have made the transcript out and forgot to enter it upon the docket.

Now, the important fact in this case is that the last four lines, which are referred to in the testimony of Mr. Fildes as not being on the docket, are the lines which as they appear on the transcript purport to render a judgment, and without those lines the docket contains no judgment.

The statute provides, Section 10378, General Code, that the justice, when the trial is had by him without a jury, must enter judgment immediately after close of the trial, if the defendant has been arrested or his property attached, and that in other cases the judgment shall be entered either at the close of the trial or, if the justice desires further time, on or by the fourth day thereafter, both days inclusive.

The language of this section was under consideration by the Supreme Court of Ohio in *Eaton* v. *French*, 23 O. S., 560. In the course of the opinion the court say, speaking through Day, J., and after quoting the section to which reference has just been made: "this language is clear, specific and peremptory."

It thus appears in this case that although more than four years have elapsed since the case was heard before the justice, no judg-

ment has in fact been yet entered upon his docket, and we think under those circumstances the plaintiffs are entitled to the relief prayed for in their petition in this case. It is doubtless true that good practice would require that the justice of the peace should not have been made a defendant, the only necessary defendant being the plaintiff in the justice's court who was seeking to enforce the alleged judgment.

We are, however, confronted with the fact that the plaintiffs in this case, probably relying upon the transcript, averred in their petition that a judgment was entered, claiming the same, however, to be fraudulent. We think this discrepancy between the allegations and the proof is an immaterial variance as defined in Sections 11556, 11557, General Code, and it is apparent that the defendants have not been misled thereby.

We find from the evidence of the justice of the peace himself that no judgment was in fact entered upon his docket, and the plaintiffs may have leave to forthwith amend their petition in accordance with such finding.

The decree of the court will be in favor of the plaintiffs enjoining the collection of the alleged judgment

AS TO ABANDONMENT OF A RAILWAY EASEMENT.

Circuit Court of Cuyahoga County.

THE CLEVELAND & PITTSBURGH RAILWAY COMPANY ET AL v. FRANK B. WARD ET AL.

Decided, October 28, 1912.

Railroads—Easements—Abandonment—When Construction of New Line Does Not Abandon Old Right-of-way—Abandonment of Easement a Question of Intention.

1. When land has been acquired for a right-of-way by a grant to a railroad company which contains a clause to the effect that the land is to be used only for the purpose of operating a railroad over it and for purposes convenient thereto, the passage of a resolution by the board of directors of the railroad at a later date, reciting that, for the purposes of eliminating grades and curves and to facilitate travel the line of the railway should be changed at that point, the actual construction of a new line of road upon a new right-of-way, and the removing of the rails and ties from the old right-of-way, do not amount to an abandonment of the old right-of-way for all purposes connected with the operation of a railway if the railroad company continues to exercise dominion over it and it appears that it would be valuable to the company for switching purposes.
2. The question whether or not there has been an abandonment of an easement is to be determined by the intention of the holder of the dominant estate and such intention is not proven by a mere non-user for a period of three years.

Squire, Sanders & Dempsey, for plaintiffs.
C. J. Gould and *A. W. Lamson,* contra.

MARVIN, J., WINCH, J., and NIMAN, J., concur.

Each of the plaintiffs is a railroad corporation. The first is the owner of a railroad line extending from the city of Cleveland, Ohio, easterly through Bedford Township, Cuyahoga county, Ohio, to the city of Pittsburgh, Pa. The second is a lessee of this line of road from the first, and is the sole operator of the said line of railroad.

The defendant, Frank B. Ward, is the owner of certain land in Bedford township through which said railroad line as origi-

nally constructed in or about the year 1850 passed, and over which the same was operated, continuously, up to about the month of May, 1904.

The Cleveland & Pittsburgh Railway Co. obtained its rights in the land, which is in dispute in this case, from the predecessors in title of the said Frank B. Ward. The greater part of said land was owned, at the time of the original construction of the railroad, by J. W. Ward. Another parcel was owned by School District No. 7 of Bedford township, and still another by one Samuel Burchfield. Whatever rights said original owners would have had in the present action, had there been no change of ownership, are now in the defendant, Frank B. Ward, as the successor in title of said original owners.

From those several original owners, the Cleveland & Pittsburgh Railway Co. obtained its rights by instruments in writing, all of said instruments being substantially alike. Each recites the legislation by which the railroad company was authorized to construct its line of railroad, etc., and then in the writing of J. W. Ward these words follow:

"Now, therefore, in consideration of the benefit to accrue to my property by the construction of said road, and especially for $180 to be paid by said company on entering the land for the construction of said railroad, I hereby agree to grant to said company the right of way for said road through and over the lands belonging to me, and particularly to the following described land lying in the township of Bedford in the County of Cuyahoga, being part of lots numbers 76 and 77 as now staked and located, it being understood and agreed that the said Ward is to make and construct his wagon way and crossing according to the directions of the company's engineer, at his own expense. The said right of way, however, not to exceed 66 feet in width; to be held by said company, its successors and assigns forever, but for the purpose only of running a railroad over the same, and for purposes convenient thereto. And I agree that the said company may forthwith enter upon the possession of the land and take the materials hereby granted, and that I will execute according to law any deeds or other instruments in writing for the full and perfect conveyance of the rights hereby granted on reasonable request by said company.

"Bedford, October 10th, 1849.

"(Signed) J. W. WARD.

"Received the consideration mentioned in the within. $180 October 13th, 1849.

"(Signed) J. W. WARD."

Without quoting from the other writings, they are in effect the same, differing in the consideration, and the description of the land, and in no other material particular.

Later in this opinion these instruments are spoken of as grants, under authority of *Railroad Co.* v. *Ruggles,* 7 O. S., 1, Judge Brinkerhoff, in the opinion at page 7, speaking of a similar writing, says it is to be treated as if it were a formally executed legal conveyance.

Some time prior to the year 1900 the Cleveland & Pittsburgh Railway Co. decided to construct a new line of road between the village of Bedford and a point something like two miles southerly or southeasterly from said village, between which two points the line as originally constructed and as operated up to the month of May, 1904, was over and upon the land described in said several instruments of writing, hereinbefore referred to.

In furtherance of said purpose to construct such new line, the board of directors of the Cleveland & Pittsburgh Railway Co. took action on the 15th day of March, 1901, as appears by the minutes of the proceedings of said board in these words:

"*Resolved:* By the board of directors of the Cleveland & Pittsburgh Railroad Company, that, for the purpose of avoiding annoyance to public travel and difficult and dangerous curves and grades in its railroad, and to facilitate the movement of the greatly increased traffic, and to enable this company to more efficiently and satisfactorily perform its duty to the public as a common carrier of freight and passengers, it is necessary to change the location and grade of its railroad from a point at or near Wheelock Summit, Cuyahoga county, Ohio, to a point in the village of Bedford, Cuyahoga county, Ohio, for a distance of about 40,000 feet without, however, departing from the general route prescribed in its Articles of Incorporation.

"*Further Resolved:* That for the purpose aforesaid, the location of this company's railroad be changed between the points above stated from its old location to the new location, as shown on the map presented to this board, marked 'No. 7902,' which said new location shown upon said map is hereby adopted as and

for the location of this railroad between said points, the same being more particularly described as follows, to-wit:

"Diverging from the old location of the Cleveland & Pittsburgh Railroad Company at a point near the Wheelock Summit by a 50 degree curve to the left."

Then follows a particular description of the proposed new line.

The new line so decided upon was constructed by the Cleveland & Pittsburgh Railway Co., and trains began running thereon in May, 1904.

Within a few months thereafter the rails and ties were removed from the old line, leaving along said line, or on a considerable part thereof, fills and embankments which consisted of gravel, earth, stone, cinders, etc., used in construction of the old road bed.

The defendant Ward, claiming to own the unused right-of-way, was, at the bringing of this action, removing from such old road-bed such material, and the other defendants, the township trustees, were also removing such material from said old bed, claiming their right so to do by consent given to them by said defendant Ward.

This action was brought on the 20th day of November, 1907, seeking to enjoin the defendants from removing such material and from in any manner interfering with said road-bed or its material, or any part thereof.

From the instruments under which the railroad company acquired its rights in the land in controversy, whenever it abandons the same for railroad purposes, it loses all right therein.

The language of Ward's grant is:

"To be held by said company, its successors and assigns forever, but for the purpose only of running a railroad over the same, and for purposes convenient thereto."

The language of the school board grant is:

"To have and to hold the above granted and bargained land in the said company or its assigns and successors forever, for the purpose of running as many sets of track over the same as said company at any time may deem necessary, and also for any other purposes necessary, useful or convenient in the location, con-

struction and repair of said road, and all work whatsoever, which may be necessary, useful or convenient for the use of said railroad, and for no other purpose."

The language of the Burchfield grant is:

"To be held by the said company, its assigns or successors, forever, for the purpose only of running a railroad over the same land for purposes convenient thereto."

It has already been said in this opinion that the effect of each of these grants is the same. Each authorizes the railroad company to use the land for any legitimate purpose, for the successful operation of a railroad.

Although the company, as already said, removed its ties and rails from this land in 1904, it does not necessarily follow that it thereby abandoned the same for all purposes connected with the operation of its railroad.

It is shown that the company has crossed the right-of-way, claimed by the defendants to have been abandoned, with three switch tracks to reach an extensive manufacturing plant, and that, within a few weeks it has laid ties and rails along the old right-of-way for a distance of 1,400 feet or more, and connected the same by a switch with the present through line, using this track so laid for cars to get them out of the way of trains on the main line. It has done some fencing in and some mowing of weeds and grass on this land; not very much, as indicating the use to which it proposed to devote the land, but it is shown that it is feasible to connect by proper switches, the tracks of the present operating line with tracks on the old line if they should be laid thereon, and that such old line might be useful and valuable for the running of freight trains and for storing of cars, and perhaps for other purposes.

On the part of the defendants it is urged that the resolutions of the board of directors of the railroad company passed on the 15th of March, 1901, from which quotations are made earlier in this opinion, and the construction of the new line in accordance with such resolutions, established the claim of the defendants that the company thereby abandoned its old right-of-way.

This action of the board was taken under authority of Section

3277, Revised Statutes, and 8753, General Code, then and now in force which read:

"For the purpose of avoiding annoyance to 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."

Certainly it does not follow from the action of the board or the authority given by the statute, that the company undertakes to devote the land covered by the old track to some purpose other than that of a railroad.

Section 8755, General Code, provides:

"When the location is changed, after the road has been used for transportation of persons and property, the company shall be liable for all damages occasioned by the change, to the owner of the land upon which the road was first constructed."

Reading this in connection with Section 8753, General Code, it is urged on behalf of the defendants that the statutes contemplate that the change of location provided for in the former of these sections, necessarily results in the complete abandonment of the right-of-way. This contention does not seem to be sound. The change may or may not cause damage to the land owner, and there might be damage to him by making a change of location so that the right-of-way through his land was used for storing cars only; but it would hardly be claimed that even if he were damaged by the change in the use last suggested, the railroad company had abandoned the use of the land for railroad purposes.

The first case to which our attention is called by the defendant is that of *Columbus* v. *Railroad Company*, 37 Ind., 294. In that case it was held that the changing of the line of a railroad which ran through the city of Columbus so that the trains ran on a new line outside the city, leaving the tracks still down in the city, but so disconnected with the new line by the taking up

of a part of its track that trains could not run through on it, but so that it could be used as a switch, was not an abandonment of the old line.

Another case cited on the part of the defendants is *Railroad Co.* v. *Mecartney,* 104 Cal., 616. This was a suit by the railroad company to quiet its title to a strip of land 12½ miles long; the width is not given, but it plainly appears that the strip was a right-of-way for the tracks of the railroad company. The defendant claimed title through a tax sale, and in discussing the validity of the sale the court said, incidentally, that:

"The right-of-way is in the nature of an easement, and is acquired only for the purpose of the railroad. When the road is abandoned or removed from the strip of land over which the railroad has a right-of-way, the land is discharged of the burden. The right-of-way no longer exists."

This was said, not because there had been any removal of the road here from the right-of-way, but as illustrating that application of the taxing laws of the state.

In *Railroad Co.* v. *Frowein,* 163 Mo., 1, land was conveyed to a railroad company on condition that it would operate a railroad with passenger and freight trains over the land, which was adjacent to a river where the grantor had a ferry, and would send all its passengers and freight across the river by the grantor's ferry. This it did for ten years, then built a bridge across the river and so took the traffic from the grantor; then with the consent of the railroad company, the grantor leased the land to a lumber company. The railroad company sold its buildings on the land to the lumber company, which used the premises for its business until the expiration of the lease, when the grantor purchased the buildings from the lumber company and leased them to various tenants. It was held that the railroad company could not maintain ejectment, and that under the peculiar facts of that case, the railroad company had forfeited its title, although it had not absolutely abandoned the use of all the land.

Another case cited is *Railroad Co.* v. *Rich,* 91 Mich., 293. In that case there was no question such as in the case under consideration. It was a suit brought to obtain an order of court to abandon a railroad constructed in part by local subscription,

and to repay the petitioners the money put in by them for the construction of the road. The suit was brought under a statute of the state; the question was whether the railroad company had so far fallen short of its obligations as to justify the order prayed for. The trial court held that it had not. This was reversed by the Supreme Court.

We have been embarrassed in this case by being unable to find some of the authorities on which defendants rely, there being some mistake in the citations made in the brief, but so far as we have found the authorities they fail, as we think, to sustain the claim of the defendants on the question of abandonment.

It is contended by the defendant that the railroad company is undertaking to use the lands in question for anything other than railroad purposes, but that it has ceased to use them for any purpose, and that this constitutes an abandonment in such wise that the company's rights in the land are forfeited.

In *Conabeer* v. *Railroad Co.*, 156 N. Y., 474, it is said:

"Where one acquires title by deed it will not be affected by nonuser, unless there is a loss of title in some of the ways recognized by law, since mere nonuser, however long continued, does not create an abandonment."

The question of abandonment of the rights of one in lands granted to him or it for specified purposes only is said, in numerous cases in Ohio and elsewhere, to be eminently one of intention. See *Garlick* v. *Railway Co.*, 67 Ohio State, 223; *Nail & Iron Co.* v. *Furnace Co.*, 46 Ohio State, 544; *Hatch* v. *Railway Co.*, 18 O. S., 92; *Townsend* v. *Railway Co.*, 101 Federal, 737; *Peter* v. *Caswell*, 38 O. S., 518.

In this last mentioned case a mill race had been dug by a mill owner in such a way as to cause the water of a stream to flow in such race and not in its natural channel, for a considerable distance, where it turned the wheel of the mill, returning below the mill to its natural channel. The flood-gate was, however, maintained at a point where the current left the natural channel, so that whenever repairs were required to be made on the mill, the water could be cut off from the race and returned to the channel.

For more than twenty-one years the water was carried through this mill race, and only occasionally and temporarily turned into the natural channel for the purpose of making repairs on the mill. The channel had so long been disused that it became obstructed and partially filled, so that it was not sufficient to carry off all the water which had originally passed through it.

It was held that nothing in this condition of things or the acts of the parties showed that the use of the ancient channel had been permanently abandoned.

In the case of *Garlick* v. *Railway Co., supra,* the court in its opinion cites a large number of authorities on the question of what constitutes abandonment, and the court quotes with approval, from *Washburn's Easements and Servitude,* the following language:

"It is not easy to define in all cases what would be such act of abandonment as would destroy a right of easement, and each case seems to be a matter for a jury to determine. But nothing short of an intention to so abandon the right would operate to that effect, unless other persons had been led by such acts to treat the servient estate as if free of the servitude, and the same could not be resumed without doing injury to their rights in respect to the same. And in this it is not intended to embrace questions which may arise from a mere nonuser of an easement."

The facts in this case do not seem to warrant the conclusion that the railroad company ever intended to abandon the right-of-way on which the railroad was originally constructed. At most, it can only be claimed for the defendants that there was a nonuser of this right-of-way for a period of about three years, for the rails and ties were removed in 1904 and in 1907 when the defendants assumed the right to remove and began to remove the materials of which the old road-bed was constructed, this action to enjoin such removal was begun.

True, during the period from the removal of the ties and rails to the bringing of this action, the railroad company did very little upon this right-of-way to indicate ownership. However, there was some cutting of weeds and grass, as already said, and it can hardly be supposed that the railroad company, if it was its intention to abandon this right-of-way, would have done anything upon the ground.

The land in dispute in this right-of-way is near to a great city, and passes through a manufacturing district in the village of Bedford, where it hardly seems probable that the railroad company would expect to abandon lands which they had a right to use for railroad purposes. Such lands would seem to be exceedingly valuable for a right-of-way, even though the main line of the road had been diverted from this old right-of-way to a distance in some places of several hundred feet, and even though such old right-of-way crosses Tinkers Creek and two or more public roads in suchwise that the building of a track along the entire old right-of-way that would connect with the tracks as now operated on the new right-of-way, would be attended with considerable expense. But when we remember the expenditures which railroad companies make to cross streams and to pass through obstructions, such as great hills and even mountains, the matter of expense does not loom up as a preventive, as it does in those smaller enterprises where but a few hundred thousand dollars are invested.

We reach the conclusion, therefore, that the plaintiff is entitled to the injunction prayed for, and the same is allowed.

AS TO APPLICATION OF THE DOCTRINE OF LAST CHANCE.

Circuit Court of Cuyahoga County.

JOHN BEJAC v. THE CLEVELAND, PAINESVILLE & EASTERN RAILWAY COMPANY.

Decided, October 28, 1912.

Negligence—When Doctrine of "Last Chance" Does Not Apply.

The doctrine of last chance has no application in cases where the negligence of both plaintiff and defendant are concurrent and directly contributing to produce the accident, but only in cases where the negligence of the defendant is proximate and that of the plaintiff remote.

Pattison & Austin, for plaintiff in error.
Kline, Tolles & Morley, contra.

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

The plaintiff in error was injured while crossing in front of an approaching car of the defendant company. His case was submitted to a jury, which brought in a verdict for the defendant under a charge which eliminated from the consideration of the jury any application of the doctrine of last clear chance.

For the purpose of testing the correctness of the judgment on this verdict, it may be conceded that the company was negligent in operating its car at too great a speed and in not sounding a gong or giving other warning of the approach of the car, or was otherwise negligent. But the plaintiff was negligent, also, He carelessly put himself in a place of danger. If he looked and did not see the approaching car, as he testified, his senses must have been befuddled by the beer he had just drunk. There was an unobstructed view in the direction from which the car was coming, of over 800 feet. It was a clear day about noon. The motorman saw the plaintiff and his companion when they left the saloon and started to cross the street and the tracks, when he was about 350 feet away. He had a right to believe that the men would look and see the car, as he saw them, and no step upon the track immediately in front of the car, as they did.

Plaintiff must have been within fifteen to fifty feet of the car when he stepped upon the track. His companion was ahead of him and barely jumped out of the way.

This contributory negligence on the part of the plaintiff in stepping in front of a rapidly approaching car, which he should have seen, bars his recovery, because his negligence was contemporaneous with that of the motorman, and was a proximate cause of the injury.

In the case of *Drown* v. *Traction Company*, 76 O. S., 234, Judge Davis, after quoting from *Thompson on Negligence* to the effect that "Although a person comes upon the track negligently, yet if the servants of the railway company, *after they see* his danger, can avoid injuring him, they are bound to do so." goes on to say, on page 248 of the opinion:

"Now it must be apparent upon even a slight analysis of this rule, that it can be applied only in cases where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and the defendant both be negligent, and the negligence of both be concurrent and directly contributing to produce the accident, why then the case is one of contributory negligence pure and simple. But if the plaintiff's negligence merely put him in a place of danger and stopped there, not actively continuing until the moment of the accident, and the defendant either knew of his danger, or by the exercise of such diligence as the law imposes on him would have known it, then, if the plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury and that of the plaintiff is a remote cause. This is all there is of the so-called doctrine of the last clear chance."

On authority of the Drown case, it would have been proper if the trial judge had directed a verdict for the defendant.

There is no error in the record prejudicial to plaintiff in error, and the judgment is affirmed.

FAILURE OF CONSIDERATION IN PURCHASE OF A PATENT.

Circuit Court of Cuyahoga County.

W. C. SUNDERLAND v. AMOS BARNES.

Decided, November 11, 1912.

Contracts—When Action to Recover Purchase Price for Patent Not Maintainable.

That a patent has no practical or beneficial use, is a defense to an action on a contract for the purchase price of such patent, as it amounts to a failure of consideration.

Ammerman & Thompson, for plaintiff in error.

Bentley, McCrystal, Biggs & Staiger, contra.

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

This was an action for money due on a contract for the purchase of a patent. The defendant admitted the execution of the contract, but set up three defenses to the action against him:

First. That the contract was incorrectly read to him before he signed it, and that its written terms were different from what he was thereby led to believe them to be.

A copy of the contract was delivered to him; he had it in his possession and read it some two months after its date, but never offered to return the patent and have the contract canceled on this account for some two years, meanwhile continuing to make payments as stipulated in the contract.

There was no merit in this defense.

Second. That he was induced to enter into the contract through fraud and misrepresentation as to the merits, salability and use that had been made of the patented article.

This defense, also, was unavailable, by reason of the defendant's laches.

Third. That the patent had no practical or beneficial use: in other words, that there had been a total failure of consideration.

The law applicable to this defense is found in the cases of *Daust* v. *Brockway,* 11 Ohio, 462, and *Tod* v. *Wick Brothers & Co.,* 36 O. S., 370, from which we gather that:

"If the patent is valid, any interest in it, without regard to the degree of its utility, or its pecuniary value, constitutes a sufficient consideration for a promissory note" or other contract. Also: "If capable of being applied to some practical or beneficial use, and it is not frivolous or injurious to the well being or morals of society, it is a valid patent, although other similar machines may be of greater utility."

The patent here involved was for a railway rail-joint. It had been regularly issued by the patent office, but the defendant introduced witnesses who testified that it had no practical or beneficial use.

Samuel Rockwell, chief engineer of the Lake Shore Railroad, on page 45 of the record, states, "I do not consider it practical," and then he goes on to give his reasons for his opinion, which seem sensible and to sustain his opinion.

R. C. Newcomer, a division engineer of the Pennsylvania Company, located at Cleveland, was a witness for the defendant, and testified, on page 59 of the record, as follows:

"Q. Will you state in your opinion whether these two wedges at the bottom in there are of any beneficial use? A. I would say from the model, no, and from the full sized bar to look at it, more so.

"Q. I call your attention now to an 85 or 95 pound joint. Will you state whether the wedges in this full sized joint add any beneficial use to a rail splice or rail joint? A. No, sir, they do not."

The patent was for a combination, the wedges referred to being the only new thing in the combination not found in other rail joints in use.

Cross-examination of these two witnesses tended to show that other rail joints were in use containing a less or greater number of parts, or the same number of parts, some of them differing substantially from the parts of the patent here involved, but these witnesses did not depart from their opinions that this rail joint had no practical or beneficial use; indeed they seemed to have the impression that the wedge referred to was a bad thing and made this rail joint an improper one to use.

With this evidence before the jury, the trial judge directed a verdict for the plaintiff.

In this we think he erred; the evidence of the witnesses referred to tended to show that the patent was valueless, not merely that it was of less utility than other devices on the market. If valueless, the defendant was under no necessity of tendering it back, before making this defense.

The plaintiff should have been required to meet the evidence of the witnesses Rockwell and Newcomer, with some testimony that the patent had some practical and beneficial use, for their evidence needed contradiction before it could be said that defendant had failed to establish their defense.

For error in directing a verdict for the plaintiff below, the judgment is reversed and the cause remanded for further proceedings.

DEFECTS WAIVED WHERE GOODS ARE RETAINED AFTER INSPECTION.

Circuit Court of Cuyahoga County.

THE BIGALOW FRUIT COMPANY v. FREDERICK B. HUXLEY.

Decided, November 11, 1912.

Trial—When Error Rendered Harmless by Verdict—Sales—Retention of Goods Waives Defects.

1. Where, in an action for the purchase price of fruit sold under a contract providing different prices for first and second grades, it was alleged that all fruit shipped was first grade, the court erroneously excluded evidence of a custom of the trade that where first and second grades of fruit are mixed, all are to be considered second grade, such error is rendered harmless by a verdict of the jury for the full amount claimed by plaintiff, as this amounts to a finding that all fruit supplied was of the first grade.
2. Where goods delivered under a contract of sale are retained and used after inspection or after a reasonable opportunity for inspection, any defect in them is thereby waived.

C. C. Wise, for plaintiff in error.
H. A. Couse, contra.

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

Frederick B. Huxley, the defendant in error, was plaintiff, and the Bigalow Fruit Company, the plaintiff in error, was defendant in the court below. The action was begun to recover the balance claimed to be due the plaintiff on account of a quantity of pears and apples sold the defendant. The plaintiff below recovered the full amount sued for and this proceeding in error is prosecuted to reverse the judgment rendered against the plaintiff in error, as defendant below.

The controversy relates to the pears sold the plaintiff in error, and not to the apples involved in the sale.

The agreement between the parties provided for a certain price for No. 1 pears and one-half that price for No. 2's.

The plaintiff claimed that all the pears shipped to the defendant were No. 1's and the recovery sought was based upon this claim, while the defendant contended that the pears shipped to it were partly No. 1's and partly No. 2's with some culls mixed in, and that according to an established trade custom known to both parties, when pears are so mixed together they are all classed as No. 2's.

The court instructed the jury to disregard the evidence offered by the defendant to prove the custom referred to because, quoting the language of the charge, "it is in contravention of the contract itself, and no such custom has been shown as would bind the plaintiff to any such appropriation of his goods as that."

We do not share the view of the trial court on this subject. The contract between the parties contemplated that the plaintiff might deliver either No. 1 or No. 2 pears, or some of each kind, and provided a certain price for No. 1 pears and one-half that price for No. 2 pears. Proof of the custom, therefore, would not contravene the contract but would furnish a means of ascertaining whether the pears were all to be classed as No. 2's. It would simply, in other words, have a bearing on determining the quantity of No. 2 pears, if any, in the shipment.

This portion of the charge being, in our opinion, erroneous, it remains for us to decide in this connection whether in view of other parts of the charge given on the issues involved, and the verdict returned, the defendant below was prejudiced by the mistake.

One of the issues presented to the jury was whether or not the defendant, either by itself or its agent, had accepted the pears after inspection, or opportunity of inspection. There was evidence before the jury which made it proper and necessary to submit this question to the jury. The verdict was for the full amount sued for and indicates that the jury must necessarily have found either that the pears were all No. 1's, or that the defendant had accepted them as such after inspection or opportunity of inspection.

We are impelled to this conclusion because the court charged the jury in substance that if they found that part of the pears delivered were No. 2's, the plaintiff was entitled to one-half the price of No. 1's for such pears. The amount of the verdict shows that the jury made no allowance for any pears of the quality of No. 2. It is to be presumed that the jury followed the instructions given them. The inference is clear that the result would have been no different even if the court had not mistakenly taken from the jury's consideration the evidence tending to establish the custom contended for by the defendant. We therefore reach the conclusion that the error committed by the court on this subject was not prejudicial.

Complaint is made that the court charged the jury in effect that if the defendant accepted the pears and used them after inspection or a reasonable opportunity to inspect, without offering to return the same, it would be deemed in law to have accepted them and to have waived any defect.

We think this instruction was justified by the evidence and that it is sustained by the authority of *The Bowman Lumber Co.* v. *Anderson et al*, 70 O. S., 16, the syllabus of which reads as follows:

"By an executory contract for the sale and delivery of chattels of a described grade or quality, the seller becomes bound to deliver goods of the character described, but in the absence of ex-

press terms of warranty, no obligation is imposed upon him which survives the acceptance by the purchaser of an article delivered by the seller in good faith as in the performance of the contract, if the acceptance is with full knowledge of all conditions affecting the character and quality of the article."

Other parts of the charge are complained of, but in our opinion, when the charge is taken as a whole, and the verdict returned is considered, it does not appear that the plaintiff in error was prejudiced by the parts of the charge referred to.

It is contended on behalf of the plaintiff in error that the evidence established an express warranty that the pears shipped were all No. 1's, and that the verdict is against the weight of the evidence. The court charged the jury as to what constitutes a warranty, and submitted the question whether or not a warranty existed. We are unable to say that the verdict, whether it be presumed to have been founded on the determination of this issue or on any or all of the other issues involved is so manifestly against the weight of the evidence as to justify a reversal on this ground.

We find no error in the ruling on evidence complained of, and no error prejudicial to the plaintiff in error in any of the matters covered by the argument and brief of its counsel.

Judgment affirmed.

QUALIFICATION OF JUROR.

Circuit Court of Cuyahoga County.

WILLIAM H. MILLER, TRUSTEE, v. LOUIS SANDS ET AL.

Decided, October 28, 1912.

Trial—Juror's Qualification Determined as at Date of Trial—Evidence —Partnership Books Admissible in Suit Against One Partner, When.

1. A new trial will not be granted because one of the jurors may have been disqualified to act at the time he was summoned, if it does not affirmatively appear that he was disqualified at the date of the trial.
2. The account books of a partnership are admissible in evidence in a suit against one of the individuals constituting the partnership, where it appears that the partnership has been dissolved and that the defendant had taken over all the assets and assumed all the liabilities of the partnership.

P. P. & G. A. Groot, for plaintiff.

W. D. McTighe and *B. J. Sawyer,* contra.

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

This action was brought by the plaintiff in error, who was plaintiff in the court of common pleas, to recover of the defendants there, compensation and expenses for acting as trustee under a chattel mortgage or deed of trust executed by the Riggi Candy Co. The mortgage given by the company to the plaintiff in error, as trustee, provided that the trustee should be entitled to reasonable compensation and all necessary and reasonable expense, to be paid by the mortgagor or out of the trust estate.

The petition does not, by positive averments, charge any agreement of the part of the defendants to become liable for the fees and expenses sought to be recovered, but the case was tried on the theory that the making of such an agreement was sufficiently averred in the petition.

The action was dismissed as to the defendant, the Union National Bank. All the other defendants, except C. S. Horner, defended on the ground that the services performed by the plaintiff

as trustee under the mortgage were rendered as the result of an agreement between him and Horner alone, and that the latter, who was alleged to have been the attorney for the Riggi Candy Co., had been paid in full for all his services and the services of the plaintiff in connection with said mortgage.

The defendant, C. S. Horner, in his answer alleged in substance that the plaintiff, in acting as trustee, acted at the request of the said defendant and no one else, under an arrangement whereby an equal division of the fees and charges was to be made between plaintiff and the said Horner; that the sum of $900 was paid by the Riggi Candy Co. to the aforesaid defendant as full compensation for all work done by both himself and plaintiff; that the plaintiff, being indebted to said defendant in the sum of $950, said defendant retained the half of said $900 due the plaintiff as his share of the fee paid by the Riggi Candy Co., and applied it on the account due said defendant from the plaintiff.

The verdict was for the defendants, and the plaintiff in error prosecutes error to reverse the judgment entered thereon.

The first ground on which the plaintiff in error bases his claim for a reversal is that the court erred in overruling his motion for a new trial on the ground that one of the jurors was disqualified because of insanity.

The views of the court on this subject were expressed on the hearing, and no reason has been found for adopting any different views than were then indicated. There can be no dispute with the proposition of law laid down in *Watts* v. *Ruth*, 20 O. S., 31, and found also in other decisions, that jurors must have the qualifications of electors. But in this case there was no satisfactory proof offered in support of the motion for a new trial that the juror complained of did not at the time of the trial possess the necessary qualifications to act as a juror. Even though he might have been disqualified when his name was originally selected, yet if he possesses the necessary qualifications, at the time he served as a juror, the verdict would not be invalidated.

A similar question was presented in *Toledo Consolidated Street Railroad Co.* v. *Toledo Electric Street Railroad Co.*, 12 C. C., 367. The syllabus of that case reads as follows:

"Where a juror is summoned and another party appears and answers to his name under a misapprehension, and is sworn and serves as a juror, it will not invalidate the verdict, if the party serving would be a legal juror when properly summoned and none of the parties to the case knew of the substitution until after the verdict."

The second ground of error is based upon the admission of testimony given by the defendant, C. S. Horner, as to the indebtedness of the plaintiff to said defendant.

A book constituting the record of the law firm of Hile & Horner, of which the defendant Horner had been a member, was produced and by reference to this book said defendant testified to various items of charges against the plaintiff, and to a credit of $450 thereon. This evidence was offered in support of the averment in the defendant Horner's answer, that $450 due the plaintiff on account of the fee received from the Riggi Candy Company had been retained by said defendant and credited on an indebtedness from the plaintiff to him, greater in amount than this sum.

The objection urged against this testimony is that it permitted an indebtedness due from the plaintiff to the firm of Hile & Horner to be utilized as a set-off by Horner alone to defeat a claim asserted against him individually.

We think the answer to this objection is found in that portion of the testimony of Mr. Horner in which he states that at the time of the dissolution of the firm of Hile & Horner, he assumed the liabilities and took over the assets of the firm. There was evidence, therefore, before the jury that the defendant Horner was the sole owner of the indebtedness shown by the books of Hile & Horner to be due from the plaintiff. In this view of the case, the testimony to which objection was made was competent for the purpose of showing that the claim asserted by the plaintiff against the defendant had in fact been paid by the giving of credit therefor on an account against the plaintiff owned by said defendant.

The language of the petition in error indicates that a claim of error is made because of the fact that the defendant Horner was permitted to refer to and read from the account book of

Hile & Horner referred to, although it was not offered in evidence. The witness, however, testified that he, himself, made the entry in the book. This being so, it was proper for him to refer to the entries for the purpose of refreshing his recollection as to the transactions there indicated.

No error prejudicial to the plaintiff was committed by the trial court, and the judgment is affirmed.

UNFAIR USE OF TRADE NAMES.

Circuit Court of Cuyahoga County.

THE CLEVELAND TRANSFER & CARRIAGE COMPANY v. M. R. BRAILEY ET AL.

Decided, October 28, 1912.

Unfair Trade—Use of Words Which Could Not be Trade-Names May be Enjoined.

There may be an unfair use for trade purposes of words which are not capable of being an arbitrary trade-mark or trade-name, because they are geographical or purely descriptive, but when used unfairly tend to create confusion on the part of the public as to goods or firms, and when so used and such confusion results, their use will be enjoined.

W. H. Boyd and *M. W. Sanders*, for plaintiff.
Matthews & Orgill, contra.

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

This action is here on appeal. The plaintiff is a corporation engaged in the business of handling, transferring and transporting baggage to and from railroad depots, hotels, private residences and places of business in the city of Cleveland, and the hiring of conveyances and the doing of general livery and transfer business. The business conducted by it was founded by its predecessors in interest about fifty years ago. The business so founded was conducted until about the year 1886 under the name

of "Cleveland Transfer" or "Cleveland Transfer Company," and was generally known as "the Cleveland Transfer" or "Cleveland Transfer."

In 1886 the owners of the business incorporated it under the name of "the Cleveland Transfer Company," and continued to operate in the city of Cleveland, using the names and designations of "the Cleveland Transfer," "Cleveland Transfer" and "Cleveland Transfer Company" until 1890, when the plaintiff company was incorporated under the laws of Ohio as "the Cleveland Transfer & Carriage Company." Upon its incorporation the plaintiff acquired all of the assets, property, interests, rights and trade names of the Cleveland Transfer Company, and continued the business as before, making general use of the name "Cleveland Transfer Company" on its baggage checks, buildings, wagons and other vehicles.

The plaintiff claims that the names indicated have become familiar to the public of Cleveland, and have been exclusively associated for many years in the public mind with the business conducted by the plaintiff and its predecessors in interest, so that such association has become a property right of great value to it.

Complaint is made by the plaintiff against the defendant, M. R. Brailey, who is engaged in the auto livery and transfer business in the city of Cleveland, that he has caused the defendants, the Cleveland Transfer Auto Livery & Baggage Company, the Auto Livery Company and the Taxicab Company to be incorporated, and has adopted various names, fictitious in character, under which to conduct his business; that in the conduct of his business under the names of the corporate defendants and under the fictitious names referred to, said defendant, M. R. Brailey, has assumed and appropriated the names "Cleveland Transfer Company," "the Cleveland Transfer Company" and "Cleveland Transfer," and used the same in telephone directories and otherwise in such a manner as to induce the belief in the minds of the public that said business is the same as that conducted by the plaintiff; that the object of said defendant in so making use of said names is to obtain the customers of the plaintiff on the representation made by the use of said names that they are dealing with the plaintiff, and that he has in fact unfairly obtained

some of such customers who have been deceived into the belief that they were patronizing the plaintiff. The equitable interference of this court is sought by the plaintiff to enjoin the defendants and each of them from using the name "Cleveland Transfer" and "the Cleveland Transfer" and "the Cleveland Transfer Company," or any one of said names in the manner complained of, in the conduct of the business of the defendants.

The authorities sustain the contention of the defendants, that neither the word "Cleveland" nor the word "Transfer" nor the two words in combination, can be protected as a trade-mark or trade name. The first is geographical and the second merely descriptive of the business. If the plaintiff is entitled to the relief sought, it must be because of unfair competition on the part of the defendants.

The doctrine of unfair competition is discussed in *G. W. Cole Co.* v. *American Cement & Oil Co.*, 130 Fed. Rep., 703. In the opinion on page 705 it is said:

"Unfair competition is distinguishable from the infringement of a trade-mark in this: that it does not involve necessarily the question of the exclusive right of another to the use of the name, symbol, or device. A word may be purely general or descriptive, and so not capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of such word or symbol which will constitute unfair competition. Thus a proper or geographical name is not the subject of a trade-mark, but may be so used by another unfairly, producing confusion of goods, and so come under the condemnation of unfair trade, and its use will be enjoined. The right to the use of an arbitrary name or device as *indicia* of origin is protected upon the grounds of a legal right to its use by the person appropriating it. The doctrine of unfair competition is possibly lodged upon the theory of the protection of the public, whose rights are infringed or jeopardized by the confusion of goods produced by unfair methods. Whether such confusion has been or is likely to be produced by the acts charged, is a question of fact to be resolved either by evidence of actual sales of the one product for the other, of actual mistake of one for the other, of fraudulent palming off of the one for the other, or, on the other hand, failing such evidence, by comparison of the two brands to determine whether the one can be readily mistaken for the other, even by the inattentive and unobserving retail purchaser."

The doctrine under consideration is discussed in *Nims on Unfair Business Competition,* in Section 1, in this language:

"Unfair competition is not confined to acts directed against the owners of trade-marks or trade names, but exists wherever unfair means are used in trade rivalry. Equity looks not at what business the parties before the court are engaged in, but at the honesty of or dishonesty of their acts. It is unfair to pass off one's goods as those of another person; it is unfair to imitate a rival's trade name or label; but he who seeks to win trade by fair means or foul is not limited to these methods. He may copy and imitate the actual goods made or sold by a competitor, he may libel or slander these goods, make fraudulent use of a family name, or trade secrets, of corporate names, of signs, of threats, of action; he may construct buildings which are reproductions of peculiar buildings of a rival, thus producing confusion in the minds of purchasers, which enables him to purloin his rival's trade, and in a hundred other unfair ways secure another's trade. All acts done in business competition are either fair or fraudulent, equitable or inequitable, whether they relate to marks or not; and it is believed that the question of trade-marks will soon be lost sight of in discussing unfair competition, in the problem of securing, through the principles of equity, full protection to every merchant against unfair business methods."

The law on the subject of unfair competition being as stated in the authorities cited, if the defendants have so appropriated and used the words "Cleveland Transfer" as to deceive the public and obtain the plaintiff's customers by inducing them to believe that they were patronizing the plaintiff, when in fact they were patronizing the defendants, or some of them, the plaintiff should receive protection against the acts complained of.

We think the proof is such that the plaintiff is entitled to the relief asked.

This conclusion is in accord with the holding of this court in *The Enterprise Manufacturing Co.* v. *The E. A. Pflueger Company and E. A. Pflueger,* decided May 21, 1909, the principle of which was sustained by the Supreme Court.

A decree will, therefore, be granted the plaintiff.

DISTRIBUTION OF INCOME AFTER TERMINATION OF TRUST ESTATE.

Court of Appeals for Hamilton County.

BARBOUR ET AL, TRUSTEES, v. GALLAGHER ET AL.

Decided, December 2, 1913.

Estates—Trusts—Distribution of Income—Arising After Termination of Trust.

Income arising after the termination of the trust under which this estate has been held follows the property and should be distributed in accordance with the provisions of the will.

J. B. Foraker, for Mary Swigert.
John J. Acomb, for estate of Laura B. Capron.
Mallon & Vordenberg, for Harriette C. Goodloe.
Harmon, Colston, Goldsmith & Hoadly, for the trustees.

JONES (Oliver B.), J.

The question here presented is on motions filed by several beneficiaries for distribution of the income from certain property held by trustees under the will of James Smith Armstrong. The will provided:

"Seventh. All the rest, residue and remainder of my estate real, personal and mixed, whatsoever and wheresoever, I devise, give and bequeath to my executors and trustees hereinafter named, and the survivors and successors of them, in trust, nevertheless: * * *

"4th. Now as to the manner in which the income arising from my said property both real and personal shall be divided, I hereby order and direct my hereinafter named executors and trustees, and as one of the conditions of their trust to divide the

net revenue and income of my property, real, personal and mixed to them hereinbefore devised and bequeathed, in the following manner, to-wit:

"They shall divide said net income and revenue into equal parts, and pay the same semi-annually as follows: * * *

"One part to my niece Laura Capron during her natural life and after her death to any child or children of her body surviving her or to the issue of such child or children. * * *

"One part to my brother Frank W. Armstrong during his natural life and after his death to any lawful child or children of his surviving him, or to the issue of such child or children; * * *

"One part to my sister Amelia A. Mannen during her natural life and after her death to any child or children of her body surviving, or to the issue of such child or children;

"Eighth. When all my sisters, nieces, nephews and my brother Frank W. Armstrong who are hereinbefore made beneficiaries of the income and revenue arising from the real and personal property hereinbefore devised in trust shall have deceased, it is then my will that the successors of my hereinafter named executors and trustees, or said executors and trustees themselves if then living, shall proceed without delay to divide such real and personal property, or the proceeds thereof should it be found necessary to sell for cash a part or the whole of such property to carry out equitably the objects and purposes of this my last will and testament, and to divide such property or the proceeds thereof into as many equal parts as there will be then surviving children of my aforesaid nephews, nieces and of my brother Frank W. Armstrong, and to make over, transfer and give to each one of said surviving children one of said equal parts, to have and to hold the same absolutely forever."

The Supreme Court of Ohio has decided that the trust created by this will was terminated on July 17, 1911, by the death of Mrs. Capron, who was the last of the named beneficiaries. The testator having died on March 10, 1883, the executors made the first distribution of income September 10, 1883, and since that time distributions have been made regularly on the 10th of each September and March—the last of such distributions being March 10, 1911.

The question now presented to the court is whether the income accumulated between March 10, 1911, and the date of the death of Mrs. Capron, July 17, 1911, should be distributed among the beneficiaries of the income, or whether because ordinarily it would not have been payable until September 10, 1911, this income should be added to the corpus of the estate and distributed among the persons entitled thereto as provided by item eighth.

From a careful reading of the parts of the will quoted above it will be seen that the testator distinguishes clearly between the "beneficiaries of the income and revenue arising from the real and personal property hereinbefore described devised in trust," and those to whom the principal was to be distributed at the termination of the trust. Laura Capron, the last surviving named beneficiary of the income, whose death terminated the trust, was to receive one part of this income during her natural life. The provision as to the payment of that income semi-annually was evidently made for the convenience of the trustees, and could not, under the language used in the will, be construed to prevent the estate of Mrs. Capron from receiving her proportionate share of such income for the full term of her life.

Mrs. Swigert, as the daughter of Frank W. Armstrong, and Harriette A. Goodloe, as the daughter of Amelia A. Mannen, and the other beneficiaries of the income, were also entitled to receive their proportionate shares of the income during the life of the trust.

In other words, it became the duty of the trustees to collect revenue and income from the property held by them, and after deducting expenses to divide same into as many equal shares as there were then surviving beneficiaries, and instead of making division of each sum of money as it came in, the will provided that this income should be paid semi-annually.

The trust not having been terminated upon one of these semi-annual dates, it becomes necessary to make a final division of this income on the date of the termination of the trust. Had it been practically possible to make immediate division of the corpus of the property on the day of the termination of the trust, that would have been the duty of the trustees; but as that was impossible, any income arising after the termination of the trust would follow the property and become part of the fund to be distributed under item eighth.

The rules of apportionment between life tenants and remaindermen have been ably presented by counsel and many cases cited, but in the opinion of the court it is not necessary to discuss or consider them.

The property in the hands of the trustees consisted of real estate, railway, street railway, gas and water company stocks, and municipal and railroad bonds. Dividends on these stocks not yet declared would of course not be apportionable, but those declared and collected would be already income in the hands of the trustees and would be apportionable as such. The interest on the bonds and the rentals of the real estate would become due day by day, and would be apportionable. It has been argued, however, that as the title to the property itself was in the trustees the distribution of income to the beneficiaries was in the nature of an annuity and therefore rules of the common law forbidding the apportionment of annuities apply, and that no part of the income accumulating after the last semi-annual distribution could be distributed to the beneficiaries of the income. We can not agree that a proportionate share of this income constitutes an annuity.

Taking, however, the rules of apportionment as they existed under the common law and as modified later by the statutes and decisions, if they were applied to the determination of the question of division of the property in the hands of the trustees, we are of the opinion that it would result in the same division that

we have found necessary to carry out the intention of the testator as expressed in the will.

It is therefore ordered that the trustees make the apportionment of the income to the beneficiaries entitled thereto as stated above.

Judgment accordingly.

SWING, J., and JONES (E. H.), J., concur.

JURISDICTION OF THE MUNICIPAL COURT OF CLEVELAND.

Circuit Court of Cuyahoga County.

S. F. SLANSKY v. P. W. GAUGHAN.

Decided, November 18, 1912.

Municipal Court of Cleveland, Jurisdiction of.

When personal service has been secured in the city, the municipal court in the city of Cleveland has jurisdiction in an action on contract against a householder and resident of another township or municipality within the county, where the amount claimed is less than $2,500.

Fred Desberg and *A. W. Lamson*, for plaintiff.
Gaughan & Collins, contra.

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

This proceeding in error had its inception in an action brought in the municipal court of the city of Cleveland, in which the plaintiff in error was plaintiff and the defendant in error was defendant.

The statement of claim filed in the municipal court shows that the action was for the recovery of $20.50 for work and labor performed and material furnished. Personal service was obtained on the defendant within the city of Cleveland.

A motion to quash service of summons was made by the defendant on the ground that the defendant was a resident and householder of the village of Cleveland Heights, Cuyahoga county, Ohio, and not a resident of the city of Cleveland.

This motion was overruled and the defendant then filed a statement of defense, in which the same facts relied on to support the motion were set forth in the first defense. The case proceeded to trial and resulted in a judgment against the defendant for the amount sued for.

The defendant prosecuted error in the court of common pleas, and there secured a reversal of the judgment of the municipal court.

By this proceeding in error a reversal of the judgment of the court of common pleas is sought.

The question presented for our determination is whether the defendant in the original action who, it was admitted, was a resident of Cleveland Heights village, Cuyahoga county, Ohio, and a householder therein, and not a resident of the city of Cleveland, could be held to answer the summons in the action from the municipal court, personally served on him within the city of Cleveland.

Section 6 of the act amending and supplementing an act providing for the establishment of a municipal court in the city of Cleveland, found in 102 O. L., 156 (P. & A. Ann. O. General Code, Section 1579-6), contains the following provision:

"The municipal court shall have original civil jurisdiction within the limits of the city of Cleveland in the following cases: 1. In all actions and proceedings of which justices of the peace have or may be given jurisdiction."

Section 10225, General Code, provides that except as provided in the next preceding section, no householder or freeholder resident of the county shall be held to answer a summons issued against him by a justice in a civil matter in any township of such county other than the one where he resides, except in certain cases which are enumerated in the statute.

The cause of action sued on in the municipal court was one over which a justice of the peace would have jurisdiction and it did not fall within any of the exceptions enumerated in said Section 10225.

It is argued in support of the judgment of the court of common pleas that since the municipal court is given jurisdiction in all actions and proceedings of which justices of the peace have jurisdiction, it must, by implication, assume that jurisdiction, subject to all the restrictions and limitations attaching to the exercise thereof by justices of the peace, and that since the defendant in the original action could not have been held to answer the summons of a justice of the peace issued against him in any township of Cuyahoga county, other than the one in which he resides, on the claim involved in this action, he likewise could not be held to answer the summons of the municipal court of the city of Cleveland.

This contention would be sound unless the Legislature has by appropriate language expressly conferred jurisdiction on the municipal court in cases of the kind under consideration in such a way as to indicate an intention to remove the implication suggested.

Proceeding to an examination of other provisions of said Section 6 we find that subdivision 3 thereof gives to the municipal court original jurisdiction within the limits of the city of Cleveland of "all actions on contracts, expressed or implied, when the amount claimed by the plaintiff, exclusive of all costs, does not exceed twenty-five hundred dollars."

Here is an express and unqualified conferring of jurisdiction on the municipal court of all actions on contract, expressed or implied, when the amount claimed, exclusive of costs, does not exceed twenty-five hundred dollars. This express provision must control any limitation or qualification on the exercise of jurisdiction over the class of cases mentioned therein that might accompany the assumption of jurisdiction solely under authority of subdivision 1 of said Section 6.

The action of the municipal court was on contract; the amount was within the jurisdiction of the court, and by virtue of said subdivision 3 of said Section 6, the court had jurisdiction thereof within the limits of the city of Cleveland, and service on the defendant within said city was properly made.

The court of common pleas erred in reversing the judgment of the municipal court.

The judgment of the court of common pleas is, therefore, reversed and that of the municipal court affirmed.

CONSTITUTIONALITY OF THE ELIMINATION OF GRADE CROSSINGS ACT.

Circuit Court of Summit County.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY v. CITY OF AKRON.

Decided, October 12, 1912.

Constitutional Law—Grade Crossings—Laws Compelling Street Railways to Bear Portion of Cost of Elimination of Grade Crossings Constitutional—Nature of Liability of Company.

1. Sections 8892, 8893 and 8894 General Code, giving to municipalities the right to compel a street railway company to bear a reasonable portion of the cost to the municipality incurred in the abolition of railroad grade crossings, is constitutional, does not vest judicial power in a legislative body, does not deny due process of law, nor sanction the taking of private property for public uses without providing compensation.
2. When, upon the abolition of grade crossings in a street in which there is a street railroad, the municipality and the street railway company can not agree upon the portion of the cost to be borne by the street railway company, the municipality may, by ordinance, fix the amount to be paid by the company and institute an action in court for its recovery, but the recovery in such case will not be as upon a judgment, but for such amount as the jury shall determine to be a reasonable portion of the cost of the improvement.

Rogers, Rowley & Mather, for plaintiff in error.
Jonathan Taylor, contra.

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

The sole question attempted to be reserved upon the record of this case is the validity of Section 8 of the act of May 2, 1902 (95 O. L., 356), and the amendment thereto adopted April 2, 1906 (98 O. L., 192).

The act of 1902 was an amendment of the original grade-crossing act of 1893 (90 O. L., 359). The first seven sections of the act of 1902 provide for the separation of grades where steam

railroads cross municipal streets at grade. The constitutionality of these sections is conceded in this action.

The eighth section of the act of 1902 reads as follows:

"In case the track or tracks of any street railway company or companies within the limits of any municipality where the improvements authorized by this act are made shall cross at grade or otherwise a public street or the right-of-way of any railroad company or companies at a point where, under the plans and specifications provided for in this act, it has been determined to construct the said improvements, the municipality shall have power by ordinance to require such a street railway company or companies to bear a fair and reasonable proportion of the costs assumed by said municipality in the making of said improvement, not exceeding one-half the portion payable by said municipality; provided, however, that said street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character which may be necessary to support such tracks."

On the 4th of August, 1902, the council of the city of Akron took action toward the abolishment of the Mill street grade-crossing in said city, by the erection of a viaduct over the tracks of three steam railroads where they crossed said street.

On the 4th of April, 1904, the council passed an ordinance requiring the traction company, whose tracks were located upon Mill street, to bear one-half of the city's portion of the cost of the Mill street viaduct, reciting that one-half of the city's estimated cost of the viaduct was $36,000.

Later in the same year an ordinance was passed approving plans for the viaduct and determining the proportion of the estimated cost of the improvement to be borne by the three railroads and the city.

Section 8 of the act of 1906 reads as follows:

"In case the track or tracks of any street railway company or companies within the limits of any municipality where the improvements authorized by this act are made shall cross at grade or otherwise a public street or the right-of-way of any railroad company or companies at a point where, under the plans and specifications provided for in this act, it has been determined to construct the said improvements, the municipality shall have

power by ordinance to require such street railway company or companies to bear a fair and reasonable proportion of the cost assumed by said municipality in the making of said improvement, not exceeding one-half the portion payable by said municipality; *and the municipality shall have the right of action against any such street railway company or companies for such proportion of the said cost as said ordinance shall require said company or companies to bear, and such proportion of said cost shall be a lien upon all the property, both real and personal, of the said company or companies situated in the county in which the municipality is situated from and after the date of the passage of said ordinance;* provided, however, that said street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character which may be necessary to support such tracks. *And the council, board of legislation or other legislative body of said municipality may by ordinance provide the mode and time or times of payment for the proportion of the cost of said improvement to be borne by said street railway company or companies.*"

The only change made by this amendment was the addition of the words in italics.

On August 3, 1908, the city passed the following ordinance:

"Section 1. That the said the Northern Ohio Traction & Light Company be and it is hereby required to bear the following amount of the said cost of said improvement, to-wit: twenty-seven thousand nine hundred and ninety-one dollars and seventy-nine cents ($27,991.79), which said amount is hereby determined to be a fair and reasonable proportion of the cost assumed and paid by said city in the making of said improvement, and which said amount is not in excess of one-half of the part of the cost of said improvement assumed and paid by said city.

"Section 2. That, unless the said the Northern Ohio Traction & Light Company shall pay the costs to be paid to said city of Akron, the said sum of twenty-seven thousand nine hundred ninety-one dollars and seventy-nine cents ($27,991.79) on or before eleven (11) days after the passage of this ordinance, the solicitor of said city is hereby authorized and directed to commence an action in a court of competent jurisdiction to enforce payment by said company to the said city of said sum, or to file a cross-petition for said purpose in a certain case pending in the Court of Common Pleas of Summit County, Ohio, entitled the Northern Ohio Traction & Light Company against the city of Akron, and being case No. 12552.

"Section 3. The clerk of council is hereby directed to give notice of the passage of this ordinance to said the Northern Ohio Traction & Light Company by leaving a copy thereof at the office of said company forthwith upon the approval by the mayor.

"Section 4. This ordinance shall take effect at the earliest period allowed by law."

Meanwhile, on December 14, 1904, the Northern Ohio Traction & Light Company had filed its petition in the cause now under review, asking that the city be restrained from assessing any part of the cost of said improvement against it.

After the passage of the amendatory act of 1906, the city filed its answer and cross-petition praying for judgment against the traction company in the sum of $27,732.92, which it alleged to be one-half of that part of the cost of the viaduct assumed by the city in its agreement with the railroad companies.

A demurrer to this cross-petition being sustained, the ordinance of 1908 was adopted and a new cross-petition filed upon which the parties went to trial, other pleadings being filed by the parties in the meantime.

This cross-petition contained an allegation that $27,991.79 was the fair and reasonable proportion of the cost assumed by the city in the making of said improvement which the traction company ought to pay.

The jury brought in a verdict in favor of the city in the sum of $18,916.66, about $10,000 less than the amount claimed by the city.

There is no bill of exceptions filed in this case showing the nature of the evidence introduced on the trial and the charge of the court, but attention being called to the fact that the verdict was less than the amount fixed in its ordinance by the city and claimed by it in its cross-petition, it was conceded by counsel on both sides that the court received evidence on the question of the fair and reasonable proportion for the traction company to pay, if anything, and charged the jury that the ordinance of the city was not conclusive upon that subject.

The small size of the verdict compels the conclusion that such must have been the case.

This fact is important, for the whole contention of counsel for the traction company proceeds upon the theory that Section 8 of the grade-crossing act, now found as Sections 8892 to 8894 inclusive, General Code, is unconstitutional, because it vests judicial power in a legislative body, denies due process of law and the equal protection of the law, and sanctions a taking of private property for public use without first providing compensation therefor.

If Section 8 *must* be construed as vesting in the city council the power to fix and determine the exact amount that a traction company must pay it when a separation of grades is determined upon at a crossing where street railroad tracks are upon the street, the contention of plaintiff's counsel would require more critical examination and review than seems necessary to a decision of this case, from another view of the grade-crossing act which seems tenable.

The city and the steam railroad companies are the only necessary parties to the abolishment of a grade-crossing. The street railroad company has nothing to say about the propriety of separating the grades; if the city decides that the railroad tracks must pass over or under the street and an agreement is made with the railroad company, or the mode and manner of crossing is determined according to law, the street railroad company must adapt itself to the change and go with the street, over or under the railroad tracks.

The separation of grades, however, is manifestly beneficial to the street railroad company; it renders the movement of its cars safer and quicker.

The burden of the street railroad upon the street increases the cost of the change, particularly in the case of a viaduct, for it must be built of a width to accommodate the tracks and the general public, and of a strength to sustain the heavy traction cars, which weigh many tons more than other vehicles.

It would seem that for the benefits thus received the traction company should pay, even in the absence of a statute on the subject, and the statutes under consideration are only a declaration of what natural justice should require, even though no decisions

on the subject have crystallized the law of the land with respect to such conditions. This statement, of course, applies only to the declaration of the *rights* of the parties under the relations created by the necessity for a separation of grades; it is not meant as authorizing one of the parties to determine the liability of the other, finally and without other formality.

Now, with this view of the law, what did Section 8 of the act of 1902 provide? That "the municipality shall have power by ordinance to require such street railroad company or companies to bear a fair and reasonable proportion of the cost assumed by said municipality in the making of said improvement, not exceeding one-half the portion payable by said municipality."

This authorizes the city to come to an agreement with the street railroad company as to what is fair and reasonable for it to pay and to settle with it for that amount, the action of the city being confirmed by ordinance, a proper and formal way of recording its action. The limitation "not exceeding one-half the portion payable by said municipality," is for the benefit of the street railroad company.

This section does not specify *how* the city shall require the street railroad company to pay; it does not authorize the city by ordinance to determine *what* amount is fair and reasonable.

It seems that this section would authorize the city, if it could not come to an agreement with the street railroad company as to how much it should pay towards the improvement to "require" it to pay a fair and reasonable proportion thereof by proceeding against it according to law.

Suit brought, as in this case, by the filing of a cross-petition setting up all the facts with regard to the improvement, its cost and the benefits supposed to flow to all the parties therefrom, leaving to a jury under the direction of a court to determine from all the facts presented in evidence what was fair and reasonable for the street railroad company to pay, if anything, under all the circumstances, would be according to law and violate none of plaintiff's constitutional rights.

The presumption is in favor of the judgment in this case and such a trial must have been had.

This view of the statute makes it constitutional. It is a universal rule in the construction of statutes that they shall be held by the courts to have a constitutional operation if it is possible to give them such operation.

The amendment of Section 8 in 1906, was an effort to make this effect of the act of 1902 clearer, but it is doubtful if it has served such purpose. The words then inserted were: "and the municipality shall have the right of action against any such railway company or companies for such proportion of the said cost as said ordinance shall require said company or companies to bear."

If this amendment means that the city can sue for the amount determined by its ordinance *as upon a judgment* and recover that amount or more, then the amendment might be invalid. If it means that the city might by ordinance determine what was fair and reasonable in its judgment for the street railroad company to pay, being unable to agree with the company on the amount, if any, which it in justice should pay, present a bill therefor and, if not paid, sue on such bill, then it would be constitutional. It would be according to the practice of all creditors, who make out their own bills and, if not paid, sue on them, claiming the full amount that they themselves think ought to be paid. At the trial the proper amount due the plaintiff is determined, without regard to what he thinks he should receive.

That course, we understand, was followed in the trial here under review.

An examination of the ordinance of August 3, 1908, shows that it was a mere statement of what the council thought the traction company should be required to pay as its fair and reasonable proportion of the cost of the improvement, and that said amount was not more than one-half of the cost assumed and paid by the city with directions to its attorney, the city solicitor, to bring suit for that amount if it was not paid in eleven days after the claim was presented to the company.

We are not required to give this ordinance or the law under which it was passed an unconstitutional effect, and the trial court gave it no such effect, though the plaintiff in error seeks a strict construction of the law and its application in an uncon-

stitutional manner so that it may escape the payment of an obligation for which a fair interpretation of the law makes it liable.

Judgment affirmed.

SALE OF LAND UNDER A MISTAKEN IMPRESSION AS TO THE BOUNDARIES.

Circuit Court of Summit County.

CHARLES MALLISON v. DANIEL DUERR AND ELIZABETH MAHONEY.

Decided, October 12, 1912.

Contracts—Rescission Granted when there Was no Meeting of Minds as to Land Conveyed.

Where it appears that there was no meeting of the minds of the parties to a contract for the purchase of land, due to the fact that the purchaser thought the boundaries included certain land not in fact included but which the purchaser desired for a particular purpose, an abatement of the purchase price not furnishing adequate relief, a rescission of the contract will be granted.

J. A. H. Myers and *C. L. Dinsmore*, for plaintiff.

Wilcox, Burch & Adams, contra.

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

This case comes to us on appeal from a judgment of the court of common pleas.

Mallison purchased a tract of land from Duerr, directing that it should be deeded to a relative, Elizabeth Mahoney. At the time this agreement to purchase was made, Mallison and Duerr went upon the land. Duerr owned land in the township and village of Cuyahoga Falls, bounded on the north side by Front street, on the south side by the Cuyahoga river, and on the east side by the boundary line between Cuyahoga Falls and Stow townships.

This land was all originally in Stow township, but something like sixty years ago the township of Cuyahoga Falls was estab-

lished, being made up from Stow and other townships. There was no visible mark to fix just where this boundary line was. Duerr and Mallison both understood that Duerr's land was all in Cuyahoga Falls, but we think it plain, from the evidence, that both supposed the line to be considerably east of where it really was.

Duerr says he told Mallison he didn't know which of two stones which he pointed out was on the line. As a matter of fact neither of these stones was on the line; both were too far east.

Duerr shows by his testimony that he understood that Mallison was buying expressly that he might have a boat landing on the river front. He says 26 feet would be enough for a boat landing, and that he, Duerr, spoke of 26 feet as a sufficient boat landing.

A deed was made out by Duerr and delivered to Mrs. Mahoney, making the east boundary the township line. As already said, this was considerably east of both the stones pointed out by Duerr, and reduces the river front to much less than 26 feet; in fact, it practically leaves no room for a boat landing.

There is a mistake, too, in the west line as it appears in the deed. This is agreed to by all parties, and if this were the only difficulty it would be easily corrected as a mutual mistake; but Duerr did not own the land which Mallison says he supposed he was getting. He did not own as far east as either of the stones pointed out, so that if Mallison is entitled to any relief here it can not be given him by a decree of specific performance.

We think it clear that he is entitled to relief; there would remain but two means of giving the plaintiff proper relief, to-wit, a rescission of the contract or an abatement from the consideration. The latter would not be adequate and proper relief when we take into account the fact that the inducing cause operating upon the plaintiff to make the purchase was that he might have a suitable river front for a boat landing. Giving him the land only which the defendant could have given him, he fails to get this river front. The purpose for which he purchased the property failed, and he would not be made good by a recovery back of a proportionate share of the purchase money. In such case

we understand the plaintiff to be entitled to a rescission of the contract.

In the case of *Stewart* v. *Gordon,* 60 O. S., at page 170, it is said in the second paragraph of the syllabus:

"Where a grantor is mistaken as to the size of a particular tract of land from which a given number of acres in rectangular form are to be taken, but the grantee is not, the fact that the grant so made includes a house both understood was not to be included, is ground for a rescission of the grant, but not for reformation of the deed."

On pages 174 and 175 in the opinion in this case, prepared by Judge Minshall, this language is used:

"The evidence in this case fails to disclose that it was a mutual mistake. There was a mistake in this, that the plaintiff and her husband both testified that the eleven acres were to be taken off of the east side of the southwest quarter of the southeast quarter of the section named, but so as not to include the house. The defendant, on the other hand, testifies that it was to be taken off of the north side, whether it included the house or not. He was not certain at the time whether it included the house. Both parties agree that whether taken from the east or north side, it was to be in the form of a rectangle; there was no treaty for anything else. The court, however, found with the defendant, that it was to be from the north side and that both parties mutually understood that it was not to include the house, and permitted the petition to be amended so as to support a finding that the eleven acres were to be taken from the north side so as not to include the house.

"The plaintiff thought it was to be taken from the east side so as not to include the house and lot. The defendant understood that it was to be taken from the north side. As to this the court found with him, but found that he understood that it was not to include the house. And then finding that this could not be done so as to convey the requisite number of acres in the shape understood by both parties, decreed it to be taken from a side conforming to the understanding of one of the parties, and in a form different from the understanding of both. It is not competent for a court to determine the contract that should have been made and decree its performance. Parties must be left to make their own contracts. The most the court can do, in exercising the power of reformation, is to clearly ascertain what the contract was and to correct such mutual errors as have intervened in

carrying it into execution. The evidence in the case would doubtless have warranted a rescission had suit been brought for that purpose."

In the present case suit is brought for the rescission of this contract. It is a case where the minds of the parties did not meet; it is a case which, as already pointed out, can not be corrected by decreeing a specific performance, even if the minds of the parties had met, because Duerr did not own the land which Mallison supposed he was getting, and, as has also been pointed out, an abatement from the purchase price would not do justice to the plaintiff.

We reach the conclusion, therefore, that the plaintiff is entitled to have the contract rescinded.

The defendant Duerr having died during the progress of this action and his successors in title having been made parties, including also the executor and his widow, the decree must be against them. We have examined the decree entered in the court of common pleas, and the same decree may be taken here.

AS TO PROCEDURE IN A FIRST DEGREE MURDER TRIAL.

Circuit Court of Cuyahoga County.

WILLIAM MURRAY v. STATE OF OHIO.

Decided, October 12, 1912.

Trials—Criminal Law—Indictment Need Not Follow Words of Statute —Illustrations May be Used in Charge to Jury—Proof Beyond Reasonable Doubt Not Required as to all Circumstances—Failure to Define "Attempt to Rob" Not Error in Trial for Murder While Attempting to Rob—Not Error to Fail to Instruct as to Lesser Crime, When—Misconduct of Jury, How Proven.

1. The identical words of a statute need not be used in an indictment charging an offense in violation of it, but it is sufficient if the offense charged is brought substantially within the provisions of the statute defining it.
2. In defining circumstantial evidence, it is not error for the court in its charge to the jury to use illustrations drawn from common experience or based upon familiar events in everyday life.
3. In a criminal prosecution, it is not essential that every fact and circumstance be proven beyond a reasonable doubt, if every essential link in the chain of circumstances necessary to prove each or any of the charges, is so proven.
4. In the trial of one accused of having committed murder while attempting to perpetrate a robbery, the failure of the court to define an attempt to perpetrate a robbery is not error where no such definition is requested.
5. In the trial of one indicted for first degree murder it is not prejudicial error on the part of the court to fail to charge the jury that they might find defendant guilty of assault and battery, where under the charge as given the jury might have found the defendant guilty of a crime of lesser degree than that of which they did in fact find him guilty.
6. Misconduct on the part of the jury can not be proven by the affidavit of one of the jurors.

H. M. Hagelbarger, for plaintiff.
F. J. Rockwell, contra.

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

William Murray, the plaintiff in error, was indicted by the grand jury of Summit county for murder in the first degree on account of the alleged murder of one Frank Price. He was tried and convicted of murder in the second degree. A motion for a new trial was overruled and he was sentenced to life imprisonment in the penitentiary.

By this proceeding in error a reversal of the judgment of the court of common pleas is asked.

The indictment contains eight counts. The first count charges the crime to have been committed with a club; the second count, with the fists; the third count, with the hands and feet; the fourth count, with a razor, and the last four counts respectively charge the crime to have been committed by means of the several instrumentalities enumerated in the first four counts, while the accused was engaged in an attempt to perpetrate a robbery upon the said Frank Price.

A motion to quash the indictment was filed and overruled. A demurrer to the indictment was then filed which was also overruled.

Among the errors claimed to have been committed by the court below is the overruling of the motion to quash and the overruling of the demurrer.

The motion to quash was based upon two grounds: First, that in the last four counts of the indictment it is charged that the defendant assaulted the said Frank Price with intent to rob him, and also that the assault upon the said Frank Price was made by the defendant with the intent unlawfully and purposely to kill and murder. Second, that in each of said counts, it is alleged that the assault was committed "whilst engaged in the attempt to perpetrate a robbery," while the exact words of the statute are "in attempting to perpetrate a robbery."

As to the first of those grounds it is sufficient to say, that in order to charge murder in the first degree while the accused is attempting to perpetrate a robbery, the indictment must allege facts sufficient to show an attempt to commit robbery as defined by Section 12432, General Code, since the attempt to perpetrate robbery takes the place of deliberate and premeditated malice.

The counts objected to do nothing more than comply with this requirement and are not open to the objection urged.

In *Blair* v. *State,* 5 C. C., 496, this question was raised, and it was there held:

"An indictment charging the crime of murder in the first degree, wherein the killing was done at the time the accused was attempting to perpetrate a robbery, is not bad for duplicity on the ground that in the same count it charges an assault with intent to rob. Such averments are essential in charging the crime of murder." See also, *Jackson* v. *State,* 39 O. S., 37.

The second ground of objection to the last four counts of the indictment stated in the motion to quash, is also without foundation. The words "whilst engaged in the attempt to perpetrate robbery," used in the indictment, are the equivalent of the words of the statute, "attempting to perpetrate robbery." The identical words of the statute need not be used. It is sufficient if the offense charged is brought substantially within the provisions of the statute defining it. *Loeffner* v. *State,* 10 O. S., 598.

The grounds urged in support of the demurrer which was filed to the indictment are, that: first, in none of the counts is the location of the mortal wound stated; second, that in the third and seventh counts there is an allegation that the injuries were inflicted in several different ways, and the counts are objectionable because of duplicity; third, in the fifth, sixth, seventh and eighth counts, two intents are alleged and the words of the statute are not followed.

The last of these grounds has already been considered in connection with the motion to quash. An examination of the indictment discloses no basis for the other two contentions urged in support of the demurrer.

It is claimed on behalf of the plaintiff in error that the trial court committed error in embodying in the charge an illustration on the subject of circumstantial evidence. The court used this language:

"Circumstantial evidence is as competent as direct evidence. The weight of it, the credibility of it, is solely a question for the jury, guided by the rules of reason in common, ordinary, everyday human experience. Let me illustrate briefly the difference in

a homely way. You retire at night after a day dusty, dry and hot. You sleep soundly all night, wake up in the morning, find the sky clear with a burning sun, but the streets are generally muddy, the gutters are filled with water, the grass is generally more green and very wet; you did not see it or hear it rain; yet you can say with reasonable certainty it rained last night. Your neighbor came home at midnight. He saw, heard and felt the pelting rain. He knows with equal certainty that it rained last night. This is direct evidence. You get the distinction."

It is claimed that this was a far-fetched and fateful illustration and well calculated to mislead and prejudice the jury.

The use by the court of illustrations drawn from common experience or based upon familiar events in everyday life has been repeatedly upheld. Illustrations which are apt and clearly made and not of such a character as to cause the jury to lose sight of the issue to be determined, are often helpful in making clear a legal proposition which would otherwise be difficult of comprehension. It is not error to employ such illustrations. *Neal* v. *Powell*, 130 Ga., 756; 61 S. E., 729; *Whitney* v. *Wellesley, etc., R. Co.*, 197 Mass., 493; 84 N. E., 95; 38 Cyc., 1071.

We do not see how any juror could have been deceived by the illustration complained of, especially in view of the fact that it was immediately preceded by the positive instruction that the weight and credibility of circumstantial evidence was solely a question for the jury, guided by the rules of reason in common, ordinary, everyday human experience.

It is also contended that the court erred in using the following language in the charge:

"Not every fact and circumstance in this case needs to be proven beyond a reasonable doubt, but every essential link in the chain of circumstances necessary to prove each or any of the charges, as claimed by the state, must be proven beyond a reasonable doubt."

The language used in *Brick et al* v. *State*, 4 C. C., 160, is an answer to the objections urged against that portion of the charge just quoted. On page 176, Baldwin, J., said:

"It is not true that, in order to convict a person of a crime, all those circumstances that may be material in the case must be

established beyond a reasonable doubt. It is quite possible and probable that there may be a large number of circumstances, no one of which will be established beyond a reasonable doubt, but yet the aggregate of those various circumstances, the number all pointing one way to the guilt of the accused, may be such that there can be no reasonable doubt that the accused is guilty of the crime that is charged. It is true, that when what is to be proved is supported by a chain of circumstances that are dependent one upon the other, that in order to convict of the crime on that proof each of these must be established; that is, that it is an essential fact that must be proven beyond a reasonable doubt."

The charge in that case was substantially like the one here in the respect complained of. It was approved by this court and the decision was affirmed by the Supreme Court without report, 21 W. L. B., 204.

It is urged that the court erred in not defining an attempt to perpetrate a robbery. After giving to the jury a definition of the crime of robbery the court said:

"Having the definition of robbery, you will know what it would mean to speak of an attempt to perpetrate a robbery."

There is in Ohio no crime specifically known as an attempt to commit robbery. Having defined robbery, it is doubtful if any further explanation would have added to the understanding of the jury as to what was meant by an attempt to perpetrate a robbery, even if an additional explanation had been requested. No further explanation or request, however, was asked for and the failure of the court to give a more detailed and comprehensive instruction on this subject was not reversible error. *State* v. *Schilly*, 70 O. S., 1.

It is urged also that the jury should have been instructed that if they found that the defendant actually perpetrated the robbery, then they could not convict him under any of the counts charging him with having committed the crime while engaged in the attempt to commit a robbery. In the perpetration of a robbery, however, is involved the attempt. Even if it had been requested it would not have been proper to charge the jury on this subject in the manner indicated.

It is claimed that the court erred in omitting to instruct the jury that they might return a verdict of assault and battery if they saw fit.

If it should be admitted that such an instruction would have been proper, it does not appear that the accused was prejudiced by the omission. Under the instructions given, a verdict of manslaughter might have been returned, but a verdict of guilty of murder in the second degree was in fact returned. It is clear that the jury would not have found the defendant guilty of assault and battery when they did not exercise the right given them to find him guilty of as low a degree of crime as they might have done under the charge.

Moreover, the death of Frank Price was so clearly established and the other evidence in the case was such, that a verdict of assault and battery would not have been justified, and it was therefore not error for the court to omit any instruction that would have authorized such a verdict.

The contention is made also that the defendant could not lawfully be convicted of murder in the second degree under the seventh count of the indictment, but only of murder in the first degree.

In *Lindsay* v. *State,* 69 O. S., 215, a conviction of murder in the second degree under an indictment similar to the charge contained in the seventh count was sustained. In the opinion, page 235, it is said:

"The current of decisions in this state justifies the conclusion that an indictment, good as to murder in the first degree, embraces necessarily the lower grades of homicide, and that when this is the case presented, the jury may, if the facts proven warrant it, acquit of the graver offense and convict of the lower."

Another claim of error is based on the refusal of the trial court to grant a new trial on the ground of misconduct of the jury.

In support of the charge of misconduct, an affidavit of one of the jurors was presented setting forth, in substance, that after the jury had retired to their deliberations, and before a verdict had been reached, the foreman of the jury, who was the affiant,

had held some communication with the bailiff in charge of the jury on the subject of whether or not the court would instruct the jury only on a point of law and not as to the penalty on the different degrees of murder. Such a communication was highly improper if made as detailed in the affidavit, but the court could not consider the charge of misconduct supported by this affidavit alone, because of the well established rule, applicable to civil and criminal cases alike, that the depositions or testimony of a juror will not be received, on a motion for a new trial, to impeach the verdict by showing misconduct or misbehavior on the part of the jury.

This rule is said to be framed "for the purpose of setting bounds to the discretion of the court in granting new trials" and to be "founded on reasons of public policy." *Hulett* v. *Barnett,* 10 O. S., 459; *Farrer* v. *State,* 2 O. S., 54.

In *Kent* v. *State,* 42 O. S., 426, the rule is stated in paragraph 4 of the syllabus in the following language:

"Where a juror in a criminal case makes no statement with respect to the matter on trial until the jury retires to deliberate on their verdict, and then makes to his fellow-jurors a statement of matters alleged to be within his own knowledge, contradicting in an important particular the testimony of one of the defendant's witnesses, and the defendant is convicted, ground is afforded by such misconduct for a new trial, where the fact is properly made to appear, but the affidavits of jurors will not be regarded for the purpose of setting aside the verdict, until misconduct of the jury is shown *aliunde.*"

We find no error, prejudicial to the plaintiff in error in any of the matters complained of, and the judgment is affirmed.

MEASURE OF DAMAGES UNDER A BREACH OF CONTRACT.

Circuit Court of Summit County.

THE NATIONAL MILLING COMPANY v. CHARLES G. CRAFT.

Decided, October 12, 1912.

Contracts—Damages—Construction of Provision for Resale of Goods.

Where a contract for the sale of goods contains a provision that should the goods be resold the seller agrees to use care and diligence in selling in those markets that will, in his judgment, net the best figures, charging therefor a certain commission, such provision contemplates an act of reselling under a subsisting contract and does not apply so as to affect the measure of damages where the purchaser has repudiated the entire contract.

Jas. A. Ford and *H. L. Snyder*, for plaintiff in error.
Auten & Ormsby and *Chas. H. Stahl*, contra.

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

The action out of which this proceeding in error arises was begun by the plaintiff, the National Milling Company, in the court of common pleas, to recover damages of the defendant, Charles G. Craft, for breach of contract to purchase 750 barrels of flour.

The evidence before us in the bill of exceptions shows that on May 22, 1910, the defendant gave to the plaintiff an optional order for 750 barrels of Osota flour at $5.25 per barrel. The order was accepted by the plaintiff on October 31, 1910. By the terms of the order shipment of the flour was to be made between December, 1910, and May 1, 1911. After acceptance of the order by the plaintiff and before the expiration of the time fixed in the order for shipment of the flour, the defendant repudiated the contract and refused to receive the flour or to give directions for its shipment. The plaintiff in its original action sought to recover $637.50 damages for breach of contract.

On the trial of the action the court instructed the jury to return a verdict for the plaintiff, and laid down a rule of dam-

ages, which will be considered hereafter. The jury returned a verdict of $75 on which judgment has been duly entered.

The plaintiff in error seeks a reversal of this judgment in its favor on two grounds. First, that the court erred in charging on the measure of damages; second, that the court erred in not granting the motion of the plaintiff below for a new trial on the ground that there was error in the amount of the recovery, the claim being that the verdict is too small.

Considering these grounds of error in their order, our attention is challenged to the rule of damages, laid down by the court in the following language:

"In assessing the damages due the plaintiff, you will follow this rule, if there was an available market for the goods in question the measure of damages is the difference between the contract price and the market or current price on May 1, 1911. If you find that there was no available market price, or if you find that there were special circumstances showing proximate damages of a greater amount, then the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the defendant's failure to take the goods as agreed."

This portion of the charge is based upon the provisions of Section 8444, General Code, which prescribes the measure of damages in case the buyer wrongfully neglects or refuses to accept and pay for the goods contracted for. It correctly states the law of this state and is applicable to the facts in evidence unless, as is claimed by the plaintiff in error, another element of damages should have been included by reason of that provision of the contract between the parties which reads as follows:

"Should this flour or feed be resold, the seller agrees to use care and diligence in selling in those markets that will, in his judgment, net the best figures, charging 10 cents for one barrel commission besides other expenses actually incurred."

The trial court took the position that this provision of the contract did not bind the defendant to any different rule of damages than that provided in the statute and we concur in this view. The provision in question contemplates an act of reselling

under a subsisting contract and does not apply where the buyer has absolutely repudiated the contract and put an end to all its provisions.

We are of the opinion that the trial court committed no error in the charge complained of.

A consideration of the second ground of error complained of leads us to the conclusion that the jury could not have applied the measure of damages given them, to the evidence in the case. The verdict for $75 is irreconcilable with all the evidence given on the subject of the market value of Osota flour on May 1, 1911. The amount of the verdict indicates that the jury must have found, if the instructions were followed, that the difference between the contract price and the market value per barrel of flour of the kind named in the contract, on May 1, 1911, was only 10 cents. The undisputed evidence shows the difference to have been considerably greater.

We think the verdict on the undisputed facts and under the law was insufficient in amount, being too small, and therefore, the trial court erred in not granting the plaintiff's motion for a new trial on the ground indicated.

In *Toledo Railway & Light Co.* v. *Mason,* 81 O. S., 463, it was held:

"In an action to recover damages for personal injuries, a new trial may be granted on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff's claim."

By the fifth subdivision of Section 11576, General Code, when the action is upon a contract, error in the amount of recovery, whether too large or too small, is made a ground for the granting of a new trial.

It follows that the judgment of the court of common pleas must be reversed and the cause remanded for further proceedings according to law.

EFFECT OF ACQUIESCENCE IN WRONGFUL CONDUCT.

Circuit Court of Cuyahoga County.

LOUIS N. GROSS v. J. R. WIENER, THE WIENER BROS. COMPANY, AND THE INTERVALE FRUIT COMPANY.

Decided, January 13, 1913.

Equity—When Doctrine of Laches Bars Equitable Relief.

Acquiescence in the wrongful conduct of another by which one's rights are invaded, in order to preclude the injured party from obtaining equitable relief to which he would be otherwise entitled, must be voluntary, with knowledge of the wrongful acts and their injurious consequences, and it must last for a reasonable length of time, so that it will be inequitable to the wrongdoer to enforce equitable remedies against him.

White, Johnson & Cannon, for plaintiff.
Kline, Tolles & Morley, contra.

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

Some time in March, 1909, the plaintiff, Louis N. Gross, entered into a contract with the Wiener Bros. Company, a corporation organized under the laws of the state of Ohio, of which J. H. Wiener was a principal stockholder and treasurer, for the purchase of 208 shares of the capital stock of the Intervale Fruit Company, a corporation also organized under the laws of the state of Ohio.

It is claimed by the Wiener Bros. Company that this contract was made on the 10th day of March, and by Gross that it was made on the 19th day of March, 1909, but in our opinion this dispute is unimportant, as the knowledge which Gross had of the facts on which he relies for relief in this action, were substantially the same on both dates.

This action is brought by Gross for the rescission of this contract, and the prayer for relief is founded upon the following allegations of fraud and misrepresentation on the part of the defendants in the making of the contract:

First. That the farm owned by the Intervale Fruit Company, a one-half interest in which Gross sought to buy in the purchase

of the stock of the company, contained six hundred and twenty-six acres.

Second. That the farm was worth $60,000.

Third. That there were 50,000 trees, practically all three, four and five years old.

Fourth. That the title of the company was clear.

Fifth. That the Wiener Bros. Company, which owned two-thirds of the outstanding stock of the company, had been offered $27,000 for one-half of their interest.

Sixth. That the canning factory located on the farm and belonging to it, had an estimated capacity of 30,000 No. 3 cans every ten hours.

Seventh. That the canning factory cost $3,800 to build.

Eighth. That the canning factory employed eighty hands.

Ninth. That the fruit company shipped twenty-seven cars of fruit in the season of 1908.

Tenth. That the fruit company paid dividends of 30% in 1908.

Eleventh. That orchard A contained 12,000 peach trees.

Twelfth. That orchard B contained 3,700 apple trees, and bore a full crop in 1908.

Thirteenth. That orchard C was the finest plum orchard in the south, and had borne three crates to the tree.

Fourteenth. That orchard D contained ten acres of land planted in pecan trees.

Fifteenth. That orchard E contained forty acres of apple trees.

Sixteenth. That parcel F contained twenty-five acres of strawberries.

Seventeenth. That orchard G contained 5,000 peach trees.

Eighteenth. That orchard H contained 600 pear trees.

Nineteenth. That orchard I contained 15,000 Elberta peach trees, and averaged one crate to the tree in 1908.

Twentieth. That orchard J contained 7,000 peach trees.

Twenty-first. That orchard E contained 4,000 peach trees.

Twenty-second. That orchard L contained 8,000 plum trees.

Twenty-third. That parcel M contained ten acres of strawberries.

Twenty-fourth. That orchard N contained 4,000 peach trees, and in 1908 bore a half crop.

Twenty-fifth. That orchard O contained 20,000 peach trees.

Twenty-sixth. That orchard P contained twenty acres of peach trees.

Twenty-seventh. That parcel Q contained eight acres of peach trees.

Twenty-eighth. That parcel R contained thirty acres of walnut, filbert and pecan trees.

It may be important to note that, with the exception of representations as to numbers 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, the several representations referred to the number of trees on the farm.

Representation No. 3 refers to the age of the trees on the farm, and it is substantially conceded that the value of the farm rested upon these two considerations.

For reasons which need not be recounted here, representations numbers 1, 2, 4, 5, 7, 8 and 9 are practically eliminated from the case. There remains, therefore, for our consideration, representations numbers 6 and 10, and those relating to the number and age of the trees on the farm.

We therefore have before us the representations, first, referring to the number and age of the trees on the farm; second, the capacity of the canning factory; and, third, that the company paid a dividend of 30 per cent. in 1908.

The falsity of these representations is denied by the defendants, and for their further defense they allege that Gross made no claim that he had been deceived in the making of the contract until January 10, 1910, when, accompanied by Mr. Neff, he went to Akron and demanded of the Wiener Bros. Company a rescission of the contract, and that by his conduct in the iterim he ratified the transaction and is now estopped to complain.

What are the facts and circumstances attendant upon this transaction?

The record is voluminous, and within the narrow limits of this opinion it will be impossible to refer to more than the principal facts of the transaction.

Gross and Wiener had been intimate friends for perhaps a dozen years. Late in January or early in February, 1909, Gross

called upon Wiener at his office in Akron, as had been his custom when visiting that city.

In the course of their conversation at this time, Mr. Gross said to Mr. Wiener that he was tired and contemplated going south for a short rest, and incidentally for the purpose of viewing and perhaps buying a tract of land at Palatka, Florida, for his son, whom he wished to interest in agriculture. Wiener asked Gross how soon he intended going, saying, if you will let me know a week or ten days before you go, I am quite sure that I can go along with you, as I have been working very hard and need a little rest myself.

A short time later Gross communicated with Wiener by telephone relative to the time of their departure. At this time it was arranged that they should leave Akron for the South on Saturday evening, March 6th.

At Akron, on the evening of the 6th, at Wiener's home, the conversation relative to the purchase of lands in Florida by Gross was renewed. Wiener assured Gross of his faith in southern farm lands. Among other things he said to Gross, in substance, you know that I had very little money. A short time ago I invested a small amount in a small parcel of land in Georgia, the profits from which I reinvested in other lands adjacent thereto, until now, as a result of the accumulations from my original investment, I have $60,000 or $70,000 worth of farm lands in that state.

He then suggested to Gross that they stop over at his farm and "spend a day or two there," to which Gross acceded, saying, however, that he did not think they would wish to remain there any great length of time. Wiener said, in substance: "Well, when we get there, if we find it is not as pleasant as we want it, we will not stay, and it won't take us much out of our way to stop, as it is on the route to Florida."

At this time Wiener had in mind the selling of the Wiener Bros. Company's interest in the farm, as is evidenced by the facts which will be adverted to later in this opinion.

After dinner they left Akron together and arrived at Chattanooga at 7 P. M. Sunday, March 7th.

En route from Cincinnati to Chattanooga the conversation turned again to farms and farming in the south. Gross again spoke of his boy, who was then about fourteen years of age. He said he would like to educate him in an agricultural college and make a farmer out of him, as he felt that he would be much more contented at farming than he would be in the mercantile business, and that he intended to look at some lands at Palatka, Florida, with the intention of purchasing the same if they suited him. In the course of the conversation Wiener encouraged Gross in this intention, saying, among other things, that his was a most excellent idea.

After some further conversation on this subject Wiener said:

"Now, Gross, what is the matter with your buying an interest in my farm instead of going away down to Florida? I have $60,000 or $70,000 worth of property out there, and, as you are aware, I never had much money, but I bought a small part of the place which I now have, and with the profits bought more, until now I have six hundred and twenty some odd acres of land worth more than $30 an acre. There are over 50,000 fruit-bearing trees upon it, all young, four or five years old, and a good many of them not over two years old that I put out myself, and this place has a most promising future for it. If you want your son to become a farmer, I think here is a most elegant proposition for you to go in on. Very recently I turned down an offer of $27,000 for a half interest in my holdings in the farm."

At this juncture Wiener withdrew a packet of papers from his traveling bag, from which he handed a letter to Gross from one Byrne, in which Byrne conditionally offered $27,000 for a half interest in the farm. Wiener also showed Gross a copy of his reply to Byrne, in which the Wiener Bros. Company offered to take $30,000 for their interest in the farm, and represented, among other things, that the property was worth from $60,000 to $65,000; that there were 50,000 trees on the place, and that practically all of them were three, four and five years old and worth at $1 a tree; also that the farm consisted of 626 acres of land worth from $30 to $35 an acre, with buildings on the Tompkins farm, which was one of the two farms composing the entire tract, worth alone $10,000.

thus the conversation continued, off and on, until they
hattanooga, Wiener seemingly leaving nothing unsaid
is mind, would induce his friend Gross to purchase
is company's interest in the farm. Gross regarded
friend, and believed implicitly all that Wiener
he subject of the farm and its value.
ga they met, as if by appointment of Wiener, one
m Port Clinton, who was represented as a fruit buyer
who accompanied them to the farm, adding his mite at times, we suppose, in swelling the worth of the Intervale farm.

The party left Chattanooga on Monday, March 8th, stopping over night at Summerville, Georgia. On Tuesday morning, March 9th, they drove to the farm some five miles away. Adopting the language of counsel for the defendant, they found the peach trees in full bloom, which presented a most beautiful sight. It was perhaps ten o'clock when they arrived at the place. An hour or more was spent in walking in the orchard and about the place, not going very far away, however, from the farm house. Luncheon was served at about 12:30 at the farm house, after which the party remained in and about the farm house, and the grounds immediately surrounding the same, until early the following morning, when they returned to Summerville.

While at the farm Wiener convinced Gross of the truthfulness of the representations which he had made to him concerning the extent and value of the farm, and of the advantages in owning a share in the same, and had successfully induced Gross to agree to purchase a half interest in the farm for the sum of $15,000. Some debts were outstanding against the place which were pressing. Wiener explained to Gross that it was because of these debts and his need of money that he entertained at all the thought of disposing of any part of the farm, as he regarded the investment a capital one. Then, too, he added that he was glad to take Gross into partnership with him in a good thing, because of the long-standing friendship existing between them.

On their arrival at Summerville on the morning of March 10th, they went to the office of C. B. Rivers, an attorney, who drafted an agreement for them, which in part is as follows:

"For and in consideraion of the sum of $15,000, said Wiener Bros. do herby transfer, assign and convey unto the said Louis

N. Gross one-half of all the stock of the Intervale Fruit Company, incorporated, of Akron, Ohio, and agree to deliver to him the usual certificates for said stock by shares, with all and full the rights and privileges of every other shareholder of such stock of equal amount."

And further, the agreement provided the sum of $15,000 was to be paid according to the terms of a further agreement between the said Louis N. Gross and J. Henry Wiener, president of the said the Wiener Bros. Company. What this further agreement should contain does not appear, at least, from this instrument, but we suppose reference is here made to the agreement to be and which was made later. The agreement was signed by the Wiener Bros. Company, by J. H. Wiener, treasurer, and Louis N. Gross.

For the purpose of meeting certain pressing claims against the company, as above stated, and in accordance with an arrangement made by and between Wiener and Gross at the farm on the previous day, Gross paid at this time $760, which was credited on the contract.

Having concluded their business in Summerville they continued on their journey. About March 21st, they returned home, after which Gross was elected secretary and treasurer of the Intervale Company and assumed the management of the same. He had an examination made of the title to the property; he inquired into the indebtedness of the company and in other ways set about to familiarize himself with the business of the company.

On the 19th of April the transaction was finally closed. Another contract was made and signed by Gross who gave his notes to the Wiener Bros. Company in payment of the purchase price.

In this latter contract it was recited that the Wiener Bros. Company "this day sold and transferred to the second party 208 shares of the capital stock of the Intervale Fruit Company, one-half of the outstanding capital stock of said company, for the sum of $15,000, said transfer to take effect as of the 10th day of March, 1909."

As we have previously observed, it is contended by Gross that the true date of the contract was April 19, or the day on which

this latter contract was made, and by the Wiener Bros. Company that it was March 10. In support of his claim Gross cites the fact that on March 10th, J. H. Wiener was without authority to execute a contract on behalf of the Wiener Bros. Company, later ratified his act and, for the purpose of carrying out the agreement, purchased the outstanding one-third interest of the capital stock of the company for the sum of $3,500; and, further, Gross in his testimony says, that when Rivers handed him and Wiener duplicate copies of the contract drawn at Summerville, he said to Wiener:

"This is a preliminary contract for an agreement and you must surrender your copy up to Gross when the final contract is made."

Whatever there may be in these contentions, it seems to us, that they are unimportant here. In concluding the transaction Gross must have relied, for the most part, upon the representations concerning the farm made to him by Wiener. Doubtless he had no other knowledge of the number of fruit trees that were on the farm, their ages or their bearing qualities, and this was the all-important factor in the transaction. These representations were made to him prior to March 10th, and relied on by him in entering into the agreement of March 10th, and it is a matter of no particular importance how this agreement is classified in connection with the agreement of April 19th, as his knowledge on this subject had not changed, and his belief in the truthfulness of the representations was perhaps only strengthened by an incident which had occurred in the meantime.

As previously promised, sometime between March 10th and April 19th, a book of views, carefully and incorrectly prepared with the obvious purpose of deceiving prospective buyers of the farm, and as if the better to confirm the belief which Gross had in the truthfulness of the representations made to him by Wiener, and lest he should become aware of the perfidy of his friend before the consummation of the transaction and the payment of the balance of the purchase price, was placed in his hands by Wiener's order. This book is distinguished particularly by the gross misrepresentations embodied in the foot notes appended to the various views contained therein. According to these notes there were between 80,000 and 90,000 trees on the

place. While the placing of this book in Gross' hands was doubtless intended to mislead and deceive him, we do not believe that it was the controlling factor in causing Gross to fall a victim to the fraud that was perpetrated upon him.

Without going into the evidence in detail relative to the efforts made by Gross to ascertain whether or not he had been deceived, it is enough to say that shortly after the consummation of the transaction on April 19th, 1909, he became suspicious of the truthfulness of the alluring representations made to him by Wiener. Most likely his confidence in his friend had not as yet been shaken and it is equally likely that he was reluctant to think, much less accuse Wiener of having defrauded him. However, under one pretense and another he sent various persons to the farm for the purpose of ascertaining the true state of affairs. But he seems to have been able to get very little information from them. Likewise, by letter he sought to ascertain the true state of things relating to the farm, but without much success.

Sometime before the 1st of January, 1910, having become convinced that probably he had been imposed upon by his unsuspected friend, he consulted counsel as to the course which he should pursue in the premises. This conference resulted in Mr. Neff going to the farm and making a careful examination and investigation of the property, and reporting the true condition thereof to Mr. Gross. Mr. Neff remained on the farm about a week and returned to Cleveland on the 8th or 9th of January. Then for the first time Mr. Gross was fully and accurately apprised of the true condition of the property; and then, also, Mr. Gross became aware for the first time of the absolute falsity of the representations made to him concerning the farm by Wiener. Until he received Mr. Neff's report he was without accurate knowledge as to the number of trees there were on the property, or their ages, or their bearing qualities, and had only such knowledge on that subject as had been imparted to him by the false representations of his friend Wiener and as contained in the untruthful book of views placed in his hands as above stated. He now learned for the first time that instead of their being 50,000 trees on the property, as represented by Wiener, or between 80,000 and 90,000 trees, as indicated by the book of views, there was but a fraction of that number. The investigation of

Mr. Neff disclosed that there were not more than 7,100 trees under five years of age, and not more than 8,100 under seven years of age, and that the great majority of the trees that were on the place were old and valueless; also that the representations concerning the cannery, as well as the representation that the farm had paid a dividend of 30 per cent. in 1908, were likewise untrue.

Without going more into detail as to the evidence relied on by the plaintiff in support of his contentions, we are led inevitably, from a careful reading of the record, to the conclusion that the grossest fraud was practiced upon him and that Wiener imposed upon his confidence and shamelessly outraged his friendship. Indeed, no attempt, or at least very little attempt, is made by the defendants to refute the claim of the plaintiff respecting the representations that were made and their falsity. That they were made, that they were material and that they were relied upon by Gross to his injury, are seemingly irrefutable propositions. The defendants chose rather to defend against the relief prayed for by the plaintiff on the ground that the plaintiff, with full knowledge of the wrong that had been perpetrated upon him, ratified the transaction and acquiesced in his injury. As to this defense, how do the defendants stand before a court of equity?

Ratification has been defined to be the approval by act, word or conduct of that which was improperly done, or of a wrong which was committed. In short, confirmation of a voidable act. In the language of Pomeroy in his work on Equity Jurisprudence, Volume 2, Section 917:

"Acquiescence in the wrongful conduct of another by which one's rights are invaded, may often operate, upon the principles of, and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves and of their injurious consequences; it must be voluntary, not the result of accident; nor of causes rendering it a physical, legal or moral necessity, and it must last for a reasonable length of time, so that it will be inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him after he has been suffered to go on unmolested and his conduct apparently acquiesced in."

While they are distinguishable, the doctrine of laches, ratification and estoppel are closely allied. In *Badger* v. *Badger,* 2 Wallace, 87, it is said:

"There is a defense, peculiar to courts of equity, founded on lapse of time and the staleness of the claim where no statute of limitations governs the case. In such cases courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in the assertion of adverse rights."

And in *Parker* v. *Bethel Hotel Co.,* 31 L. R. A., 706, it is said:

"The defense of laches does not generally apply where the situation of the parties has not been altered and one has not been put in a worse condition by the delay of the other."

Ratification, on the other hand, means confirmation. The very substance of ratification is confirmation after conduct, and "this is enough," says Bigelow, "to indicate that there may be danger in using the term estoppel freely, for it is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel at best. An estoppel is a legal consequence, a right, arising from acts or conduct, while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, *i. e.,* not as yet attended with full legal consequences. The most that acquiescence or ratification can do, and this either may under certain circumstances do, is to supply an element necessary to the estoppel and otherwise wanting, as, *e. g.,* knowledge of the facts at the time of making a misrepresentation. But each stands upon its own grounds and must be made out in its own way, not necessarily in the way required by the ordinary estoppel by conduct." *Bigelow on Estoppel,* 5th Ed., pp. 456-457.

Applying these principles to the case before us, we are clearly of the opinion that the record fails absolutely to disclose such facts and circumstances and such knowledge thereof on the part of Gross, as would estop him from attacking and attempting to have set at naught the contract which through fraud and misrepresentation he was induced to make. Accordingly a decree will be entered for the plaintiff as prayed for.

DURESS IN OBTAINING SIGNATURE OF PARENT.

Circuit Court of Cuyahoga County.

THE MAXWELL-ROLF STONE COMPANY v. JOHN P. WHIGHAM.

Decided, November 18, 1912.

Contracts—Evidence—Threats to Have Son Arrested Amount to Duress—When Defendant Has Right to Open and Close—Testimony as to Effect of Acts Alleged to be Duress Competent.

1. A contract in order to be valid and binding must be the result of the free assent of the parties making it, and where a father is coerced into signing an instrument guaranteeing the payment of the amount of a defalcation by his son, by threats of the arrest and prosecution of the son for embezzlement if such guaranty is not given, the guaranty may be avoided on the ground of duress.
2. Where an answer admits all the averments of a petition which are necessary to state a cause of action and sets up new matter as a defense, the burden of proof rests upon the defendant, and it is his right to open and close.
3. In an action upon a written instrument, to which the defendant alleges his signature was secured by duress by threats to have his son arrested, the effect of the threats upon the defendants was a question of fact and it was competent for him to testify that he would not have signed the instrument sued upon if the threats had not been made.

W. J. Patterson, for plaintiff in error.

Ong & Mansfield, contra.

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

The parties stand here as in the court below.

The plaintiff sought to recover the sum of $10,633.22 with interest, basing its claim on a written instrument signed by the defendant, and reading as follows:

"In consideration of the sum of one dollar to me in hand paid by the Maxwell-Rolf Stone Co., a corporation of Cleveland, Ohio, I hereby guarantee the payments to the Maxwell-Rolf Stone Co. of all such amounts of money as the books of said company may, on examination and audit, show to be due it from my son, J. C. Whigham. Such audit to be made without delay and my said son to be allowed opportunity to see the books of said company

at the company's office. I to have 60 days' time in which to pay the amount so found due after the said audit is completed; the said 60 days' time to be taken as a further consideration for the making of this guaranty by me."

This instrument was signed by the defendant after it had been discovered by the plaintiff that J. C. Whigham, the defendant's son, who was in the employ of the plaintiff as agent and bookkeeper, had received and converted to his own use large sums of money belonging to the plaintiff. The amount of the shortage was subsequently ascertained by an audit to be the amount sued for. The defendant does not dispute these figures.

The defense was based upon the claim that the defendant was coerced into signing the instrument sued on by threats of the officers of the plaintiff company that unless he signed it they would at once cause his son to be arrested and prosecuted for embezzlement. He alleges that he was told that an officer of the law was waiting outside the office of the company where the transactions took place, to arrest his son, and that by reason of the fear induced by the threatened arrest of his son, he was unable to exercise his own free will, and signed the instrument.

The defendant further claims that the plaintiff agreed that if he would sign the instrument sued on, the prosecution and imprisonment of his son should not take place, and this is relied on by him to establish the illegality of the agreement.

The verdict was for the defendant. The plaintiff's motion for a new trial having been overruled and judgment entered on the verdict, this proceeding in error is prosecuted to secure a reversal.

The law is too clearly established to require any citation of authorities, that an agreement made in consideration of a forbearance to prosecute one accused of a crime can not be enforced.

If threats made by officers of the plaintiff to prosecute the son of the defendant operated to deprive him of his free will power, and, as a result, he signed the agreement, he is not bound thereby, regardless of whether there was a promise to forbear prosecution.

In *Williamson-Halsell-Frazier Co.* v. *Ackerman et al,* 20 L.R.A.(N.S.), 484 (77 Kan., 502), it was held:

"A contract in order to be valid and binding, must be the result of the free assent of the parties making it, and where a father is coerced into executing a mortgage to secure the payment of a defalcation of his son by threats of the arrest and prosecution of the son for embezzlement if such security is not given, the mortgage may be avoided on the ground of duress."

This we conceive to be the law applicable to the second defense set up in the amended answer.

There was evidence tending to sustain the defenses of the defendant, and the case, in our opinion, calls for no interference with the judgment on account of the verdict not being sustained by sufficient evidence.

It is contended by counsel for plaintiff in error that the court erred in its ruling that the defendant had the opening and closing.

By the amended answer all the essential averments of the petition entitling the plaintiff to recover, in the absence of affirmative defenses, were admitted, except possibly the amount of the shortage, and in open court at the beginning of the trial, counsel for defendant admitted this to be as stated in the petition. It was therefore incumbent on the defendant to assume the burden of producing evidence in support of his affirmative defenses. He was entitled to open and close, and the court committed no error in the ruling complained of.

Another ground of error relied on is error in the admission of evidence. The court, over the objection of the plaintiff, permitted the defendant to answer the question:

"Mr. Whigham, can you state to the jury whether if Mr. Maxwell had not made the statement to you about arresting your son, as you have related it to the jury, can you state to the jury, whether, if that had not been said, you would or would not have signed the contract in suit?"

The answer was:

"I undoubtedly would never have signed it, by no means."

Whether or not the act of the defendant in signing the instrument in question was the result of duress or coercion, was a

question involved in one of the defenses. The influences that operated upon the mind and will of the defendant was the proper subject-matter of inquiry. The defendant might properly testify what influence controlled his act.

The jury would not be bound to take his statement on this subject as final, but it was proper testimony on a question which was to be determined by the jury in the light of all the circumstances shown by the evidence.

The same principle controls the competency of this testimony as is stated in *Grever & Sons* v. *Taylor et al,* 53 O. S., 621, in paragraph 2 of the syllabus, which reads as follows:

"Whether representations as to his pecuniary circumstances made by the purchaser to the seller of goods, at one time in order to obtain credit, influenced the seller in making a like sale to the same party at a subsequent time, is a question of fact; and, in such case, it is competent for the seller to testify that they did. But the fact is to be determined by the jury in view of all the circumstances; as, also, whether there was such fraud in the subsequent sale as to entitle the seller to recover the property on the ground that the information given in the first instance was false."

No error prejudicial to the plaintiff in error has been brought to our attention, and the judgment is affirmed.

LIABILITY FOR FRAUDULENT REPRESENTATIONS BY PROMOTERS.

Circuit Court of Lorain County.

ARTHUR CHAMPNEY, HARRY R. EDWARDS, LOUIS SCHNEURER AND J. W. ROOF v. LEONORA A. BRAUN.

Decided, July 1, 1912.

Corporations—Fraud—Trial—All Promoters of a Corporation Liable for Fraudulent Representations of One of Their Number—Latitude Allowed Attorney in Argument.

1. Where several persons engage in business jointly, and, to facilitate such business, use a corporate name and issue stock, and in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business as to material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making false representations are liable to those, who, relying upon such representations, purchased stock to their injury.
2. Every argument has for its aim the convincing of the jury of the justice of the cause of action or defense advocated by counsel, and considerable liberality should be allowed counsel in drawing inferences and even in indulgence in invective, where there is any support thereof in the evidence.

H. G. Redington and *Q. A. Gillmore*, for plaintiff in error.
Webber & Metcalf, contra.

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

The defendant in error was plaintiff, and the plaintiffs in error were defendants, in the court of common pleas.

In the original action, the plaintiff recovered a verdict against the defendants on which judgment was duly entered after the overruling of the defendants' motion for a new trial.

By this proceeding the plaintiffs in error seek a reversal of the judgment rendered against them in the court below.

The plaintiff's cause of action was for the recovery of damages for alleged false and fraudulent representations made by A.

R. Champney, one of the defendants, claimed to have been acting not only for himself, but for the other defendants, whereby the plaintiff was induced to subscribe for one thousand dollars of the capital stock of a proposed corporation, the Liquid Force Company, and to pay for the same the full face value, upon the subsequent organization of the corporation.

The organization of the Liquid Force Company seems to have had its inception at a meeting held in June, 1908, in the city of Cleveland, at which the four plaintiffs in error and W. L. Hills, who had been manager of the Moxie Company, of New York, were present. The plaintiffs in error were the owners of all the stock of the A. R. Champney Company, located at Elyria, Ohio. This company was manufacturing and selling, as one of the lines of its business, a soft drink called "liquid force." At the meeting referred to there was some conversation between those present about organizing a new corporation to take over the business of the making of liquid force, and apparently some understanding was reached looking to the organization of such a corporation. The testimony of the various witnesses, who were questioned about the conversation that took place, was not very specific, but it is clear that some arrangement was made providing for the character of the organization of the proposed corporation and the terms of the transfer of the rights of the A. R. Champney Company in liquid force to the proposed corporation, because subsequent to this meeting a subscription contract was prepared embodying a prospectus of the new corporation, and specifying the terms on which it was to acquire from the A. R. Champney Company the rights of that company in liquid force. Various persons, including the defendant in error, signed this subscription contract.

On the 14th day of July, 1908, the plaintiffs in error and a daughter of one of them, met at Elyria and signed articles of incorporation of the Liquid Force Company which were filed in the office of the Secretary of State on the 21st day of September, 1908.

The false and fraudulent representations claimed to have been made to the plaintiff below by the defendant, A. R. Champney, on which were based her right to recover were:

That the liquid force department of the A. R. Champney Company had, for a year previous to the time plaintiff subscribed for the stock, paid a dividend of 33%; that for the year previous to the time of her signing the subscription list, the A. R. Champney Company had done between $25,000 and $30,000 worth of business in liquid force alone; that the business of liquid force had been fully advertised and needed no further advertising, but sold on its merits; that the secret formula and good will and trade mark of the liquid force business were worth $150,000.

At the conclusion of the plaintiff's testimony in the court below the defendants made a motion to arrest the testimony and instruct a verdict for the defendants. It is contended here that this motion should have been granted, and the contention requires a determination of the question whether any evidence was introduced by the plaintiff tending to sustain her right to recovery.

Liability of those who engage in the promotion of a corporation, for fraudulent representations, is stated in *Thompson on Corporations,* 2d Ed., Section 727, in the following language:

"It is made very clear by the authorities that promoters are liable for their frauds in obtaining subscriptions to the capital stock of the proposed corporation. It matters not what form the fraud assumed, if it was sufficient to influence the subscriber. The fraud of promoters in securing subscriptions may consist in representations as to the value of the property and as to the method of organization of the proposed corporation."

The representations complained of by the plaintiff in error in her petition in the court below are of such a character as to furnish the foundation for a recovery, provided they were false, and the party making them knew them to be false, or made them recklessly, without knowledge of their truth or falsity, and provided, further, plaintiff relied upon such statements and was damaged thereby.

As to the defendant, A. R. Champney, there can be no question raised as to the evidence having been sufficient to have required a submission of the case to the jury.

It is not claimed that the other three defendants below, themselves, made any of the representations relied upon by the plaintiff to sustain a recovery, and the question remains to be determined whether these three defendants can be held for the representations made by the defendant, A. R. Champney.

The petition charged a conspiracy between the four defendants; but the charge of conspiracy was abandoned and, in the charge of the court, the jury were told that if they should find from the evidence, by a preponderance thereof, that all the defendants were the promoters of the Liquid Force Company and that Champney as one of the promoters thereof, before the organization thereof and in furtherance of the promotion, organization and financing of the corporation, made false and fraudulent representations to the plaintiff for the purpose of inducing her to subscribe to the capital stock, knowing the same to be false, or recklessly making them, without any knowledge as to their truthfulness, and plaintiff, relying on such representations, was induced to and did subscribe for such stock and paid one thousand dollars therefor, which has become wholly lost to her, and she would not have so subscribed or paid her money for the stock but for such representations, then their verdict should be for the plaintiff against all of the defendants.

In *Hornblower* v. *Crandall,* 7 Mo. App., 220, the liability of those who engage in the joint enterprise of organizing a corporation on account of the false representations of one of those engaging in the joint enterprise, was considered and it was there held, quoting from the syllabus:

"Where several persons engage in business jointly, and, to facilitate such business, use a corporate name and issue stock, and in the promotion of the scheme, false representations are made by those holding themselves out as promoters and managers of the business as to material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making false representations are liable to those who, relying upon such representations, purchased stock to their hurt.

"That one of the associates, thus connected, is ignorant of the details of the business, will not avail him where he had the

means of knowing, but trusted to his associates, and where he, with the others, received the benefit of the wrongdoing."

There was evidence here tending to prove that all of the defendants were engaged in the joint business of organizing the Liquid Force Company and that the sale of stock was intrusted to the defendant, A. R. Champney, and the evidence is undisputed that all four of the defendants signed the articles of incorporation and became the beneficiaries, indirectly at least, of the subscriptions secured by Champney, including that of the plaintiff. There being evidence produced by the plaintiff tending to prove a state of facts which would render all of the defendants liable, the case was properly submitted to the jury to determine whether such state of facts had been established by the required degree of proof and the trial court committed no error in refusing to arrest the testimony from the jury and direct a verdict for the defendant. *Thompson on Corporations,* 2d Ed., Section 114.

It is argued that the verdict is not sustained by sufficient evidence, but, in our opinion, the verdict is not so manifestly against the evidence as to justify us in interfering with the result reached by the jury who heard all the evidence in the case and had an opportunity of seeing the witnesses and determining their credibility.

It is contended that the court below committed error in permitting the trial to proceed upon the theory of conspiracy as stated in the petition and admitting certain testimony which would be competent in support of a charge of conspiracy, but not competent upon any other theory, and then eliminating from the case, in his charge to the jury, the question of conspiracy, without also taking from the jury the evidence admitted in support of the conspiracy charge.

An examination of the evidence discloses nothing prejudicial to the defendants in the admission of evidence of the kind referred to, except that relating to statements made by Champney to Eugene Sites and the conversation that took place with reference thereto between Champney and Hills. The testimony of Hills on this subject was, however, withdrawn from the consideration of the jury and no complaint can therefore be made of

this matter. It is argued that the court should have expressly indicated to the jury that the cause of action based upon a charge of conspiracy was not the one upon which they were to pass. The allegations in the petition on the subject of conspiracy may be treated as surplusage and the cause of action there stated remains as one for recovery of damages on account of fraudulent representations.

The court in his charge apparently so treated the plaintiff's cause of action and charged the jury properly on the law by which the defendants were to be held liable, if at all. This, by necessary implication, rejected any other cause of action and withdrew the same from the consideration of the jury. If the defendants desired more specific instructions on this subject they should have submitted a request to charge.

Numerous exceptions were taken by the defendants during the course of the trial to the admission of evidence on behalf of the plaintiff and the rejection of evidence offered on their own behalf. We have examined these exceptions and, without indicating our opinion as to each one separately, the number being so great as to render this impracticable within the limits of an opinion, we have reached the conclusion that the court committed no error prejudicial to the defendants in rulings on evidence.

The plaintiffs in error complain of the special requests to charge before argument given on behalf of the plaintiff below and contend that these requests do not correctly state the law applicable to the case before the jury.

In our opinion, however, these requests embodied well settled principles of law and were appropriate to the facts in evidence and the trial court committed no error in giving the charges requested.

In the general charge, the court said:

"In order to recover for the alleged false representations made by the defendants, plaintiff must show that she was induced to make the purchase relying solely upon the false representations of the defendants, which she relied upon, and certain other information received from some other source. If it appears that the plaintiff did not trust the false statements, but acted alone upon information received from other sources, the jury should find for the defendants."

It is argued that this part of the charge left the jury to find in plaintiff's behalf if she not only believed that which Champney said to her, but also was influenced by other statements which she may have received from other sources without even the knowledge of Champney. While the first sentence of this part of the charge is somewhat obscure and is certainly awkwardly worded, we think the second sentence remedies any possible prejudice that may have resulted from the other. In the second sentence, the jury are told that if it appears that the plaintiff did not trust the false statements, but acted alone upon information received from other sources, it should find for the defendants. It is a well recognized rule that all parts of a charge must be considered together and, applying this principle, it seems clear that the court did not err in this part of the charge complained of.

The plaintiffs in error also complain of other portions of the charge in which the liability of the promoters of a corporation for the false representations of one of their number is stated and defined.

We have already indicated our views of the law on this subject and it is sufficient to say again that in our opinion the court committed no error in charging the jury on this subject. We are supported in this view by a recent case decided by the Court of Appeals of New York, *Downey* v. *Finucane,* 205 N. Y., 251. Quoting from the syllabus:

"The promoter of a company, whether he be a director or not, who knowingly issues or sanctions the circulation of a false prospectus containing untrue statements of material facts naturally tending to mislead and to induce the public to purchase its stock or other securities, is responsible to those who are injured thereby. Where there are a number of such promoters all the co-adventurers are liable in damages for the fraud of an agent employed by them to effect the sale of the corporate securities, without reference to their own moral guilt or innocence."

It is contended on behalf of the plaintiffs in error that counsel for the plaintiff below, in his argument to the jury, was guilty of misconduct. The argument objected to is set forth in the bill of exceptions, but the arguments of other counsel in the case are not before us. While it is apparent that a very generous latitude

was allowed counsel for plaintiff by the trial court in the making of his argument to the jury, we do not think that there is anything in the argument that would justify a reversal of the judgment rendered in the court below. The defendants were represented by able counsel who undoubtedly presented the defense of their clients in a thorough and vigorous manner, Some parts of the argument to which the exceptions were taken were apparently called forth by statements or arguments of opposing counsel. Every argument has for its aim the convincing of the jury of the justice of the cause of action or defense advocated by counsel and considerable liberality should be allowed counsel in drawing inferences and even in indulgence in invective, where there is any support thereof in the evidence.

We can not see that there was any error committed by the trial court in permitting counsel for plaintiff to make the argument complained of.

It is claimed on behalf of the plaintiff in error that the court erred in the forms of verdict submitted to the jury. No requests for any different forms were made, however, and no error can be said to exist on this account. Moreover, the fact that the jury found for the plaintiff against all the defendants indicates clearly that any additional forms of verdict submitted would not have been resorted to by the jury.

A careful examination of all the errors assigned leads us to the conclusion that no error prejudicial to the plaintiffs in error was committed, and the judgment is, therefore, affirmed.

FINES GOING TO LAW LIBRARIES.

Circuit Court of Cuyahoga County.

THE STATE OF OHIO, EX REL THE CLEVELAND LAW LIBRARY ASSOCIATION, V. PETER J. HENRY, CLERK OF THE MUNICIPAL COURT OF CLEVELAND.

Decided, May 10, 1912.

Statutory Construction—Later and Special Statutes Prevail—Law Libraries Not Entitled to Fines Collected in Municipal Courts.

1. Where two statutes are irreconcilable the one last enacted must prevail, and where there is a conflict between a general law and a special act the special act will prevail.
2. Section 3056, General Code, giving to law library associations fines and penalties collected in police courts in certain cases, does not give to such associations the fines and penalties collected in those cases in a municipal court, which has been created by special act, and to which jurisdiction of all cases formerly exercised by police courts has been transferred, where the act creating the municipal court expressly directs the clerk of that court to pay all moneys collected to the city treasurer.

A. A. & A. H. Bemis, for plaintiff.

E. K. Wilcox, contra.

POLLOCK, J. (sitting in place of Winch, J.); DUSTIN, J. (sitting in place of Marvin, J.), and NIMAN, J., concur.

This is an action in mandamus brought in this court by the relator, the Cleveland Law Library Association, against Peter J. Henry, clerk of the municipal court of Cleveland, for a writ in mandamus to compel the defendant, Mr. Henry, to pay over to the library funds of this city, the amount collected as penalties for offenses and misdemeanors, as provided by Section 3056 of the code.

They allege in their petition that the relator, the law library association, is duly incorporated under the laws of Ohio and has its location in the city of Cleveland, and that, in short, it is entitled to the funds provided for in this section and that the defendant has refused to pay to it such funds.

This involves a construction of the section referred to, together

with certain sections providing for the municipal court of this city.

The Legislature of the state of Ohio in the year 1910 passed an act creating a municipal court for the city of Cleveland (101 O. L., 365), giving to it certain concurrent jurisdiction with the court of common pleas, and also the jurisdiction of justices of the peace. The act further provided for judges of that court and the clerk of the court, and such other judicial machinery as was necessary to carry out the intent of the Legislature.

The Legislature of 1911 increased the jurisdiction of this court by giving to it the jurisdiction of all misdemeanors and of violations of the city ordinances, which the police court of this municipality had theretofore exercised.

It is claimed that transferring the jurisdiction of the police court to another court having a different name would not destroy the plaintiff's right to funds under the section above referred to.

We fully agree with counsel that the mere change of name of the court would not affect the distribution of any funds which might come into the hands of the officers of that court, and if this were all the change, affecting the fines coming into the hands of the clerk, that was made in providing a municipal court for this city, we would have no trouble in arriving at the construction of this statute claimed by the plaintiff. But the act creating the municipal court went further than this, and, by Section 30 of that act, provided for the distribution or payment of the funds that should come into the hands of the clerk of this court by virtue of his official position. It provides as follows:

"He shall pay over to the proper parties all moneys received by him as clerk; he shall receive and collect all costs, fines and penalties, and pay the same quarterly to the treasurer of the city of Cleveland, and take his receipt therefor, but moneys deposited as security for costs shall be retained by him pending the litigation."

This statute specifically directs that all costs, fines and penalties shall be paid by the clerk quarterly to the treasurer of the city of Cleveland. If he obeys this requirement of the statute, it is certain that he can not pay to the library association under

Section 3056. That section requires the clerk of the police court to pay a certain proportion of the fines and penalties assessed and collected for offenses and misdemeanors to the library fund. If we say that a change in the name of the court that now has jurisdiction to hear these cases, changed in no way the rights provided by statute of parties to share in the distribution of funds, we have here a direct contradiction in the statute. The clerk, if both of these statutes apply to him, can not obey the requirements of both of them. If the clerk of this municipal court is controlled by both of them, the two statutes are irreconcilable, and where two statutes are irreconcilable the latter must prevail (*State, ex rel Guilbert, Auditor*, v. *Haliday*, 63 O. S., 165). And, further, the act creating the municipal court is a special act and creates the office of clerk, the official position held by the defendant, Henry, and this act provides for the distribution of the funds coming into the hands of the clerk by virtue of his office. Where there is a conflict the special act should prevail over the general.

For this reason we feel that the clerk of the municipal court can not be ordered to pay these funds to the law library association.

No doubt the result reached is to be regretted by all parties, for it would be greatly to the benefit of the officers of the municipal court and city to have free access to the books of this law library, but we feel that we could not place such a construction on this statute without reading into it an exception which it does not contain, and that the proper way to remedy this oversight in the statute, if it is an oversight, is through the Legislature.

The writ is denied, and plaintiff's petition dismissed.

REGULATION OF THE SALE OF ICE CREA.

Circuit Court of Cuyahoga County.

NEMIS METROPOLIS v. CITY OF ELYRIA.

Decided, October 14, 1912.

Municipal Corporation—Constitutional Law—Forbidding Sale of Ice Cream in Public Places Except in Certain Receptacles—Valid Exercise of Police Power.

An order or regulation of a city board of health, forbidding the sale of ice cream on highway or public grounds of the city unless contained in sealed or locked cans or other containers approved by the board of health, is a valid exercise of police power, and is constitutional.

Fauver & Rice, for plaintiff in error.
G. B. Findlay, contra.

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

The plaintiff in error was convicted in the mayor's court of the city of Elyria on a charge of selling ice cream in quantities less than a pint and not contained in sealed or locked cans, or other containers, approved by the board of health of the city of Elyria. On a review of the case on error in the court of common pleas, the judgment of the mayor's court was affirmed. A reversal of the judgment of the court of common pleas, affirming the judgment of the mayor's court, is sought in this proceeding.

The offense of which the plaintiff in error was convicted was a violation of Section 8 of an order and regulation of the board of health of the city of Elyria, regulating the manufacture and sale of ice cream within the said city. The section in question reads as follows:

"No person, by himself or by his servant, agent or employee, or as a servant, agent or employee of another person, partnership or corporation, shall sell or offer for sale on any of the highways or public grounds within the said city of Elyria, any ice cream, nut ice cream, fruit ice cream or French ice cream, except in quantities of at least one pint, and contained in sealed or locked cans

or other containers, approved by the board of health of the said city of Elyria."

The evidence contained in the bill of exceptions shows that the plaintiff in error sold ice cream cones upon the streets of the city of Elyria in quantities of less than one pint, which were not contained in sealed or locked cans or other containers approved by the board of health of said city. This fact is conceded and it is admitted that the conviction of the plaintiff in error must be sustained unless said Section 8 is repugnant to the Constitution, and therefore void.

It is contended on behalf of the plaintiff in error that Section 8, above quoted, is unconstitutional and void because it is an unnecessary and unreasonable regulation and not related or adapted to the ends sought to be attained. The power delegated to boards of health to provide measures for the protection of the public health is very broad. It is practically co-extensive with the necessities that may arise for the purpose indicated. The authority for the exercise of such power is referable to the police power inherent in the state. The only limitation on the exercise of the police power of the state, whether for the preservation of the public health, or for any other purpose, is stated in *Stage* v. *Boone,* 84 O. S., 346, as follows:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The purpose of Section 8 of the order and regulation of the board of health of the city of Elyria was undoubtedly the protection of the health of its inhabitants, and especially of its children, which might be endangered by the unsanitary conditions attending the sale of ice cream in the streets of the city, and on other public property, as well as the danger of the contamination by flying dust incident to eating ice cream in the streets. This is a perfectly legitimate subject for the exercise by the board of health of its power.

Reference to the language of Section 8 discloses that two things are forbidden by it. First, the sale of ice cream in quantities of less than a pint; and, second, the sale of ice cream in any form except in sealed or locked cans or other containers approved by the board of health.

It seems clear that the second part of the section under consideration is a perfectly proper regulation and one against which no constitutional criticism can be aimed. It is appropriate to the purpose in view and is adapted to the end sought and there is nothing unreasonable in requiring those who wish to sell ice cream on the city streets and other public property to take the sanitary measures provided in the regulation to protect their ice cream from exposure to the dust and to prevent other undesirable conditions which might prevail in the absence of such a regulation. As we understand it, this is conceded and the attack directed against the prohibition of sales in quantities of less than one pint.

In our view of the case, the facts before us do not call for a decision on the validity of this particular part of Section 8. The two parts are separable and where such is the case that which is constitutional and valid can be upheld. The principle is the same in dealing with a regulation like this as that which has been repeatedly applied by the court in upholding that part of a statute which is not repugnant to the Constitution and rejecting the unconstitutional part where the two parts are not so inseparably connected in subject-matter and so related to each other as to give rise to a presumption that a part would not have been enacted without the whole. *Railroad* v. *Commissioner,* 31 O. S., 338; *Gibbons* v. *Catholic Institute,* 34 O. S., 289.

Even, therefore, if that part of Section 8 dealing with the quantity of ice cream that may be sold in the streets or on public grounds of Elyria should be held void, that part dealing with the sale of the article in closed cans or retainers would stand as a valid regulation.

The facts show that the plaintiff in error sold ice cream cones that were not contained as required by the regulation, and regardless of the validity of the other part of Section 8, his conviction must be sustained.

The judgment of the court of common pleas is affirmed.

PORCHES COVERED BY BUILDING RESTRICTION.

Circuit Court of Cuyahoga County.

ROSA HAAS v. MOLLY STRAUSS.

Decided, January 23, 1912.

Building Restrictions—A Porch is a Part of a Building—Plaintiff Not Estopped from Enforcing Building Restriction Because of Trifling Violation of it by Herself and Neighbors.

1. A porch, built upon a brick foundation, roofed and permanently attached to the whole width of the front of a house, is an integral part of the building within the meaning of a building restriction in a deed providing that all buildings shall be erected not less than a certain distance back from the line of the street.
2. The fact that plaintiff and other lot owners have violated the building restrictions in an allotment by building porches nearer to the street than is permitted by such restrictions, will not, where such violations are slight, estop her from enjoining the construction by her neighbor of a porch of a different type from those theretofore built and which would seriously obstruct her easement of light and view.

S. N. Weitz, for plaintiff.

J. J. Sullivan and *Sol. Edgert,* contra.

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

It appears from the agreed statement of facts filed in this case, and the evidence, that the plaintiff is the owner of sub-lot No. 126 in Southern & Chamberlain's allotment in the city of Cleveland, which sub-lot has a frontage of fifty feet on the north side of Hawthorne avenue. The defendant is the owner of sub-lot No. 125 in the same allotment on the same side of Hawthorne avenue and adjacent to plaintiff's property on the east. That at the time Southern and Chamberlain allotted this property and sold lots therein, the following restriction was imposed upon all the lots:

"And as a further consideration of the following described property, no buildings are to be placed nearer to the street than twenty feet from the front of the lot line."

That the defendant, at the time this action was started, had under way the construction of two buildings on her lot, the main portions of which were placed back from the lot line the distance required by said restriction, but the two porches of which, as originally planned, encroached upon the restricted portion of the lot; that these porches sought to be constructed by the defendant extended to a distance of about eight feet into the restricted space, so that the outside line of the porch piers and the porches proper would be eleven feet two inches from the inside lot line; that the porches which the defendant was about to construct were to be of brick, attached to a part of the building proper, each being twenty feet in width and eight feet in depth, and extending from four feet below grade through to the roof, the roof on the porch being an extension of the roof of the building, and the piers to said porches being two feet by two feet. It appears further that the porches of numerous other houses on the same side of the street encroach somewhat upon the restricted part of the lots; that the plaintiff's own porch stands about 89-100 of a foot over the restricted area.

Since the buildings proper are placed twenty feet from the lot line and in conformity to the restriction, it becomes necessary to determine whether or not the building of the porches upon the restricted space is a violation of the restriction. In *Ogontz Land & Improvement Co.* v. *Johnson*, 168 Pa. St., 178, this question was before the court, and it was there held:

"A porch built upon a brick foundation, roofed and permanently attached to the whole width of the front of a house and projecting to within seven feet of the fence line, is an integral part of the building within the meaning of a building restriction in a deed providing that all buildings upon said lots shall be erected not less than fifteen feet back from the fence line. Such a structure is a violation of the building restriction, notwithstanding the fact that it is open at the sides and front."

Jones on the Law of Real Property and Conveyancing, Volume 1, Section 760, states the law in this language:

"The piazza or porch is ordinarily a constituent part of the building, and is within the terms of a restriction which prohibits the placing of a building less than a certain number of feet from the line of a street."

In *Bader* v. *Walther et al,* 5 N.P.(N.S.), 497, the syllabus is as follows:

"1. The word 'house' as used in a building restriction, means the building, and includes a porch which is an integral and substantial part of it.

"2. An injunction will lie against the construction of a house by an adjoining property owner when the enjoyment of his neighbor's property is substantially affected thereby as to view, light and air, although his neighbor may have submitted to encroachments upon portions of the street remote from him and not affecting his enjoyment, in violation of a general restriction.

"3. One buying land for the purpose of building a house upon it is held to have fully contemplated, not only the restrictions in his deed, but such surrounding conditions as were obvious and material."

It seems clear that the porches which the defendant was about to erect on her lot, as shown by the plans in evidence, were a substantial and integral part of the buildings, and that their erection as contemplated would constitute a violation of the restriction. It remains, therefore, to be considered whether the restriction imposed upon the lots of the plaintiff and defendant and on the other lots in this allotment, has been broken to such an extent that the plaintiff is prevented from insisting on an observance of such restriction by defendant.

In *McGuire* v. *Caskey,* 62 O. S., 419, it was held:

"Where neighboring proprietors of urban lots are bound by covenant in a deed under which both held not to erect buildings within a prescribed distance from the street upon which the lots abut, either is entitled to an injunction to enforce the observance of the covenant by the other.

"That relief will not be denied to a plaintiff because he has erected a porch in front of his residence and within the prescribed distance from the street, when the purpose of the covenant is to secure and preserve the desirability of the street for private residence, and the porch does not substantially interfere with the easements of neighboring proprietors for light, air and view."

In *Brown* v. *Huber,* 80 O. S., 182, part 2 of the syllabus states the law in the following language:

"Where such covenant or restriction is still of substantial value to the dominant lot, notwithstanding the changed condition of the neighborhood in which said lot is situated, a court of equity will restrain its violation."

Pomeroy's Equity Jurisprudence, Third Edition, Volume 5, Section 280, contains this statement of the law:

"An injunction will not be granted if the plaintiff has acted so as to make its issuance inequitable. A person who seeks to enforce such a covenant must permit no such breach of the stipulation as will frustrate all the benefit that would otherwise accrue to the other parties to the agreement. One who stands by and acquiesces in repeated violations by the defendant and others, can not be heard to deny the right; and where a party has violated the restrictions in his own deed, he can not enjoin violations by others, even though the covenant violated by the plaintiff is entirely different from that disregarded by the defendant; but where the violations of the plaintiff are not substantial, and violations by other parties have been in places remote from plaintiff, an injunction will not be denied."

The encroachment of the plaintiff's own porch upon the restricted space is very slight. The violations of the restriction by the other lot owners on the same side of the street, according to the evidence, are not such as to materially interfere with the enjoyment of the plaintiff's property, and do not offer any substantial obstruction to the easement of neighboring proprietors for light, air and view. The most pronounced violation is that of the Wertheimer property, which is a distance of 295 feet from the property of the plaintiff, and does not, therefore, materially injure the plaintiff in the use and enjoyment of her property. None of the porches are more than one story in height. The porches which the defendant desires to build are two stories in height, with large pillars and roofs, which, on the original plans, were an extension and a part of the main buildings and which, even according to the modified plans, are still of such a character that the porches, if completed, will seriously interfere with the plaintiff's view, and with her easement for light and air. The proposed violation of the restriction by the defendant is of a different kind than any that exists on any other portion of

that side of the street. We think there is no such equity arising against the plaintiff from the fact that her house and the houses of others have been located and built in the manner described as to render it unjust for her to seek relief by injunction. Her enjoyment of her property has not heretofore been substantially affected by the violations of the restrictions that have occurred on that side of the street. The restriction is still of value to her and should be enforced, to the extent that the court deems equitable to both parties, unless she has been guilty of such laches in seeking relief as will now estop her from asking intervention of a court of equity. We find that she has been guilty of no such laches. The construction of the porches has proceeded only so far as putting in the foundations to the brick work and stone capping on the first story, and it appears that a portion of this work was done after the defendant was notified of the filing of this action. The plaintiff acted with all reasonable dispatch in seeking relief, and is not estopped from maintaining her action.

The enforcement of building restrictions in deeds is somewhat a matter of discretion with the courts (*Russel* v. *Harpel*, 20 C. C., 127), and in the exercise of this discretion, the plaintiff is granted an injunction enjoining the defendant from building the porches according to her present plans.

But the defendant will be permitted to build her porches in the position planned so far as the location within the restricted portion of the lot is concerned, to the height of one story, and will be permitted to place floors over the tops of these porches, but no roofs, and she will be required to use pillars of moderate size, and to leave the sides and fronts of the porches open, except as to the placing of railings around the floors of the porches.

A journal entry may be prepared and submitted to the court, together with plans for the porches as indicated, for the approval of the court, which plans will be made a part of the journal entry in the case.

DETERMINATION AS TO THE LOWEST RESPONSIBLE BID.

Circuit Court of Cuyahoga County.

CYRUS LOCHER v. F. H. HASEROT ET AL.

Decided, November 10, 1907.

Public Contracts—Sample Need Not Conform to Specifications—When Contract Must be Awarded Lowest Bidder.

1. Where a public contract is let to the lowest bidder and the specifications on file are made a part of the contract, it is immaterial that a sample submitted does not conform to specifications.
2. Where a statute governing the awarding of a public contract provides that the contract shall be let to the lowest responsible bidder, and the lowest bidder has submitted two samples with a different price upon each sample, but both of which are lower than the prices submitted by any other bidder, the public officers may award the contract to the lowest bidder, but not for the goods made according to the more expensive sample.

Gott & Locher, for plaintiff.
Stearns, Chamberlain & Royon and *E. K. Wilcox,* contra.

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

This suit is brought by Locher, as a tax-payer, to have the board of education of the city of Cleveland enjoined from carrying out a contract with the Superior Seating Company, a corporation, for the furnishing of 1,200 chairs for use in furnishing the West Technical High School of said city. The contract resulted from the acceptance by the school board of a bid made for the furnishing of these chairs by the Superior Seating Company. This bid was made in answer to an advertisement for bids made by the school board for such chairs. This advertisement called for bids to be made upon specifications on file with the director of schools of said city, the bids to be opened at 12 o'clock noon on December 4, 1911.

A number of bids were made, including two bids by the Superior Seating Company. One of these bids proposed to furnish the chairs in accordance with the specifications at $1.33 each; the other at $1.37 each. All other bids were for a greater amount

than that named in either of the bids of the Superior Seating Company. The board awarded the contract upon the bid at $1.37 per chair.

The statute regulating contracts of this sort is Section 7623, General Code. This section is long, and the manner of procedure is divided into subdivisions, the sixth of which reads:

"None but the lowest responsible bid shall be accepted. The board, in its discretion, may reject all the bids or accept any bid both for labor and material for such improvement or repair which is the lowest in the aggregate."

The provisions of the specifications are these:

"Backs and seats to be of five-ply veneer, surface of birch, curved so as to form comfortable seats; edges to be nicely finished. All wood work to be smooth, and to be stained a dark brown shade, to be furnished by school architect F. S. Barnum, finished with a heavy body of durable varnish, dull finish. And a sample chair finished as specified must be furnished with the bid."

To this was added, before the bids were made and as a part of the specifications on file with the director of schools, an alternative for plain oak veneer finished with dull varnish, sample to be submitted; also for birch with dark weathered oak stain and dull finish.

On the part of the plaintiff it is urged, first, that the Superior Seating Company is a responsible bidder. This is conceded by the defendants. Of course it must be conceded, because the defendants contracted with this same bidder. The price at which the chairs were to be furnished under the accepted bid was certainly not the smallest amount of money for which this bidder proposed to furnish chairs which should in all respects correspond with the specifications, but it is said that this does not determine certainly whether the bid at $1.33 was the lowest bid, notwithstanding it proposes to furnish the chairs for less money than the accepted bid. "Lowest," as applied to money, ordinarily means "smallest" amount, and if the statute uses the word in this sense, then the bid accepted was not the lowest bid. If the word "lowest," as used in this statute, has its ordinary meaning, it is plain that the defendants, acting as a board, vio-

lated the statute in accepting the bid at $1.37. But it is said that the statute did not take from the board the discretion to determine what bid under all the circumstances was the lowest, and that it might determine that a bid for an amount greater than the smallest amount of money was the lowest bid. As already said, this would be a departure from the meaning of the word "lowest" as used in common parlance. That the board had the discretion to determine whether a bidder was responsible, so that if a contract was entered into it could be relied upon to furnish the chairs which should be in exact accord in every particular with the specifications, can not be doubted. It exercised that discretion and determined that the Superior Seating Company, which made the bid at $1.33, was responsible in the sense indicated.

The bidder furnished a sample under each bid. The samples were not entirely alike, nor was either sample in exact accordance with the specifications, nor was it expected they would be, because the specifications would require the manufacture of chairs not such as are kept in stock by the manufacturer. This is clearly shown, and, indeed, is conceded.

There was a difference in these samples, the chief being in the castings, which were a part of the chairs. The castings on neither sample were of the weight provided for in the specifications, but this would not necessarily require the rejection of either of the bids. As is said in the case of *Many* v. *The City of Cleveland,* 19 C. C., 58, speaking of a bid for lamps to be furnished to the city of Cleveland and of a sample furnished with the bid:

"That lamp did not in all its details correspond with the specifications. The evidence shows that if the contract is entered into, it is not expected that exactly such a lamp as that which was present at the bidding and furnished by Daykin (the successful bidder) is to be used, but the contract which will be entered into, if this injunction is not allowed, is in evidence before us, and that contract has as a part of it all the specifications which are on file in the director's office. So that if this injunction is allowed, it will prohibit the city from entering into a contract in which the party with whom it is to contract agreed to furnish everything which the specifications require."

From this it will be seen that the fact alone that the sample furnished does not fully meet the specifications, will not justify the rejection of the bid. But it is said that the sample accompanying the bid at $1.33 had a different finish from that which accompanied the $1.37 bid; that the special object in having a sample furnished was that the board might determine whether the finish of the chairs furnished under a bid, if it should be accepted, would be satisfactory to the board. The language of the specifications as to finish is this:

"All wood work to be smooth, and to be stained a dark brown shade furnished by school architect F. S. Barnum and finished with a heavy body of durable varnish, dull finish, and a sample chair finished as specified must be furnished with the bid."

And then in the added specifications the word "finish" is used in this language:

"To include an alternative for plain oak veneer finish with dull varnish, sample to be submitted; also for birch with a dark weathered oak stain and dull finish."

On the part of the plaintiff it is urged that the word "finish," as here used, plainly has reference to the wood work of the chair, because it says "it is to be finished with a heavy body of durable varnish, *dull finish,* and a sample chair finished as specified must be furnished," etc.; and again in the added specification, where "it is to be plain oak veneer finish with dull varnish, sample to be submitted; also for birch with a dark weathered oak stain and *dull finish.*"

It is not contended that so far as the finishing of the wood work of the chairs is concerned there is any material difference in the samples, but the sample furnished with the $1.33 bid shows a different construction of the metal part of the construction in this, that whereas the metal shown in the $1.37 sample is solid without openings or beads, that furnished with the $1.33 sample has openings and beads. And it is urged that this may properly be considered as a part of the finish of the chair as that term is used in the specifications.

This contention is not sound. The word "finish," as used both in the first specifications and in the added specifications,

clearly refers to the finish of the woodwork, the polishing, veneering and varnishing, and perhaps the outer coat of japan or varnish to be put upon the metal work, and in this respect the two samples are alike. If the school board desired to have the metal of a particular kind and form, it could easily have said so in its specifications. It saw fit to make its specifications without so saying.

The statute under consideration differs from some of the statutes which refer to the letting of public contracts by competitive bidding. Those statutes provide that the contract shall be let to the party who makes the lowest and best bid. Under such statutes it has been held by this court, and by the Supreme Court of this state, and by courts in other states, that the board or officers whose duty it is to let the contracts are not bound to let it to the responsible bidder who offers to furnish the article for the smallest amount of money, but the discretion is left to the public authorities to determine whether a bid is, taking into account all matters connected with the question of whether the thing proposed to be furnished is by him whose bid requires a greater amount of money to be paid, and is on the whole the one which economy dictates as that which will be best for the public.

We think that the discretion left with the board under the statute now under consideration is less than that left where the statute requires the lowest and best bid to be accepted, and we think, to secure to the public the benefit of the competitive bidding provided for in the statute, the discretion left with the board is the discretion to determine whether he who offers to do for the least amount of money is a responsible bidder, so that he may be depended upon to furnish that which corresponds in all respects with the specifications, and that the board has not the discretion to say that because a bidder will furnish something better than the specifications require at a higher price than a responsible bidder will furnish that which is exactly what the specifications require, is the lowest because the best bidder.

As said in *Beaver & Butt* v. *The Institute for the Blind*, 19 O. S., 97:

"The construction put upon a statute must not be such as to nullify or reverse the evident policy of the statute and to render possible and easy the exercise of such favoritism by the trustees

toward particular parties as it is the obvious policy and intention of the statute to render impossible."

In 6 Nisi Prius, page 452, it is said:

"Where by the terms of a statute the contract for public improvements is to be awarded to the person who offers to furnish the materials and perform the labor required at the lowest price and gives good and sufficient bond to the acceptance of the particular public officers having in charge the work for the faithful performance of the contract, the statute is mandatory, and no discretion as to the awarding of the contract is vested in said officers."

See also *Boren et al* v. *Darke County,* 21 O. S., 312. The third paragraph of the syllabus reads:

"Where a bidder includes in his proposal with the labor and materials specified in the advertisement, for which proposals are invited, other labor and materials not therein called for, and the price proposed is an aggregate sum for the whole, under said act it can be regarded only as a proposal for the labor and material advertised for: and if such price is not lower than that of another bidder whose proposal embraces only the labor and materials called for in the advertisement, he is not entitled to have the contract awarded to him, if the other bidder otherwise complies with the act."

It is urged further on the part of the defendant here that the amount involved is too trivial for the court to interfere. This contention we do not regard as sound. The amount involved upon the entire award would be $48. This, as compared with the whole contract, is not a large amount, but the principle here involved is such that we regard the precedent as a dangerous one to allow this contract to be carried out. The bid accepted was not that which proposed to furnish the chairs for the least amount of money. There was another bid by this same responsible bidder to furnish the chairs in exact accord with the specifications for a less amount of money and therefore it was a lower bid, and there was nothing on the samples furnished which could be construed as relieving the bidder, if the contract was awarded to him, from complying with all the terms of the specifications.

We reach the result, therefore, that the injunction here prayed for must be allowed.

EVIDENCE AS TO RECEIVING STOLEN PROPERTY.

Circuit Court of Cuyahoga County.

MORRIS KRAUSE v. STATE OF OHIO.

Decided, November 18, 1907.

Receiving Stolen Property—No Error in Receiving Evidence of Other Like Offenses at About the Same Time.

A conviction for receiving stolen property will not be set aside because the evidence received at the trial tended to prove the receipt of several other similar pieces of stolen property at about the same time as those for the receiving of which the defendant was on trial, without making it certain which of the several pieces were the ones upon which the prosecution was based.

F. P. Walther, for plaintiff.

S. V. McMahon, Prosecuting Attorney, contra.

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

Morris Krause was prosecuted before a police court of the city of Cleveland on an affidavit charging him with having received, on or about the 6th day of December, 1906, four brass castings, the property of the New York, Chicago & St. Louis Railway Company, which property had been stolen from said company, and that Krause received it, knowing it to be stolen. The trial took place on the 18th day of January, 1907. Complaint is made that the court permitted evidence on the part of the boys from whom it is claimed Krause bought the castings, of quite a number of sales of stolen castings to him, Krause; that these various sales were not very far removed in date from the one charged in the affidavit against Krause; that the court allowed a verdict of guilty to stand under this evidence, whereas, it is said, that the evidence is such that it will be impossible, if Krause is ever prosecuted again for receiving any of the brass castings which he purchased from these boys, to know whether he is being prosecuted for the same offense upon which he has already been found guilty. The real difficulty in the

case seems to be that the evidence tended to show that Krause had been guilty of receiving stolen brasses, knowing them to be stolen, on several occasions near the time charged in the affidavit in this case, and so near to the time as that proof of other of these purchases might have been sufficient to convict of the offense charged in the affidavit; and it is said further, that there is one occasion when the evidence shows that Krause purchased brasses from these boys, which brasses were the property of the Erie Railroad Company, or at least taken from the yards of that company. It is urged further that the evidence does not show that any of the brasses purchased by Krause from these boys was the property of the New York, Chicago & St. Louis Railway Company. As to this last claim it may be said that the testimony is, the brasses were taken from the premises without any further showing than that. We think the jury might be justified in saying that it was the property of that company. Property in the keeping of one may properly be assumed to be the property of such keeper in the absence of any evidence tending to discredit or disprove such ownership. The evidence in the case is that quite a large number of these pieces of brass were taken by the boys who testified, and who say they sold them to Krause, from the yards of the New York, Chicago & St. Louis Railway Company, near the time charged in the affidavit, and that at or about the time charged in the affidavit, they sold to Krause such brasses. They say that on one of these occasions they sold to Krause either four or five pieces of these brasses, which they got from the New York, Chicago & St. Louis Railway Company's yards. Evidence of various sales might have been properly permitted as tending to show knowledge on the part of Krause that the goods were stolen, can not be doubted under the authority of *Tarbox* v. *State of Ohio,* 38 Ohio St., 581. That a conviction could be had under the affidavit for the offense charged, though the time was not shown to be the time charged in the affidavit, can not be doubted, because it is expressly provided in Section 7215, Revised Statutes, that:

"No indictment shall be deemed invalid, nor shall the trial, judgment or other proceeding be stayed, arrested or in any man-

ner affected * * * for omitting to state the time at which the offense was committed, nor stating the time improperly."

If then, the evidence here justified the finding that Krause had received stolen brasses, the property of New York, Chicago & St. Louis Railway Company, knowing them to be stolen, at a time so near to that charged in the affidavit, the judgment can not be reversed because the evidence tended to show that he was guilty of like offenses near to the same time. We find no error in the record and the judgment is affirmed.

INTERPRETATION OF CONTRACTS.

Circuit Court of Cuyahoga County.

LOUIS J. LEE v. F. W. BENEDICT.

Decided, November 18, 1907.

Trials—Prejudice Caused by Reference to Judgment Below Cured by Explanation that Judgment was by Default—Contracts—Duty of Court to Interpret a Written Contract in the Light of the Evidence.

1. Any error caused by plaintiff, while on the witness stand, speaking of the judgment secured in the justice court, is cured by the court explaining in its charge to the jury that no trial was had in the justice court and that the judgment there was by default.
2. It is the duty of the court to interpret a written contract; and where the evidence makes it clear that the parties did not intend to make the contract which the ordinary meaning given to the language used would indicate, it is not error for the court to so interpret it as to give it the meaning intended.

J. A. Thompson, for plaintiff in error.
Samuel Burgert and *George A. Groot,* contra.

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

Suit was brought in the court of common pleas by Benedict against Lee. The terms plaintiff and defendant as used in this opinion refer to the parties as they were in the court below. In the plaintiff's petition he avers that:

"On or about the —— day of ——, 1903, he and the defendant entered into a verbal agreement whereby the defendant agreed to and did employ said plaintiff to do and perform certain duties, which duties consisted of selling and leasing properties listed with the defendant, in the city of Cleveland, Ohio, and for such services the defendant agreed to pay the plaintiff a fixed salary and 25% and 33-1/3% of the commission so received by the defendant on all properties sold and leased by plaintiff for the defendant; an itemized account of which is hereto attached, marked Exhibit A., and made a part of this petition."

The account attached is a long one and purports to set out leases and sales made, upon which the plaintiff was to receive

commissions, with the amount of commission received by the defendant and the part thereof to which the plaintiff claims to be entitled, and a statement of payments which had been made by the defendant to the plaintiff. To this petition the defendant answered, that he is in the business of leasing business blocks, etc., that he receives as compensation certain commissions, that the plaintiff entered his employ on the 17th day of March, 1903, his proposed duties in said employment being to assist in the transaction of the aforesaid business, for which he was to receive a salary of $40 per month, and a certain commission on business transacted through him. Defendant says that plaintiff continued in his employment until July 10, 1905. Defendant says that he paid the plaintiff, from time to time, for his services so rendered, the sums of money set forth in the itemized statement in plaintiff's petition contained. Defendant now says that the total amount paid, was $539.19 in excess of the amount due from the defendant to the plaintiff for his labor and services performed as aforesaid, and he prays for judgment against the plaintiff for that sum.

Plaintiff replied to this answer, denying that he had received anything in excess of the amount admitted, but that there was still due him the amount prayed for in his petition, which was $226.29, with interest from the 11th day of July, 1905. The result was a verdict for the plaintiff, and by proper proceedings the case is here for review on error, a bill of exceptions being filed, containing all the evidence offered on the trial of the case.

This suit was first brought before a justice of the peace and was appealed to the court of common pleas. The plaintiff in giving his testimony in the last named court said to the jury that he recovered judgment before the justice. The way in which he came to say this was as follows: The plaintiff was being examined, and was asked, after having stated that he had brought about certain deals for which he had received a compensation, "and the balance is how much?" To which he answered: "Two hundred and twenty-six dollars and twenty-nine cents." The following question was then put to him: "With interest from when?" To which he answered: "I got a judgment in the lower

court." At this point the witness was stopped and counsel for the defendant said: "I object to the statement of the witness."

After some colloquy between the court and counsel, the court said: "Proceed, I will take care of that at the proper time." Beyond this, there was no statement as to who got a judgment before the justice, and in the charge the court, speaking of this matter, said to the jury:

"When Mr. Benedict was on the stand he was asked something and he answered that judgment in the other trial, or words to that effect, was obtained at a certain time. I thought at the time that it was very prejudicial and ordinarily it is, but in view of what I am going to say to the jury, I don't think that will hurt in any way what I am going to say—that won't hurt anybody. It is true that, for instance, if a petition comes in here, and the lawyer who draws it up, sets up in the petition that judgment in the case below was for the plaintiff or defendant, we would strike it off, or, perhaps, require him to pay costs before another action is brought and so, if a lawyer says in the opening of his case, judgment was for plaintiff or defendant, the case will be continued probably, and disregarded as utterly wrong, if he should say to the jury that the case below was won by defendant or plaintiff, and you can see that it is perfectly true, because the parties are both entitled to have it tried here as though it were never tried before. But the transcript in this case shows what was done in the court below, and reads in this way: 'July 31, 1905. 10 A. M. Case called, plaintiff in court; defendant came not for an hour thereafter; Samuel Burgert sworn and examined on behalf of the plaintiff. No defense. Whereupon the judgment was rendered for plaintiff.' So, gentlemen, that having been the history of the case, and I now tell you in substance the case never was tried before at all; defendant was not there, so I think that cures any injury done by the statement, and I now think that Mr. Benedict did not at all mean to prejudice you in any way or do anything he ought not to do; so that is out of your consideration. This is the first time the case has ever been tried, and I do not consider Mr. Benedict has been guilty of any impropriety and will bring in the verdict you think the facts will warrant."

In view of this language of the court in its charge to the jury we feel that there could have been no possible prejudice to the defendant by this statement made by the plaintiff. The jury were

distinctly told that they were not to consider it; they were told further that the defendant was not in the justice court and that they were in no wise to be affected by that statement, evidently inadvertently made by the plaintiff, and not directly in response to any question put to him. The question being from what time he was to recover interest, he probably expected to answer that in the court below he got interest from a given date. Of course this would be improper, but in view of the fact that the defendant never appeared in the justice court and that there had never been any trial before the justice of the peace to determine what defense there could be to this case, we think there should be no reversal on account of this action of the witness and of the court.

Upon the trial it developed that the plaintiff entered the employ of the defendant under a written contract and not under a verbal agreement, as set out in the petition; that he continued for a time to work under this written contract, and thereafter, that he worked under a new verbal contract entered into between the parties. There is no question as to what rate of compensation the plaintiff was entitled to recover under the verbal contract. There is, however, a dispute as to when the change was made, from the written to the verbal contract, and since under the verbal contract the salary was to be at a higher rate than under the written contract, as is agreed on both sides, and the commissions were to be at a rate about which there is no dispute under the verbal contract, to-wit, one-third of such commissions as the defendant should receive from his clients, the question in dispute and tried out before the jury was as to the commissions which the plaintiff was entitled to receive while working under the written contract, as well as the length of time that he worked under that contract, and perhaps there was some dispute as to the amount which had been paid to the plaintiff by the defendant, the defendant claiming he had paid somewhat more than was admitted by the plaintiff.

There was one item amounting to $60 which was allowed by the jury to the plaintiff and which the court, upon motion for new trial, required the plaintiff to remit as a condition for the affirmance of the judgment. The plaintiff thereupon remitted this

item of $60 and, as so reduced, the court overruled the motion for a new trial and entered judgment upon the verdict.

It is urged that this judgment, even with the remittutur, was erroneous, unless the defendant consented to the remittitur.

We know of no authority for such a proposition, nor do we know of any reason for such a proposition. The practice for so long a time that the memory of man runneth not to the contrary has been to enter the judgment upon the plaintiff remitting such an amount as the court thinks should be remitted, without reference as to whether such judgment is satisfactory to the defendant or not. There was no error in this regard, provided the evidence was such as to justify the jury in finding the amount, after deducting the remittitur.

It is said further, however, that the court erred in its charge to the jury in undertaking to construe the written contract. That written contract reads, so far as it need be considered in connection with the question now under consideration, as follows:

"For said services, Louis J. Lee hereby guarantees to F. W. Benedict a stated monthly salary of $40, together with a commission, the percentage of which is hereinafter specified.

"It is understood that said Benedict shall participate in the brokerage commission aforesaid to the extent of one-half of one per cent. of said commission."

The language used by the court in reference to this is as follows:

"There is one other thing I must speak to you about in this contract. The language of the contract is, that Mr. Benedict shall be entitled to brokerage commission to the extent of one-half of one per cent. of said commission. It is always for the court to say what the contract means, also for the court to tell the jury what a contract means. But the court, in this case, is of opinion that these parties unquestionably, by their conduct and their dealings with each other—I don't think any other conclusion than this could be drawn from the testimony of these two gentlemen on the stand, that their construction of this contract was, that the first period Mr. Benedict was to get one-fourth of the commissions and during the subsequent period one-third; that manifestly was the construction upon it, and there is one question, to find out what these gentlemen meant, or we want to know what these gentlemen intended to do, and I think it is perfectly

plain that what they intended to do was, that at the beginning, Mr. Benedict should receive one-fourth of the commission in certain cases, and subsequently one-third."

The court was clearly right that no lawyer would say that the words used, to-wit, "one-half of one per cent" of said commission meant one-quarter of the entire commission. It is not only true that no lawyer would put that construction upon them, but no other man who understands the meaning of the English language would put that construction upon these words used alone, and without something to aid him in determining that the parties meant what the court said they clearly by their conduct showed they did mean, and by their conduct thus construed the contract to mean. The evidence is substantially to the effect that the commission received by the defendant for his leases and sales was 2% to start with. It is almost inconceivable that the parties meant that the plaintiff was to receive but one-half of one per cent. of this 2%. That they did not mean this is fairly inferable from the way in which the evidence shows the defendant paid the plaintiff from time to time; but it seems to us to be rendered absolutely certain by the testimony of the defendant himself, where, in testifying as to a certain transaction, he is asked: "You remember the transaction of the Pleasant Hill Land Company?" (Answer) "Yes, sir." "Your commission in that was $300?" (Answer) "Yes, sir." "He was entitled to $75?" (Answer) "No, sir." "What was he entitled to?" (Answer) "He had very little to do with that deal, and we had a mutual understanding to the effect I would allow him a lump sum of $60." "Then, without that mutual understanding he would be entitled to $75?" (Answer) "If we did not have that understanding, yes." "That is what I asked." (Answer) "Sure." "You had some little dispute about a commission that was coming to him on that—the $75?" (Answer) "Yes, sir." "And you finally settled the matter by giving him $60, is that it?" (Answer) "That is it exactly."

Now that this transaction was under the written contract is clear, and this is the only contract under which the plaintiff claims that he was entitled to one-quarter of the commissions

which the defendant should receive. The defendant himself says that but for an arrangement made between them, by which the plaintiff accepted $60 because of the fact that it was claimed that he did not perform full services, he would have been entitled to $75; that is, to one-quarter of the commissions which the defendant received. This is a complete recognition on the part of the defendant that his understanding of this contract was that claimed by the plaintiff, and that which the court said to the jury the conduct of the parties showed was what they meant by it. So that whether it was the duty of the court to take into consideration the evidence and the conduct of the parties and so construe this contract to the jury, or to have instructed the jury properly as to how they should construe it under the evidence, showing how the parties had acted under it, there was no prejudice to the defendant in the court so construing the contract. It is perfectly clear that the parties themselves understood the contract to mean what the court said their conduct showed they understood it to mean. There was, therefore, no error to the prejudice of the defendant if what the court said was the true construction of this contract.

Complaint is made also that the court erred in refusing to give certain requests to charge which the defendant made. The first of these reads:

"The plaintiff is not entitled to recover any commissions unless he has first shown that either the owner or the purchaser or the lessee of the property entered into the transaction as a result of the plaintiff's exclusive effort."

This was properly refused. It was not necessary that the business should have been transacted by reason of the exclusive efforts of the plaintiff in order to entitle him to a commission.

The second request reads:

"The word, 'commission,' as used in the contract means the percentage which is found by multiplying the amount of the sale or lease by the rate per cent."

There was no error in the court declining to define a word, the meaning of which is perfectly plain to every man who fairly

understands the English language. The word "commission" which it was asked should be defined, must be presumed to have been understood by the jury. It might be different if some word had been used which has a technical meaning, and which technical meaning is not generally understood, but there was no more propriety in the court being required to define the word "commission" than there would have been for him to determine the word "salary" or "compensation."

The third request reads:

"One-half of one per cent. commissions, as the phrase is used in the contract, means one-half of one per cent. of the amount obtained by multiplying the amount of the sale or transaction by the rate per cent., which is admitted in this case to be two per cent."

That this was properly refused results from what has already been said as to the charge of the court upon the true construction of the contract entered into by the plaintiff and defendant.

The result is that we do not find any error in the record justifying a reversal and the judgment is affirmed.

WHEN COMMISSION OF AN UNLAWFUL ACT INVALIDATES LIFE INSURANCE.

Circuit Court of Cuyahoga County.

ST. ELIZABETH ROMAN CATHOLIC UNION v. JOHN KOCIS.

Decided, 1912.

Insurance—Commission of Unlawful Act no Defense When Not the Cause of Death or Injury.

The fact that the insured was killed or injured while in the commission of an unlawful act is no defense to an action upon a life or accident insurance policy, unless the wrongful act was the proximate cause of the death or injury.

METCALFE, J. (sitting in place of Winch, J.); NIMAN, J., and POLLOCK, J. (sitting in place of Marvin, J.), concur.

The plaintiff in error is a mutual benefit association, and as such it issued a policy to John Kocis on the 25th of July, 1910, insuring him during the continuance of the policy against loss of life or against the loss of a limb resulting from accident. While the policy was in force Kocis received an injury which he claims under the terms of the policy entitled him to the benefits thereof. The society refused to pay on the ground that such injuries were received while in the commission of an unlawful act. Kocis brought suit and recovered judgment in the common pleas court against the union, and it is to reverse that judgment that error is prosecuted here.

On the trial of the case below evidence was offered on the part of the defendant, here the plaintiff in error, tending to show that at the time he received the injuries of which he complains, Kocis was in the commission of an unlawful act. That he and another were engaged in the act of stealing hay which belonged to the city of Cleveland and loading it upon a wagon with intent to carry it away. That while in the act of loading the hay they were observed by an officer who ordered them to desist and attempted to arrest them, or at least to stop them from taking away the hay. That thereupon Kocis and his associate drove off with the hay that they had loaded, and while driving rapidly the load was partially overturned. Kocis was thrown to the ground and he received an injury which resulted in the loss of one of his feet. This evidence was admitted, but before the case was finally submitted to the jury the trial judge withdrew it and instructed the jury to disregard it. Thus arose the important question in this case, whether or not, independent of the terms of the policy such as was issued by the plaintiff in error to the defendant, such acts as those of which Kocis was said to be guilty constitute a defense to the policy.

There is no provision in the policy forfeiting it or avoiding a recovery in case the injuries were received in the commission of any unlawful act. It is urged that the following provision contained in the policy is sufficient to cover any injury of that sort:

"If, however, such member himself causes his death or disability, and where this is found out and has been proven after

a thorough investigation, no benefit whatever can be claimed. In such case the respective member, even though he survive, will be scratched from the list of the union once and forever."

We are of the opinion that this clause only covers such injuries as may be self-inflicted and death by suicide, and is not broad enough to cover anything else.

So that the sole question, we think, here is whether or not, independent of any provision in the policy, if the assured was engaged in an unlawful act, does that constitute a defense to the payment of the benefits provided by the policy? Nearly all the decisions we have been able to consult upon this question turn upon a provision of the policy itself, but we find it to be the law, as expressed in the great weight of authority, that the provision prohibiting a recovery for an injury received while doing an unlawful act refers to such injuries as may happen as the natural consequence of the act, and its probable and to be anticipated consequences. A known violation of a positive law will avoid a policy, if the natural and reasonable consequences of the violation of law are to increase the risk. A violation of law, whether the law is a civil or criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk or cause the injury. The wrongful act must have been the proximate cause of the injury or death. The injury or loss of life must be connected with the crime as its consequence—by reason of the guilty act the injury must have occurred. There must be some positive connection between the act which is the violation of law and the injury to the assured.

Thus in the case of *Griffin* v. *The Western Mutual Benefit Association,* 20 Neb., 620, where the assured had committed a robbery and while leaving the building was killed by a policeman, the court held that as the commission of the crime had been completed and the death occurred afterward, there was no forfeiture. And we think that this holding expresses the law as sustained by the great weight of authority.

Now, in this case, if Kocis had committed an offense it was not one the natural and probable consequence of which would have led to his death or injury. The crime, if any was committed, had been completed before the injury occurred. At the time of

the injury he was riding upon a wagon and the proximate cause of the injury was the overturning of the wagon and not the stealing of the hay, hence we think that the defense that he was injured in the commission of an unlawful act does not avail in this case, and there was no error in excluding the testimony in question.

It is urged, also, that the court committed error in admitting in evidence the book containing the constitution of the union, that book having been printed in a foreign language. We are unable to see how any one could be prejudiced by the admission of this book. It is not likely that any of the jurors were able to read it, and there is no proof that any of them could read it, and we think there could be no prejudice in its admission. The only clauses in it which it is claimed have any bearing upon the controversy at all in this case were translated and the translations given in the pleadings and in the bill of exceptions. The rest of it we have no doubt was a closed book to the jurors, and even if it was not, there is nothing whatever shown to indicate that any one could be prejudiced by its admission in evidence, hence we think the judgment in this case should be affirmed.

SALE BY AGENT OF GOODS AT LESS THAN AUTHORIZED PRICE.

Circuit Court of Cuyahoga County.

THE OHIO & PENNSYLVANIA COAL CO. v. THEODORE F. BEIDLER.

Decided, 1912.

Agency—Acceptance of Order Secured by Agent Gives Him Right to Commissions.

Where an agent has been authorized to sell goods on commission, the fact that he has sold them at a lower price than authorized by his principal does not defeat his right to commissions where the principal has accepted and filled the order.

METCALFE, J. (sitting in place of Winch, J.); NIMAN, J., and MARVIN, J., concur.

The plaintiff in this case was defendant in the action in the court below. That action was brought by Beidler to recover commission of two cents per ton on 108,000 tons of coal sold by the plaintiff company to the Colonial Salt Company. The plaintiff below obtained judgment and error is prosecuted here to reverse that judgment on the ground that the verdict is against the weight of the evidence.

Beidler in his petition claims that he had a contract with the Ohio & Pennsylvania Coal Company by which he was to receive two cents per ton for coal sold by him and that in accordance with that contract he did sell coal to the Colonial Salt Company. This is denied by the plaintiff company.

We are not able to say that the verdict of the jury in this case is manifestly against the evidence. It appears that negotiations began between Beidler and the Ohio & Pennsylvania Coal Company some time in July, 1908, and that Beidler was given a price of $1.05 per ton, and was to receive a commission of three cents per ton upon the sales made. Beidler entered into negotiations with the salt company through its manager, Mr. Turner, but the price of $1.05 did not seem to be satisfactory to Mr. Turner, and he asked Beidler to see Mr. Zerbe, the manager of the Ohio & Pennsylvania Coal Company, and get a better price. Mr. Zerbe, upon being told by Mr. Beidler that he would have to make a lower price, gave him a price of $1.03 and stated to him "if you have to take that much lower price you will have to take a less commission." And then continued Mr. Zerbe, "I authorized him to get $1.02 and we agreed to give him two cents a ton." At this same time Mr. Zerbe dictated a letter to Mr. Turner, the manager of the salt company, which he gave to Beidler. This letter is signed by "The Rice Coal Company by J. B. Zerbe, President." The coal which the salt company desired to purchase was known as Bergholtz coal, and was produced by the Rice Coal Company and not by the Ohio & Pennsylvania Coal Company. This letter was given to Mr. Beidler, and he called at the office of the salt company; not finding Mr. Turner in he left the letter at the office. The matter remained thus for several weeks, when it was taken up again directly between Mr. Zerbe and Mr. Turner, and a lower price than $1.02 was given to the

salt company, and at that price the sale was made. It seems to us clear from this evidence that it was through the instrumentality of Mr. Beidler that the parties were brought together, in making this sale. All of the negotiations were carried on through Beidler up to the time the sale was made, and Beidler having been instrumental in bringing the parties together, the fact that the contract was finally consummated without further intervention on the part of defendant does not prevent him from recovering his commission; nor could the fact that the sale was made at a lower price than that given to Beidler defeat him. See 42 Kan., 664; 71 Conn., 599. Same case, 44 L. R. A., 321, and note.

We are, therefore, of the opinion that the judgment in this case should be affirmed.

AS TO LIABILITY OF ENDORSER.

Circuit Court of Cuyahoga County.

CHAS. G. ALPETER v. J. L. FREE.

Decided, 1912.

Assignments of Non-Negotiable Instruments.

The assignor of a non-negotiable bond and coupons does not incur liability as an endorser.

METCALFE, J. (sitting in place of Winch, J.); MARVIN, J., and NIMAN, J., concur.

The plaintiff in error was plaintiff below, having brought this action to recover from the defendant, J. L. Free, as indorser on an interest coupon of a bond executed by the O. C. Saum Real Estate Company. This bond bears date May 15, 1907, is for $500, and is payable to the defendant J. L. Free. On the 10th day of July, 1907, the defendant indorsed the bond upon the back thereof as follows:

"Cleveland, Ohio, July 10, 1907. For value received I hereby sell, assign, and transfer all my right, title and interest in the within bond to C. J. Alpeter. J. L. Free."

There is no separate indorsement upon the coupon sued upon or upon any of the coupons. This bond also is not payable either to bearer or order and contains no words of negotiability. It also contains the following provision:

"It can be transferred by indorsement, record thereof on the company's books."

The coupon, omitting dates, signatures, etc., reads as follows:

"The O. C. Saum Real Estate Company will pay to bearer $15 in gold coin of the United States at the office of the Cleveland Trust Company of Cleveland, being six months' interest then due on its six per cent. 10-year debenture bond No. 53."

On this state of facts is the defendant liable as an indorser of the coupon? We think not. Neither the bond nor the coupon is negotiable. The contract of indorsement relates entirely to negotiable paper. The assignment of non-negotiable paper does not render the assignor liable as an indorser. We do not place our holding upon the theory that the coupon required a separate indorsement, for we are satisfied that the interest coupon is merely an incident of the bond and title to it will pass by transfer of the bond. We place our holding purely upon the ground that the assignor thereof incurred no liability as indorser or otherwise by a simple transfer of the instrument. 10 Cyc., 599; 21 O. S., 221; 42 O. S., 30; 178 N. Y., 208; 110 N. Y., 169.

MEANING OF THE WORD "ADJACENT" IN AN OIL LEASE.

Circuit Court of Cuyahoga County.

A. O. WEST v. FRED L. HALL ET AL.

Decided, October 14, 1912.

Oil and Gas Leases—"Adjacent" Defined.

Where the conditions of an oil and gas lease are that the lease is to be null and void if the lessee does not drill on land adjoining or adjacent to that leased within a certain time, drilling upon land two miles distant and separated by eight farms from the land leased does not prevent forfeiture of the lease, as that is not adjacent within the meaning of the lease.

L. D. Hamlin and *H. C. Wilcox*, for plaintiff.
Smith, Taft & Arter, contra.

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

This is an action for the cancellation of an oil and gas lease which contains the following provision:

"It is further agreed by all parties hereto that if a well is not commenced drilling on this land, adjoining or adjacent land within six months from the date hereof, then this contract is null and void and not binding on either party."

The evidence in this case shows that no well was drilled on the demised premises or on land adjoining it, within the six months. Within that time the defendant, or his successors in interest under the lease, did drill four wells on other property leased by him, the first well being two and one-half miles distant in a direct line from plaintiff's land and the other three within a radius of fifteen hundred feet of the first well. Eight farms of usual size intervene between plaintiff's land and the well first drilled; plaintiff's land is in the center of the township and the wells are in the northeast corner of it. Most of the land in the northeast quarter of the township is under lease to defendant on similar terms.

Defendant claims these wells are on land adjacent to plaintiff's land and save the forfeiture stipulated in the lease.

The main question in this case is the meaning of the word "adjacent" as used in this lease.

While many cases have been cited to us which define the meaning of that word when used in various contracts and statutes, no case has been brought to our attention which does so in regard to an oil and gas lease. It seems clear, however, both from the definitions of lexicographers and jurists that the word "adjacent" has a broader meaning than "adjoining" and that things may be said to be adjacent, even if something intervenes between them.

How far apart they may be and yet be considered adjacent must be determined from a consideration of the facts and circumstances surrounding the use of the word in each case and the meaning intended by the parties to be expressed by it, if it apparently has a special meaning.

The purpose to be served by the use of this clause in the lease, as determined from a consideration of the whole lease and the circumstances attendant upon its execution, must be first examined.

The main consideration moving the lessor to the execution of this lease was manifestly his desire to market the oil and gas under his land, if any, and receive the income therefrom.

When he provided, however, that the lease might continue in force if wells were drilled on adjoining or adjacent farms within the time stipulated (in which case the lease says he shall be paid one dollar per acre per year as rental under the lease), the lessor evidently had in mind some benefit to himself other than the marketing of his own oil and gas.

It was agreed on argument, by counsel on both sides, that this benefit to the lessor was the ascertainment, by proper drilling, of the fact as to the existence of subterranean oil and gas in his neighborhood, near enough to his lands to be some indication of the existence under his own lands of oil and gas in paying quantities.

What that distance is in the practical drilling of such wells, we are not advised by the evidence in this case, beyond the mere fact that defendant has seen fit to drill his wells fifteen hundred feet apart. Having nothing else to go by, not knowing the geological formations in this territory, their trend and dip, we take the farmer's view of the case and hold that the drilling operations in this territory were too remote from plaintiff's land to give him any indication of there being either oil or gas under his farm.

We therefore hold that the wells drilled within the six months are not on land adjacent to plaintiff's farm and that, by a failure to comply with the quoted provision of the lease, it became void by its own terms.

Defendant, however, claims the lease is still in force by virtue of another clause in it, by which it is stipulated "to commence a well on said premises within one-half year from the date hereof, or pay at the rate of $1 per acre per year quarterly, for each additional three months such commencing is delayed from the time above mentioned for the commencement of such well until a well is commenced; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rental under this provision during the remainder of the term of this lease."

It seems clear that here is a provision for the payment of rent, if the lease continues in force by the drilling of a well on adjoining or adjacent land, and that this clause falls, with the whole lease, if forfeiture occurs under the clause first considered.

The clause containing the provision avoiding the lease for failure to drill on "this land, adjoining or adjacent land" comes after the provisions for the payment of rental at the rate of one dollar per acre per year, and the later clause must prevail, if there is any conflict. But we see no conflict; the first clause is a provision for the payment of rent, while the lease continues in force; the latter clause is a provision avoiding the whole lease, if certain conditions are not complied with.

Judgment for plaintiff as prayed for.

DEFAULT IN CONSTRUCTION OF TRACKS UNDER A STREET RAILWAY FRANCHISE.

Circuit Court of Lorain County.

CITY OF ELYRIA v. THE CLEVELAND, SOUTHWESTERN & COLUMBUS RAILWAY CO. AND THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Decided, October 14, 1912.

Surety Bonds—When Provision for Liquidated Damages Treated as Penalty.

Where a contract contains a large number of stipulations of varying degrees of importance, to be performed, and for the breach of some of which the damages are readily ascertainable, while as to others they are not, a single sum stipulated as damages for a breach, and applicable alike to each of the covenants, will be treated as a penalty, and in an action for a breach only the actual damages proved are recoverable.

G. B. Findley, City Solicitor, for plaintiff.
Blandin, Hogsett & Ginn, contra.

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

On October 22, 1907, the council of the city of Elyria, the plaintiff in error, passed an ordinance known as No. 1425, granting to the defendant in error, the Cleveland, Southwestern & Columbus Railway Co. the right to construct, maintain and operate certain tracks, on and in the streets of said city. By the terms of the ordinance, the railway company was to have the tracks on certain of the streets completed and in operation on or before August 1, 1908, while, as to certain other streets on which the right to lay tracks and additional tracks was granted, no time limit was specified within which the construction should be made.

The ordinance also granted to the railway company an extension of all of its franchises for the period of twenty-five years from the date of the passage of the ordinance.

ection of the ordinance provided as follows:

rdinance shall take effect and be in force from and ssage and earliest period allowed by law, and the ond required by Ordinance No. 1421, and the pay- its of publication, as required by said ordinance, ter the acceptance of the terms and conditions e Cleveland, Southwestern & Columbus Rail- its successors or assigns, as required by said o. 1421."

Ordinance No. 1421, referred to, is a general ordinance regulating the use of the streets of the city of Elyria for railroad purposes and was in force when Ordinance No. 1425 was adopted. Section 8 thereof provides:

"Within thirty days from and after the final passage of the franchise ordinance, the grantee shall file with the city clerk its acceptance in writing of the terms and conditions of said ordinance, which acceptance shall be accompanied by a bond in the sum of ten thousand dollars ($10,000), conditioned upon the construction and equipment of said railroad within such times as shall be prescribed in the granting ordinance and to save the city harmless from the claims for damages or otherwise growing out of the construction of said railroad."

The railway company on October 28, 1907, complied with the section just quoted by filing its written acceptance of the terms of Ordinance No. 1425, and also gave the bond required by this section and Section 18 of Ordinance No. 1425. The bond was in the required sum of $10,000 and was signed by the defendant in error, the Fidelity & Deposit Company of Maryland, as surety. The condition of the bond is as follows:

"WHEREAS, the said railway company by ordinance duly passed by the council of the city of Elyria, on October 22, 1907, and approved by the mayor of said city on October 28, 1907, was granted the right to construct, reconstruct and equip certain street railroads, within said city, and within the time and in the manner prescribed in said ordinance; and

"WHEREAS, on the 28th day of October, 1907, said railway company duly accepted in writing the terms and conditions of said ordinance;

"*Now, Therefore,* if the said railway company shall well and truly construct, reconstruct and equip said street railroads within said city within the time prescribed in said ordinance, and as provided in Ordinance 1368 of the city of Elyria, as amended October 1, 1907, and shall save the city of Elyria harmless from any and all claims for damage or otherwise growing out of the construction and reconstruction of the said street railroads, then this obligation to be void; otherwise to be and remain in full force and virtue in law."

The railroad company did not construct any of the tracks provided for in Ordinance No. 1425, and on August 18, 1908, the city council of Elyria, acting under the power reserved by Section 11 of Ordinance No. 1425, passed an ordinance declaring null and void the rights and privileges granted by Ordinance No. 1425, except the provisions thereof giving the company the right to construct tracks on three certain streets and the provision extending the company's franchise for twenty-five years.

Thereafter suit was brought by the city against the railroad company and the surety company to recover on the bond, and on the trial the judgment was for the defendants.

The object of this proceeding in error is to secure a reversal of said judgment.

The only question presented for our determination is whether the $10,000 named in the bond is to be treated as a penalty or as stipulated or liquidated damages. If it is to be considered a penalty, the judgment of the court of common pleas must be affirmed, because there was no evidence produced of any loss or damage resulting to the plaintiff by the failure of the railroad company to construct its tracks within the time required by the ordinance, which is the only breach of the condition of the bond complained of. If, on the contrary, the amount named in the bond is to be considered as stipulated or liquidated damages, the judgment must be reversed.

The ordinances, in compliance with which the bond sued on was given, do not specify whether the amount for which bond was required to be given was for security merely against such loss as the city might suffer by the failure of the railroad company to perform the things required of it, or whether it was to be

treated as liquidated damages. The bond itself does not denominate the sum named therein as penalty or liquidated damages.

Even if the ordinances and the bond had described the sum specified as either a penalty or liquidated damages, the characterization would not necessarily have been controlling, since the mere calling the sum named a penalty or liquidated damages is not conclusive of the intention of the parties, if that intention, gathered from the whole agreement, appears otherwise. *Schofield* v. *Tomkins,* 95 Ill., 190.

The problem in every case is to arrive at the intention of the parties. The general rule on this subject is stated in *Pomeroy's Equity Jurisprudence,* Section 440, as follows:

"It has been repeatedly held that the words 'penalty' or 'liquidated damages,' if actually used in the instrument, are not at all conclusive as to the character of the stipulation. If upon the whole agreement the court can see that the sum stipulated to be paid was intended as a penalty, the designation of it by the parties as liquidated damages will not prevent this construction. If, on the other hand, the intent is plain that the sum shall be liquidated damages, it will not be treated as a penalty because the parties have called it by that name. It is well settled, however, that if the intent is at all doubtful, the tendency of the courts is in favor of the interpretation which makes the sum a penalty."

The bond involved here was furnished in compliance with the terms of a general ordinance, providing that whenever a franchise ordinance is passed, the grantee in accepting the same shall give a bond conditioned for the construction and equipment of said railroad within such times as shall be prescribed in the granting ordinance and to save the city harmless from any and all claims for damages or otherwise, growing out of the construction of said railroad.

In thus providing by general ordinance for the kind of bond to be given whenever a franchise ordinance might be granted, the council must have intended to provide for the giving of security to protect the city against such damages as it might suffer on account of the failure of the grantee to do the things required

of it. The rights to be granted after the passage of the general ordinance containing the requirement as to giving of bond, might be of great value, or of small value. The franchises might be of short or of long duration; they might confer rights in a single street, or a part thereof, or on every street in the city. It is hardly to be presumed that the purpose of requiring the bond was to provide a uniform sum as liquidated damages which might be collected by the city for the failure of the grantee under any franchise ordinance that might be passed to do the things stipulated in the ordinance, regardless of their importance to the city regardless of the actual loss sustained by it. *Nevada County* v. *Hicks et al,* 38 Ark., 557.

It is to be noticed, also, that Ordinance No. 1425 requires certain tracks to be built on or before August 1, 1908; other tracks are required to be built on or before December 1, 1908; while no time is specified as to when the tracks shall be completed on other streets. The bond secures the building of the various tracks within the time required. It also stipulates for the construction of tracks as provided by Ordinance No. 1368, of the city of Elyria, which, in general, controls the manner of construction and material to be used. The bond also provides for the protection of the city of Elyria against damage claims growing out of the construction and reconstruction of the railroad company's tracks.

There being thus a number of different things of varying importance covered by the condition of the bond, it is our opinion that the sum named therein should be considered as a penalty and not as liquidated damages. The principle which we believe should control here is stated in *East Moline Co.* v. *Weir Plow Co.,* 95 Fed. Rep., in the following language:

"Where a contract contains a large number of stipulations to be performed, of varying degrees of importance, and for the breach of some of which the damages are readily ascertainable, while as to others they are not, a single sum stipulated as damages for a breach, and applicable alike to each of the covenants, will be treated as a penalty, and in an action for a breach only the actual damages proved are recoverable."

For the reasons indicated we hold that the trial court committed no error in rendering judgment for the defendants and the judgment is affirmed.

SETTLEMENT OF A LAW PARTNERSHIP BY ARBITRATION.

Circuit Court of Cuyahoga County.

GEORGE H. FOSTER v. FRANK C. HARTMAN.

Decided, June 24, 1912.

Pleading and Practice—Prayer of Petition Does Not Determine Nature of Action—When Precipe Need Not State Amount Claimed—Arbitration and Award—Award when Several Parties are Involved may be Severable—Decision of Arbitrator Only Impeachable for Fraud.

1. The fact that the prayer of a petition prays for equitable relief does not change the character of an action, where the facts set forth state an action for money only, as in an action for the amount awarded by an arbitrator.
2. Where the defendant answers and an action is tried on its merits, it is not material that plaintiff failed to state in his precipe the amount of money claimed.
3. When several partners have submitted differences to arbitration and the award made is of such a nature as to be capable of division or separation, it may be enforced as to certain partners and rejected as to others.
4. The decision of an arbitrator, where a dispute has been fairly submitted to him, is final, and, in the absence of fraud or such manifest mistake as naturally works a fraud, it is binding upon the parties.

NIMAN, J.; METCALFE, J., and POLLOCK, J. (sitting in place of Judges Marvin and Winch), concur.

The plaintiff in error seeks by this proceeding to reverse a judgment rendered against him in the court of common pleas in favor of the defendant in error. No bill of exceptions has been filed and on the hearing a motion was made by the defendant in error to dismiss the petition in error for the reason that

the questions raised could not be passed upon without a bill of exceptions.

The errors complained of, however, are such as may be considered by an inspection of the pleadings and the record of the cause, as disclosed by the transcript of the docket and journal entries before us.

From the pleadings, the following state of facts appear:

On the 15th day of June, 1906, G. H. Foster and E. J. Foster, defendants below, and Frank C. Hartman, plaintiff below, entered into a co-partnership agreement for the practice of law. The partnership continued until July 31, 1909, when the firm was dissolved by mutual consent. Thereafter differences arose between the former partners concerning the settlement of the financial affairs of the firm, which resulted in an agreement between them to submit the matters in dispute to arbitration. The written agreement to arbitrate, after reciting that differences had arisen between the former members of the firm, and that such differences could not be settled between them, provided that they should submit their differences to Sam. M. Parks, and all checks, book accounts, ledgers, receipts, vouchers, and the partnership agreement, and such other matters of evidence that either party might desire to submit, should be placed in his hands upon the signing of the agreement.

The arbitration agreement further provided that the finding of the arbitrator should be final and whatever was found to be due from one to the other should be paid in cash.

The arbitrator heard the matters submitted to him, and, in his award, found that George H. Foster should account for and pay to Frank C. Hartman the sum of eight hundred and forty-eight and 02/100 dollars, and that E. J. Foster was indebted to the said Frank C. Hartman in the sum of five hundred and seventy-six and 95/100 dollars.

These sums due to Frank C. Hartman were not paid. The action, out of which this proceeding in error arises, was begun in the court of common pleas by said F. C. Hartman against the said George H. Foster and E. J. Foster. The plaintiff in his amended petition sets forth the partnership agreement, the sub-

mission of the differences between the plaintiff and defendants to arbitration, and the award made by the arbitrator.

The prayer of the petition, in so far as it needs to be noticed here, is:

"That the court confirm the finding of said arbitrator and grant such other and further relief as the plaintiff may be entitled to receive."

The defendants answered to the amended petition, and the plaintiff replied thereto. Upon the trial of the case, no jury was demanded by either party and the cause was heard to the court. Judgment was rendered for the plaintiff against the defendant, George H. Foster, in sum of eight hundred and forty-eight and 02/100 dollars, with interest from the 10th day of October, 1910, but the court found that no evidence was offered or submited to the arbitrator upon any controversy between the defendant, E. J. Foster, and the other parties to the agreement of arbitration, or either of them, and that the finding as to said defendant, E. J. Foster, was null and void, and the same was vacated and set aside.

The first claim of error relied upon by the plaintiff in error for a reversal is that: The amended petition states no facts entitling the plaintiff to equitable relief asked for by him and that the court was without power to render a judgment for money only thereunder.

The action being founded upon the failure of the defendants to pay the respective amounts awarded against them under an agreement of arbitration, was in effect an action for the recovery of damages for breach of contract and was therefore an action at law and not an equitable action.

The prayer of the amended petition is one appropriate to a petition seeking equitable relief, but it has been held repeatedly that the prayer of a petition does not determine the nature of the relief to which the plaintiff is entitled. If the facts pleaded constitute an action at law, the nature of the action is not changed by reason of the fact that the prayer is for equitable relief, and, in this case, the amended petition is sufficient to sustain a judgment rendered in favor of the plaintiff, unless the failure of the

plaintiff to state the amount of his claim in the prayer of his amended petition and his failure to state the amount sought to be recovered in the precipe, invalidates such judgment.

The provision of the statute, Section 11281, General Code, is:

"When the action is for the recovery of money only, there must be indorsed on the writ the amount stated in the precipe, for which, with interest, judgment will be taken if the defendant fails to answer. If the defendant fails to appear, judgment shall not be rendered for a larger amount, and the costs."

This provision of the statute can have no application when the defendant answers, and the action is tried on the merits. In such a case, the defendant can not possibly be prejudiced in any way by the non-compliance of the plaintiff with the statute referred to.

A second ground of error is based upon the fact that the trial court rendered judgment against the defendant, G. H. Foster, and dismissed the cause as to the defendant, E. J. Foster.

It is contended for the plaintiff in error that the award of an arbitrator is an entirety, and that it must all stand or all fall. We conceive it to be the law, however, that if the award is of such a nature as to be capable of division or separation, the principle contended for is not applicable.

In *Morse on Arbitration and Award,* p. 453, it is stated:

"Since the days of King James the First, the characteristic of divisibility has been recognized as inherent in the award under certain circumstances. An award may often be good in part and bad in part. In such event, if the good portion be complete in itself, and be wholly separable from and independent of the bad part, it may be sustained. The bad part will be rejected. It will not be actually stricken out; but it will be simply set aside and disregarded."

Again, the author of the work above cited says, on page 478:

"Though it is not allowed to go outside the award to establish the propriety of separation, yet, in construing the award itself, it appears that the doctrine of favorable intendment in support of the award will be carried so far that, if an award be bad in part and good in part, it will be presumed that there is no connection between these parts unless the contrary is to be affirmatively gathered from the face of the award."

In the award in the case before us, there was a separate finding against each of the defendants. There is no apparent and no necessary connection between them. The finding against E. J. Foster may be rejected and still leave the finding against G. H. Foster undisturbed. The two findings are separable and the ground of error contended for is not well founded.

A third ground of error is claimed to exist because it is asserted the arbitrator did not confine himself to the matters submitted, but took into account, in arriving at his award, the salary of G. H. Foster as a member of the Soldiers and Sailors Relief Fund Committee.

In the report of the arbitrator, attached to the amended petition, it appears that the arbitrator charged the said George H. Foster with certain amounts received by him as salary as a member of the Soldiers and Sailors Relief Fund Committee. It is a well established principle of law that the award of an arbitrator must correspond to the submission; but it does not appear from the award under consideration that this principle of law has been violated. It must be presumed that the arbitrator took the salary of George H. Foster, as a member of the Soldiers and Sailors Relief Fund Committee, into consideration because of some evidence submitted to him. He was made the final judge of all matters of fact and law, relating to matters in dispute between the parties to the agreement. We therefore hold that this claim of error is not well founded.

A fourth ground of error is based on the failure of the arbitrator to make any finding as to the state of matters between E. J. Foster and George H. Foster.

As this is a proceeding in which Frank C. Hartman seeks to recover from George H. Foster the amount awarded by the arbitrator, it would seem to be of no importance whether the arbitrator considered the state of the partnership account between George H. Foster and E. J. Foster, or not. Being a judge of the law and the facts under the arbitration agreement, the arbitrator found a certain sum due the plaintiff from the defendant, George H. Foster, and the fact that the arbitrator made no finding as between the two Fosters does not in any way impeach the finding made in favor of Mr. Hartman.

The argument is also made that, since the articles of partnership established certain mathematical apportionments by which profits were to be divided between the parties to the agreement, E. J. Foster could not be let out and another member be left, on which to base a finding against George H. Foster.

The answer to this is that, whatever the method the arbitrator employed in arriving at his award, his decision is final, and in the absence of fraud or such manifest mistake as naturally works a fraud, it is binding upon the parties and entitles the successful party to judgment thereon. *Corrigan* v. *Rockefeller,* 67 O. S., 354.

We find no error prejudicial to the plaintiff in error and the judgment is affirmed.

PURCHASE AND SALE OF A MORTGAGED CHATTEL.

Circuit Court of Summit County.

HARRY HOLUB v. THE KIRK COMPANY.

Decided, October 4, 1912.

Conversion—One Who Purchases and Sells Mortgaged Chattels Liable for Conversion.

One who purchases of a mortgagor, a chattel upon which there is a properly executed and recorded chattel mortgage, and resells the chattel to a third person, is liable to the mortgagee in an action for conversion.

Holloway & Chamberlain, for plaintiff in error.
Slabaugh, Seiberling & Huber, contra.

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

It appears from the agreed statement of facts, embodied in the bill of exceptions, that the Kirk Company, the defendant in error, sold to one Meredith a davenport of the value of $70.20; that a partial payment was made on the purchase price at the

time of the sale, and a chattel mortgage on the davenport to secure the balance of the purchase price was given by Meredith to the company; that the mortgage was duly filed with the county recorder, and has ever since remained uncanceled; that at the time of the institution of the original action a balance of $15 remained unpaid on the purchase price of said davenport; that after the condition in said chattel mortgage had been broken, the said Meredith sold said davenport to Harry Holub, the plaintiff in error, who bought and paid for it without actual knowledge of the existence of the chattel mortgage; that thereafter the plaintiff in error sold said davenport to some person to him unknown; that the value of said davenport at the time of its purchase and resale by the plaintiff in error was in excess of $15; that the defendant in error, upon being apprised of what had taken place, demanded of the plaintiff in error that he either surrender said davenport so that it might be subjected to the terms of said chattel mortgage, or pay to defendant in error the balance of $15 due it on the purchase price thereof; that plaintiff in error did not know, and did not have the means of ascertaining the location of said davenport and could not comply with the demand to surrender the same, and neglected or refused to pay the balance of the purchase price.

After the failure of the plaintiff in error to comply with the demand above mentioned, the defendant in error brought suit in a justice court to recover the balance of the purchase price due on said davenport. On the trial of the action on appeal in the court of common pleas, the plaintiff there recovered a judgment. A motion for a new trial having been overruled, this proceeding in error is prosecuted to secure a reversal of said judgment.

The sole question presented here is whether or not the plaintiff in error, in buying the davenport in question, covered by a chattel mortgage duly filed with the county recorder, and selling the davenport under the circumstances recited, can be held liable for conversion.

The legal wrong denominated "conversion" is defined in *Cooley on Torts* (3d Ed.), 859, as being any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it.

The interest of a mortgagee under a chattel mortgage is that of a general owner of the property mortgaged. *Robinson* v. *Fritch,* 26 O. S., 659; *Root & McBride Bros.* v. *David et al,* 51 O. S., 29.

The defendant in error, by virtue of its chattel mortgage, was the general owner of the davenport. The chattel mortgage on file in the recorder's office was constructive notice to the world of that ownership. When the plaintiff in error took said davenport under his purchase from Meredith and sold it again, he exercised acts of dominion over it which in contemplation of law were wrongful and in denial of the right of the defendant in error, and inconsistent with such right. His acts amounted to a conversion of the davenport, although he acted in good faith.

In *Woolsey* v. *Seeley et al,* Wright, 360, it was held that the owner of a chattel, or one having a special property in it, coupled with the right to possession, may follow it into whosoever's hands it may come, and make him liable in trover, if he shall have abused it, used it as his own, or done any act inconsistent with the rights of the owner, which is conversion.

The case of *Kanagle* v. *Taylor,* 7 O. S., 134, is authority for the same proposition of law. It is true that in that case the defendant, who was an innocent purchaser of property covered by a chattel mortgage, was still in possession of it when demand was made upon him for its surrender, but his refusal to deliver it to the owner on demand was no more inconsistent with the right of the owner than assuming and exercising the power to sell and dispose of the property would have been.

On the agreed statement of facts, the plaintiff below was entitled to a recovery, and the judgment is affirmed.

DAMAGE TO PROPERTY FROM CHANGE OF GRADE OF STREET.

Circuit Court of Summit County.

MARY E. HURST v. CITY OF AKRON.

Decided, October 4, 1912.

Roads and Streets—When City is Liable to Abutting Property Owners for Change in Grade of Street—Measure of Damages.

1. In an action under Section 3828, General Code, providing for the assessment of damages to property owners occasioned by the improvement of a street, only damages which would result from the improvement as actually authorized by the council can be considered.
2. Where the owner of property, abutting upon a street upon which a grade has not been established, builds upon the property without reference to any reasonable or proper grade of the street which the city may thereafter establish, he is not thereby precluded from recovering damages resulting to his property from the establishment of an unreasonable and improper grade of the street; and the measure of his damages in such case will be the difference between damages which would have resulted to his property from the establishment of a reasonable and proper grade and that resulting from the grade as actually established.
3. Where an owner uses three adjoining lots in one inclosure as a homestead, he is entitled to damages to all of them caused by the establishment of an unwarranted and unreasonable grade of the street, even though there are no buildings upon two of the lots.

Otis, Beery & Otis, for plaintiff in error.
Jonathan Taylor, contra.

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

The relation of the parties here is the reverse of the relation in which they stood in the court below. The terms "plaintiff" and "defendant," as used in this opinion, will refer to the parties as they stood in the court below.

The city had improved Frederick street, upon which certain premises of the defendant abutted, and brought its proceeding in the court of common pleas to have the damages of the several property owners, who had made claims for damages by reason

of the improvement, assessed by a jury. The result was a verdict and judgment for the plaintiff below to the effect that the defendant was entitled to no damages.

The defendant insists that there was error upon the trial, first, because the court refused to permit evidence to go to the jury tending to show that the improvement of the street, which consisted in cutting down by grading the street in front of the defendant's premises, as actually made, made a cut of about one foot below the grade which had been established by the city council.

There was no error in the ruling on this question.

By Section 3823 of the General Code, it is provided that after the city has enacted proper legislation, and given the proper notice, the owners of the lands abutting upon the improvement claiming they will sustain damage by reason of the improvement, must serve a notice with the city clerk, setting forth the amount of damages they claim, etc.

It is provided also by Section 3824 that upon the expiration of the time limited for the filing of claims for damages, the council shall determine whether it will proceed with the proposed improvements or not, and whether the claims for damages so filed shall be judicially inquired into before the commencement or after the completion of the proposed improvement.

Section 3827 provides what shall be done to bring the matter into court, where it is determined to have the damages assessed before the making of the improvement.

It provides that this may be done either in the probate court or the court of common pleas, or before a judge thereof, and then it is provided "that the court or judge shall direct the summoning of a jury in the manner provided for the appropriation of property, and fix the time and place for the inquiry and the assessment of such damages, which inquiry and assessment shall be confined to such claims."

By Section 3828 it is provided that "the jury shall be sworn to inquire into and assess the actual damages in each case, separately, under such rules and instructions as shall be given it by the court."

In Section 3829 it is provided that—

"When the council determines to assess the damages after the completion of an improvement provided for by this chapter, for which a claim for damages has been filed as herein provided, the mayor or solicitor shall, within ten days after the completion of such improvement, make written application to the court of common pleas, or a judge thereof in vacation, or to the probate court of the county in which the corporation or the larger part thereof is situated, to summon a jury in the manner provided in this division for the appropriation of property, to assess the amount of damages in each particular one, and such court or judge shall fix the time and place for inquiry, and the assessment of damages, in the manner hereinbefore provided."

These words "in the manner hereinbefore provided," clearly show that so far as the assessment of damages is concerned, the rule will be exactly the same whether the inquiry is made before the improvement is made or after, and the same oath must be administered to the jury whether the assessment be made before or after the improvement is made.

As already pointed out, that oath, which is provided for in Section 3828, is that the jury shall inquire into and assess the actual damages in each case separately, etc.

These sections clearly provide for the assessment of damages to the several property owners who shall file claims for damages on account of a single improvement, and they provide that the damages to be assessed are the damages which resulted in the one case, and which will result in the other, from the improvement of the street, as provided by the legislation of the council. The inquiry is to be the same, and the oath administered the same, whether the inquiry be before or after the improvement; and the inquiry is to be as to the right of the party to damages and the amount of such damages under the claim which he has filed with the city clerk.

It is clear that the claim filed with the city clerk must be a claim for only such damages as will result from the improvement of the street, in the manner fixed by the legislation of the council, for these claims are to be fixed before any jury can be called or anything done in the way of assessment of damages.

The court, then, was clearly right in limiting the inquiry to the damages resulting from the improvement of the street in accordance with the grade established by the ordinance of the council. And so the court was right in excluding evidence as to any damages suffered by the plaintiff by reason of the grade having been below the point fixed by the ordinance.

It is again complained of as error, that the court refused to admit evidence from experts (engineers) as to the opinion of the witnesses as to the reasonableness of the grade.

In this there was no error. Expert testimony is admitted upon questions of science and art and the like, because the expert, from the nature of his calling, is better able to judge than one not an expert, even though the latter has the facts from which to judge. It is upon this principle that engineers, physicians, surgeons and other men having peculiar knowledge of the particular matter in question, are permitted to give opinions. But an expert, whether he be an engineer, or what not, is no more capable of judging whether the grade of a certain street is reasonable or unreasonable, than any other sensible man who has all the facts upon which an opinion is to be founded. One not an expert knows as well as an expert whether a certain street is so steep as to be unreasonable, when he knows the topography of the vicinity, knows the use to which the street is to be put, knows the kind of loads that are likely to be hauled up or down it, and the other facts which are to be taken into the account. We know of no case that would authorize the receiving of such evidence as it was here proposed to give.

Another question which is raised on the evidence, is as to the question asked of Mr. William T. Sawyer. Mr. Sawyer either was, at the time of the trial, or had been, the mayor of Akron, and therefore a man whose opinion would be likely to have weight with a jury. He lived in the neighborhood of this improvement, though he had no acquaintance with the husband of the plaintiff; but when the husband of the plaintiff was on the stand, he was asked, in cross-examination, if he had not had a talk with Mr. Sawyer at the time he was excavating for the building of the house on one of the lots of the plaintiff fronting

on this street, and whether Mr. Sawyer had not said to him that he was arranging to build his house too high with reference to the street, because when the street should be improved there would be a deep cut in front of his premises, the witness had answered that he had no such talk or any other talk with Mr. Sawyer on the subject. Mr. Sawyer was then called by the city, and was asked if he had not said these words to the defendent's husband which the husband had denied. Over the objection of the husband Mr. Sawyer was permitted to answer, and did answer, that he had said to the defendant's husband what the husband had denied that he had said to him.

The court said to the jury that this testimony of Sawyer was admitted only as bearing upon the credibility of the witness, the plaintiff's husband.

If this was the only ground upon which it could be admitted, we think its admission was clearly erroneous. If it was wholly immaterial as bearing upon the real issues in the case whether such talk had been had, then the plaintiff was not entitled, as bearing upon the credibility of the witness, the husband, to allow Sawyer to contradict him. Where a question is asked in cross-examination upon an immaterial question, it is not permissible, for the purpose of impeaching the witness, to show that what he said about it was not true. We believe there is no conflict of the authorities on this question.

Suppose that this husband while on the stand as a witness, had been asked if he did not once live in the city of Massillon, and he had answered "no;" and suppose further that it had been wholly immaterial whether he ever lived in the city of Massillon or not, it is conceivable that his credibility may be affected in this case by bringing somebody in from Massillon to testify that he once did live there? Unless, then, the talk which Sawyer says he had with him in some way bore upon a question involved in the case, and we can not conceive of but one question upon which it could bear at all, and that would be whether the plaintiff exercised reasonable judgment in selecting the place to build his house (assuming that in the building he was acting as the agent of his wife), this question was wholly immaterial.

Sawyer's answer showed that Sawyer's judgment was that the house was not being built with reference to a future probable grade of the street, and while we might hesitate about reversing the case because of the admission of this testimony of Sawyer, I personally feel clear that it ought not to have been admitted, and my only doubt is as to whether it was calculated to prejudice the rights of the defendant, and it seems to me that it might well do so in view of the prominence of Mr. Sawyer in the community. However, as we have reached the conclusion that the judgment is to be reversed for other errors, to which attention will be called, nothing more will be said of this, except that it is to be hoped, if the case is ever tried again, that this question will not arise.

But the most serious question in the case, as we view it, arises upon the charge of the court. The court said in his charge:

"It is admitted in this case that when Mary E. Hurst improved Lot 31 by building a house thereon, there was no grade established on Frederick street in front of said lot. She was therefore bound in law, in making her improvement, to anticipate the city might at any time establish a reasonable grade in front of her premises, and improve the street accordingly. She was bound to anticipate a future grade of the street in accordance with the future wants of the public, and the city is not liable to her for any damage that the improvement of said street caused to her property, unless she exercised reasonable care and judgment in erecting her house with a view to a reasonable and proper grade, and unless the grade afterwards established was not a reasonable and proper grade, taking into consideration the topography of the territory through which the street passed, the grade of connecting streets, the character and amount of travel upon the street and the probable requirements of the future in that regard, the important consideration being the necessities and convenience of public travel."

In this we think the court erred. It required more of the defendant than the law requires. The court had in mind, in giving the charge, the case of *Crawford* v. *Village of Delaware*, 7 O. S., 460, and the case of *Akron* v. *Chamberlain Company*, 34 O. S., 328.

In the first of these cases, the second paragraph of the syllabus reads:

"The owners of lots upon a street, the grade of which has not been established, must use reasonable care and judgment in making improvements, with a view to a reasonable and proper grade; and the town or city will not be responsible for injuries to such improvements by afterward grading the street, if the grade, by ordinary care, could have been anticipated."

Clearly, the meaning of this is that any grade which should be made of the street after the improvements were made upon the property, which, by the exercise of "ordinary care could have been anticipated," would be a reasonable and proper grade, and, therefore, the property owner being bound to anticipate any reasonable and proper grade which should thereafter be made on the street, would not be able to recover damages because of such reasonable and proper grade. It was not meant to say that although the owner was bound to anticipate a future and proper grade of the street, that even where there had been a failure to so anticipate, still the property owner could not recover for an unreasonable and improper grade, if he had suffered thereby.

In the case of *Akron* v. *Chamberlain Company, supra,* the second paragraph of the syllabus reads:

"The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or where the buildings, if erected before a grade was so established, were injured by a subsequent establishment of an unreasonable grade."

Under this, as well as under the case of *Crawford* v. *Delaware,* it is clear that damages can not be recovered by a property owner against a municipality where the grade finally established by the municipality was a reasonable and proper one, such as a reasonably prudent man should have anticipated, provided the improvements which the owner put upon the property, were made before any grade was established. But it does not follow that

one who improves his lands in such wise that a future reasonable and proper grade would result in damage to his property, is absolutely prohibited from recovery where the future grade is unreasonable. Probably the damages to which an owner in the case last stated would be entitled would be the difference between what he would have suffered if the grade, finally established, had been reasonable and proper, and the injury which came to him by reason of the unreasonable and improper grade.

To illustrate:

Suppose that a property owner makes improvements upon his property where no grade is established.

A reasonable and proper grade, one which an ordinarily prudent man should have anticipated, would cut down the street in front of his property anywhere from seven to ten feet, because there may be more than one grade that could be established that would be reasonable and proper, and so, as already said, the owner making the improvements upon a property should have anticipated that the street would be cut from seven to ten feet, but he made his improvement on his property without reference to such future reasonable grade. It is clear that if a grade had thereafter been established which should make the cut from seven to ten feet, the owner would be entitled to no damages, because he was bound to have anticipated.

But, suppose that the street is graded in such wise that there is a cut in front of his premises of twenty-five feet, fifteen feet of which cut is unreasonable and improper. Is he to be deprived of his damages because he did not build with reference to the future cut of from seven to ten feet? And yet, if the charge of the court in this case was right, the owner making the mistake of failing to exercise proper judgment in anticipation of a future reasonable grade, is absolutely cut off from recovery of any damages, however unreasonable and improper the grade is.

We think this is not the law; that it ought not to be the law, and it is not be gathered from these two cases, when properly considered.

Another question in the case is whether the right to recover existed at all for injury to the two lots which the defendant owned, the one being on the right hand and the other on the left

hand of the house which was built on the middle lot of the three; the three were in one enclosure and, together with the house, constituted the home of the defendant.

There was evidence tending to show that though there was no building on either of the lots other than the middle one, there were flowers planted, a lawn made and the lots graded in such wise as to properly constitute, when taken with the homestead lot, a single homestead property.

The fact that these lots were purchased after the house was built, which they were, does not, as we view it, affect this question. If the plaintiff was entitled to recover at all under a proper charge, it is not certain that she was not entitled to recover as well for injuries to the lots on either side of her house as for injuries to the lot on which the house stood.

For error in the charge, the case is reversed and remanded to the court of common pleas.

AS TO NOTICE UNDER AN ABSOLUTE GUARANTY.

Circuit Court of Summit County.

THOMAS J. SNYDER v. THE HURDLEY-PIERCE-ANDERSON COMPANY.

Decided, October 4, 1912.

Guaranty—No Notice of Acceptance of Absolute Guaranty Necessary.

Where, in consideration of credit to be extended to a third person, one signs a writing by which he agrees to become responsible for the payment of all bills incurred by that person and states that the guaranty is to be good at any and all times, on any and all bills or balances due or to become due, such writing constitutes an absolute guaranty and notice of its acceptance and extension of credit is not necessary.

Boylan & Brouse, for plaintiff in error.
Wilcox, Burch & Adams, contra.

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

The relation of the parties here is the reverse of that sustained by them in the trial court. In this opinion, the terms "plaintiff" and "defendant" will refer to them as they stood below.

The plaintiff was a wholesale merchant in millinery goods in the city of Cleveland, Ohio.

The defendant sent to the plaintiff an instrument, in writing, of which the following is a copy:

"CLEVELAND, February 24th, '10.

"HURDLEY-PIERCE-ANDERSON CO.,

"Cleveland, Ohio.

"*Gentlemen*: For and in consideration of your extending credit to Mrs. Eldora Sisler, Barberton Ohio, I hereby agree to become responsible for payment of bills made by said Mrs. Sisler at any time on and after this date, either in person or by order, on your usual terms.

"This guarantee to be good at any and all times on any bills or balances that may be due you or become due.

"Respectfully yours,

"THOS. J. SNYDER."

The Mrs. Sisler named in the writing was a retail dealer in millinery at Barberton, Ohio.

No notice was given to the defendant by the plaintiff of any acceptance or rejection of the proposition, but in pursuance of it the plaintiff sold a bill of goods to Mrs. Sisler on the day it received the writing, and within the next thirty days sold her other goods, the aggregate amount of the goods so sold, after the receipt of said writing, was $398.13. Only a part of said goods was paid for, and suit was brought for the balance, and the plaintiff recovered in the trial court, obtaining verdict and judgment for the amount.

Was there error in the proceedings resulting in the judgment? This is the question before us.

The claim made on the part of the defendant is that this writing was not what is called in law an absolute guaranty, and that therefore the plaintiff was not entitled to recover on it without first having given notice to the defendant before furnishing goods to Mrs. Sisler.

We regard the case as absolutely settled by the case of *Powers & Weightman* v. *John N. Bumcratz,* 12 O. S., 273, and the case of *Wise* v. *Miller,* 45 O. S., 388.

The arguments on the part of the defendant seeking to show a distinction between these cases and the case at bar are ingenious, but not convincing.

In the first of these cases, the first paragraph of the syllabus reads:

"When upon a fair construction of the terms of a written obligation the party executing it binds himself to be responsible for goods to be sold to a third person, it is to be regarded as an absolute guaranty, and when acted on, in accordance with its terms, the liability of the guarantor attaches, and no notice to him of the acceptance of the guaranty, or of its having been acted on, is necessary."

The contract under consideration in that case read:

"Whereas, Otto H. Moeller, of Somerset, is desirous of purchasing goods of Powers & Weightman, of Philadelphia, Pennsylvania, on a credit; now, in consideration of the premises, and for divers other good and valuable considerations, the receipt of which is hereby acknowledged, I, John N. Bumcratz, of Perry county, Ohio, for myself, my heirs, and assigns, do hereby covenant and guarantee with said Powers & Weightman that the said vendee shall punctually and promptly pay all sums of money which shall become due and payable to them, on account of said purchases, whether in notes, acceptances or book accounts, or whether the obligations originally given therefor shall have been changed, extended, renewed, or the amount thereof redrafted for, and that if the said vendee shall neglect so to pay the same, I will and my heirs and assigns shall pay the amount thereof, on demand, with all costs and expenses which said vendors shall incur by reason of non-payment thereof. This guarantee is for an amount not exceeding twelve hundred dollars indebtedness, which may exist at any one time. In testimony whereof, witness our hands and seals, at Somerset, Perry county, Ohio, this 18th day of August, A. D. 1857. Otto H. Moeller (Seal), John N. Bumcratz (Seal)."

In this case suit was brought against both Moeller and Bnmcratz for the goods sold to Moeller. Bumcratz demurred to the petition on the ground that no cause of action was stated against

him. This demurrer was sustained in the court of common pleas, and that ruling was upheld by the district court, but was reversed by the Supreme Court.

The opinion in the case is long and reviews the authorities on the question involved up to that time, very fully, with the result, as already stated, that the court reached the conclusion that Bumcratz was liable upon this writing as an absolute guarantor.

In the case of *Wise* v. *Miller, supra,* the obligation is quoted in the report of the case. The first paragraph of the syllabus reads:

"When a guaranty is absolute, notice by the guarantee of its acceptance and his intention to act under it, is not necessary to fix the liability of the guarantor. The rule requiring such notice, applies only where the instrument, being in legal effect merely an offer or proposal, acceptance is necessary, as in case of other offers and proposals, to that mutual assent, without which there can be no contract."

In this latter case, the court say, on page 392, speaking by Williams, J.:

"The two propositions upon which the plaintiff in error asks the reversal of the judgment below are embraced in his exceptions to the report of the referee, and, briefly stated, are:

"1. That Wise, having received no notice of the acceptance of the contract of guaranty, never became liable to the plaintiff."

It is this proposition which is involved in the case now under consideration.

At page 393 of the opinion the court say:

"While the English cases generally, and many American cases, holding that the rule requiring notice by the guarantee of his acceptance of the guaranty and his intention to act under it, applies only where the instrument, being in legal effect, merely an offer or proposal, such acceptance is necessary to that mutual assent, without which there can be no contract. Since the case of *Powers* v. *Bumcratz*, 12 Ohio St., 273, the latter has been the rule in Ohio."

The court then goes on to quote from the opinion in *Powers* v. *Bumcratz* showing the reasoning upon which the court reached the result in that case, and they say, at page 395:

"The application of the doctrine of this case to the contract in question does not leave this branch of the case doubtful. The instrument is in no sense a mere offer or proposal of guaranty to Miller; it is an absolute and unconditional contract of indemnity; the parties thereby jointly and severally bind themselves to Miller that they will, in proportion to the amount of stock held by each in the corporation, protect him against all loss and damage sustained by him by reason of his indorsements of the company's paper."

Other reasons are given in the case why, even if this were not the rule, the same result would be reached in that case; but what has alrady been quoted is sufficient to show what the rule to be applied in the case now under consideration is, unless it be said that the obligation signed by the said Snyder was simply an offer of guaranty.

Repeating the language, it is:

"For and in consideration of your extending credit to Mrs. Eldora Sisler, of Barberton, Ohio, I hereby agree to become responsible for payment of bills made by said Mrs. Sisler."

What terms could be used that would more completely convey to the party to whom this was addressed the proposition that Snyder would absolutely guarantee the payment of the bills that should be made by Mrs. Sisler? And the last clause clearly indicates that it was not proposed that any further obligation should be taken by Snyder, but that the writing itself should constitute an absolute guaranty. That last clause reads:

"This guarantee to be good at any and all times on any bills or balances that may be due you or become due."

Applying the rule expressed in the first paragraph of the syllabus of *Powers & Weightman* v. *Bumcratz, supra,*

"When upon a fair construction of the terms of a written obligation, the party executing it binds himself to be responsible for goods to be sold to a third person, it is to be regarded as an absolute guaranty,"

we reach the conclusion that this was an absolute guaranty; that the absence of a limitation on amount or of time does not affect

its character as such absolute guaranty, and the result is that the judgment is affirmed.

WHEN CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE.

Circuit Court of Summit County.

FARES C. BITTNER v. THE NORTHERN OHIO TRACTION & LIGHT COMPANY.

Decided, October 12, 1912.

Negligence—Negligence of Plaintiff Directly Contributing to Injury in Slightest Degree Bars Recovery—Contributory Negligence Not a Defense when Not a Proximate Cause of Injury.

1. In a collision case no recovery can be had for injuries resulting from defendant's negligence where it appears that plaintiff's own negligence directly contributed, in the slightest degree, to the injuries complained of.
2. Contributory negligence of the plaintiff, in order to bar a recovery, must have been so far an efficient cause of the injury that unless he had been negligent the injury would not have happened, and although there may have been negligence on the part of the plaintiff, yet unless he could, by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover.

Holloway & Chamberlain, for plaintiff in error.
Rogers, Rowley & Mather, contra.

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

The parties here are as they were below.

The plaintiff sued for damages for injury done to a horse and wagon owned by him, which was in collision with a car owned by the defendant. The petition alleges that the collision occurred solely by reason of the negligence of the agents of the defendant in the operation of the car. The defendant denies all negligence on its part, and avers that if the plaintiff was injured, his negli-

gence was the sole cause of the injury, or, if not the sole cause, then, that his negligence contributed directly to the injury.

The bill of exceptions does not purport to contain the evidence, but it reads that "The plaintiff and defendant offered evidence to support the issues as made up by the pleadings."

This statement we think is fully as strong as though it read, "Each party offered evidence tending to support the claims made by them severally in their pleadings," and this means that there was evidence tending to support each allegation of the petition and each allegation of the answer. That being true, there was evidence before the court tending to show that the negligence of the plaintiff contributed to his injury.

At the conclusion of all the evidence and before argument, "the defendant requested that the following separate propositions of law be given to the jury for their instruction. Said requests were in writing and were as follows:" Then follow seven requests, numbered, however, 1, 2, 3, 4, 5, 6, 7 and 10. All of these requests were given to the jury, the language of the bill being:

"Thereupon the court granted the said requests and read them to the jury. To the reading of the requests and each of them, the plaintiff then and there excepted and now excepts."

After the argument of the case to the jury, the court changed the reading of the tenth request.

On the part of the plaintiff in error it is urged that this was erroneous because, it is urged, the requests must be given as read or they must be refused.

It must be borne in mind, however, that it is the party who makes the request who is entitled to have them given as requested, if they properly state the law. The other party can only complain if the law given as requested is to his prejudice. The change that was made in the tenth request was not prejudicial to the plaintiff in error, and he has, therefore, no cause of complaint because of such change.

The first request which was given reads:

"I say to you, that if you find the defendant company was negligent in any of the respects complained of in the petition,

and you further find that the negligence of the driver of plaintiff's rig directly contributed in the slightest degree to the injuries complained of, or that the combined negligence of both the driver of the rig and the defendant caused the injuries, then plaintiff can not recover."

A majority of the court are of opinion that this was not erroneous, because it is said that the law is well settled, that if the negligence of the plaintiff contributed directly in any degree to the injury, there can be no recovery, and that if he contributed in the slightest degree then he contributed in some degree.

I am inclined myself to think that even though that logic is sound, a jury would be likely to be mislead by the language, "in the slightest degree," although the word "directly" is used immediately in connection with those words, because it seems to me the jury would be likely to overlook the proposition that the negligence of the plaintiff must have contributed *directly* to the injury. I think, in giving this request, it would have been much safer to have called special attention in connection with it to the proposition that the jury must not overlook the fact that the negligence, in order to prevent a recovery, must have directly contributed to the injury. However, the judgment will not be reversed in this case because of the giving of this charge, for it was technically correct, and, as already said, a majority of the court are of the opinion that the court, having been requested to give this, was bound to give it, because under this it is clear that if the jury followed it exactly, they would allow a recovery unless the negligence of the plaintiff directly contributed to the injury.

The fifth request which was given reads:

"If the driver of plaintiff's horse and buggy, while driving down North Howard street, saw or could have seen, in the exercise of reasonable care, the baggage car coming down hill, and you further find that there was a car standing in the intersection of Cuyahoga street and North Howard street, and when he got in the rear of said car the same obscured his view and prevented him from seeing said south bound car, then I say to you, in view of the approach of said car, which he knew or ought to have known, and in view of the further fact that its approach was hidden by said standing car, he was bound to exercise greater

care and caution before passing in the rear of said standing car and onto the track of the south bound car, and if he did not exercise such higher care and precaution, and such negligence contributed in any way to the injuries complained of, plaintiff can not recover."

We think there was clearly error in the giving of this request, for the court entirely overlooked in the giving of that request the proposition that the negligence, to prevent a recovery, must have directly contributed to the injury.

The case of *Schweinfurth, Admr.*, v. *Railway Co.*, 60 O. S., 215, is relied on by the defendant in error to justify the giving of the first request, and, as already said, that first request was technically correct, and it was technically correct in this case because of what is said in the second paragraph of the syllabus:

"In an action for negligence, it is not error to refuse an instruction that the defendant can not be held liable, though guilty of the negligence charged, if the negligence of the person injured contributed in any degree or in any way to the injury of which he complains. Unless the negligence of the person injured contributed directly to, or was a proximate cause of the injury, it does not preclude a recovery."

In the opinion in this case, which was prepared by Judge Williams, this language is included, with approval, from *Thompson on Negligence*:

"The negligence of the plaintiff in error, to bar a recovery, must have been a proximate cause of the injury complained of. If the negligence of the plaintiff was only remotely connected with the injury, the plaintiff may recover damages if, notwithstanding such remote negligence of the plaintiff, the defendant might have avoided the injury by the exercise of ordinary care."

And, again, from the same authority:

"But the negligence of the plaintiff, in order to bar his recovery, must have been so far an efficient cause of the injury that unless he had been negligent the injury would not have happened. Or, as the rule is often expressed, although there may have been negligence on the part of the plaintiff, yet unless he could, by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover."

And again:

"In early cases at nisi prius in England, the rule was laid down, that if the plaintiff's negligence in any way concurred in producing the injury, he could not recover. But this, without more, is now regarded as an inaccurate statement of the law; and, as we have seen, the House of Lords has lately held it error to charge a jury in this or similar language without qualification. This well settled doctrine, as maintained by the foregoing authorities, was followed and applied by this court in the case of *Railroad Co.* v. *Kassen*, 49 O. S., 230, and had been recognized and approved in several cases before that."

Under this it is clear that the court erred in giving the fifth request, and this can not be avoided by saying that as the evidence is not before us we can not say that it was prejudicial, for we know from the bill of exceptions that evidence was introduced on this subject. The jury were therefore entitled to proper instructions on this subject of contributory negligence. They were erroneously instructed on this subject to the prejudice of the plaintiff in error, and for this error the judgment is reversed.

As to the other requests, we have not a sufficient statement of the evidence to say whether any one of them was erroneous or not, and so the judgment would not be reversed because of the giving of any of the other requests.

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A petition under G. C., 5638, which provides for building a new county bridge in place of a destroyed or dangerous bridge without a vote of the electors, alleging that the new bridge is to be "at or near" where the old bridge stood is not demurrable for indefiniteness; a motion only can reach the objection. 152.

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Where the conduct of the parties clearly shows that the ordinary meaning of a contract was not intended, the court may charge the intended meaning; thus where a real estate agent agreed to give a sub-agent one-half of one per cent. of all his commissions and the parties have treated this as meaning one-fourth of the entire commissions,

the court may order that meaning given. 561.

There must be a meeting of minds to make an implied contract as well as an express contract. Hence a charge that services which in justice ought to be paid for authorizes finding an implied contract is error; for gratuitous services might in justice deserve pay. 111.

Mutual promises to contribute to pay the debt of a third person due to an institution other than educational, religious, etc., furnish no consideration for the promise of any one of them, where the promisee has relinquished no rights and incurred no obligations on the faith thereof. 182.

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Where five persons are voted for to fill four vacancies in the directory, none of them can be declared elected. 305.

A person not being eligible to be elected a director unless he is a stockholder (G. C., 8661), a person holding a share by transfer for the mere purpose of qualification, without financial interest in the corporation, is not eligible. 305.

A restricted proxy only authorizing the holder to vote for certain persons as directors at the annual meeting or any adjourned meeting, gives no right to vote on any other question, and hence an adjournment carried by such holder's vote is of no effect. 305.

In a receiver's suit to collect a stockholder's liability it is no objection that in the preliminary suit a service on him by publication as a non-resident was void because he was at no time a non-resident, or that he was therein sued by initials. 209.

Bank stock transferrable only on surrender of the certificate was transferred without surrender to an officer of the bank as if lost, but fifty years later was found among the papers of the original owner. In a suit by the latter's administrator to compel the bank to recognize the stock and account for dividends it is error to admit the bank's stock ledger reciting the transfer, this being a mere self-serving declaration and not overcome by laches, lapse of time or the dire poverty of decedent, when the stock could have made him comfortable. 1.

A stockholder's petition against the corporation, its officers and stockholders alleging the issue of stock to officers without being paid for in order to give them control, entitles plaintiff to have such stock canceled, and is therefore not for its money value and hence not appealable. 54.

An agreement by which twenty per cent. of stock subscriptions is to be given to a board of trade as a commission for selling stock, the board of trade assigning its commission to the subscriber being a mere device to enable the subscriber to obtain his stock at eighty cents on the dollar, is no defense to compelling him to pay the other twenty cents where the rights of creditors are involved, as in case of bankruptcy. 194.

A non-resident of the county who has bought a mortgage and a judgment of foreclosure on it may be excused from giving security for costs, since his interest in the real estate is ample security. 273.

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The prosecuting attorney's authority to bring suit for money illegally withheld is limited by G. C., 2921, requiring the action to be for the use of the county; hence he can not sue the county auditor for retaining percentages

of special assessments of municipalities, for the county has no interest in them. 188.

Under R. S., 1069, allowing the auditor 2-10 of a mill on moneys collected by the treasurer on the grand duplicate and 5-10 on collections on special assessments, he is entitled to the latter amount on special assessments which for convenience were put on the grand duplicate, for they still remained special assessments. 188.

G. C., 2444, requiring county commissioners, before expending over $1,000 for land, buildings or bridge, to publish a notice of their intention, must be construed to have no application to the emergency statute for a new bridge in case of casualty (G. C., 5638) where prompt action is required. 152.

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In a bond in $10,000 conditioned on constructing a street railroad, under a franchise then granted, in several streets, and to be completed at different times in different streets and to save the city harmless, as the stipulations are of varying importance and the damages as to some are readily ascertainable, and as to others not, the amount must be treated as a penalty and not as liquidated damages, and only the actual loss is recoverable. 578.

Where the petition avers facts showing a reckless disregard of plaintiff's rights, as where goods are taken under a chattel mortgage with unreasonable violence and breaking other property, punitive damages are authorized, although the words willful or malicious are not used. 425.

DECEIT—

A charge that plaintiff may recover if she relied solely on defendant's false representations and certain other information received from some other source, but not if she acted solely on such other information, is not erroneous. 533.

A promoter's false representations as to the past dividends and earnings of a business about to be incorporated renders all the promoters liable, without a charge of conspiracy, to one induced thereby to purchase stock in the corporation. 533.

A defense to paying the price of a patent sold to plaintiff that the contract was incorrectly read to him, has no merit where a copy was given to him but not read by him for two months, but he never complained until sued two years later. And misrepresentation is also no defense by reason of laches. 477.

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DEEDS—

That plaintiff and other lot owners have slightly encroached on the restricted space not substantially obstructing light and air will not estop plaintiff from enjoining a porch which will seriously obstruct. 547.

A building restriction that no buildings shall be nearer than twenty feet from the front line, forbids putting within the re-

stricted area a two-story porch roofed and permanently attached to the whole house front. 547.

If the language is unambiguous the deed alone will be looked to to ascertain the intention of the parties, but in case of doubt extrinsic circumstances can be resorted to and the intention left to the jury. 260.

Where a railroad company conveyed a tract, excepting a forty-feet right-of-way, and later the grantee subdivided it and recorded a plat which by mistake showed a sixty-foot right-of-way and sold lots not merely by referring to the plat for a description, but also recited that they are situated on the right-of-way, the question whether the grantor intended to include the ten feet in his deeds of the lots (he having since then given a quit-claim of the strip to the railroad) is for the jury. 260.

DEVISE—

Where a will in Item 3 devised a farm to Mary and a codicil expressly ratified the will, except as inconsistent therewith, and expressly revoked two other items and gave a life estate to a husband in all the real estate and provided for "all the rest, residue and remainder" of the real estate, the word remainder is a mere synonym of rest and residue and is not used in the technical sense of an interest after the life estate; hence Item 3 is not revoked further than the gift of a life estate to the husband. 353.

A devise of all property to the surviving spouse, though for life only, with a power to dispose of and use for personal comfort, will be construed to be intended that the expenses of last sickness and funeral of such spouse should also be charged on the property if he or she died leaving no estate. 12.

DIVORCE—

Where a divorce is granted to a husband for the aggression of the wife, the court can not grant alimony, but only a share of the husband's estate under G. C., 11993. Hence a monthly allowance to the wife, though called alimony in the decree, is not alimony and is not subject to modification. 205.

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EQUITY—

Acquiescence in the action of an official board (revoking a policeman's right to a pension) can not be charged where the board's action was outside its jurisdiction; for the case stands as if no action had been taken. 133.

ERROR—

A statute (G. C., 13246) requiring a petition in error to be filed within thirty days on leave, must be deemed satisfied if the motion for leave was filed in time, but leave could not be obtained because the court was not in session. Otherwise the statute could be nullified by proceeding at a time when there was no court. 76.

The court may, if it chooses, hear an error case although the transcript does not show that a judgment was ever rendered, on the assumption that a complete

transcript showing a judgment will be furnished. 116.

EVIDENCE—

In proving a crime by circumstantial evidence each circumstance need not be proved beyond a reasonable doubt, provided every link in a chain dependent one on the other is so proved. 508.

A defendant resisting action on a promise on the ground that his signature was procured by threats, may testify that he would not have signed but for the threats; for this is a fact. 529.

Qualification of an expert rests in the court's discretion and is not reviewable unless founded on an error of law, or serious mistake or abuse of discretion. 408.

Evidence of circumstances attending an accident, though not tending to prove any fact in issue and presenting a gruesome detail (as that the severed arm was found in the machinery), is not prejudicial error. 408.

Where a written contract is susceptible of two constructions, depending on the sense in which the parties used the words (as where on termination of an agency to sell the employer was to pay for the "new stock" on hand and claimed this referred to stock of the current year, while the agent claimed it referred to all unused machines on hand), conversations preceding the contract which neither add to or alter it are admissible. 403.

In an action for commissions in procuring a lessee, an affidavit of the lessee at the time of leasing stating that the lease was the result of direct negotiations with the lessor and not of an interview with plaintiff, put in evidence by the plaintiff himself as evidence of an agency, can not be used by the lessor to prove the facts alleged in it. 338.

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Where a contractor building a house failing to pay his sub-contractor as agreed the latter desists work, whereupon the owner verbally promises to pay him the balance if he will complete his contract, this promise is within the statute of frauds and not enforcible, for the owner is not relieved of his promise to pay the contractor for the same work, and the completion of the work is referable to the original contract. 449.

GRANT—

An ordinance granting to a telephone company the right to put conduits under the public ways of a city, which ordinance has neither been accepted by the company nor acted on by it except by tendering a required bond, is subject to revocation. 145.

GUARANTY—

A guaranty to be responsible for all bills made by a retailer at any time hereafter is absolute, and no notice of its acceptance and extension of credit is necessary, though neither amount or time is limited. 599.

GUARDIAN AND WARD—

A mayor having obtained jurisdiction of an infant over fourteen years old by personal service, is not authorized to render judgment against him without appointing a guardian *ad litem* (G. C., 10234). 328.

A testamentary guardian is without authority until the probate court has appointed him (G. C., 10931); hence a petition against him on an account is demurrable if such appointment is not alleged. 447.

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An order of a city board of health against the sale of ice cream on the streets except in sealed cans or other containers approved of by the board, is a valid exercise of the police power as protecting against the contamination of flying dust. 544.

HOMICIDE—

On a trial for murder while attempting to perpetrate robbery, failure to define an attempt to perpetrate robbery (if definable) is not error if not requested. 508.

HUSBAND AND WIFE—

Whether the wife instead of the husband is the proper party to sue for services in the care of a sick relative under a contract, when the husband is testifying for her, will be left to the jury to determine whether or not the contract was made with her. 113.

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Under a statute forbidding the doing of one thing "or" another, an indictment may charge in a single count all of them using the conjunction "and," and it will not be double and will be established by proof of any one. 172.

That a grand juror was drawn and summoned by wrong initials is a misnomer only and not subject to a plea in abatement (G. C., 11436). 230.

Reasonable certainty only being required an indictment will not be quashed for not sufficiently describing the instrument with which the homicide was committed, although it might have been a little more explicit in stating why it could not be more fully described. 230.

INJUNCTION—

In a suit to enjoin enforcement of a justice's judgment the original plaintiff is the only necessary defendant. It is not good practice to add the justice as a co-defendant. 461.

The common pleas court has jurisdiction to enjoin the sale of property on execution on an alimony judgment of the probate court which has been paid, although relief might have been had by motion in the probate court. 9.

INSURANCE (Fire)—

A telephone message in which the insured told the adjuster that each would pick a man and the two a third, to which the adjuster made no reply, is no estoppel or waiver of an appraisal, especially where the insured did not proceed to pick any one. 281.

G. C., 9391, that answers by an applicant to any interrogatory are not evidence unless wilfully false or fraudulent, applies to an application for the revival of a lapsed policy on the company's blank, for it is in effect an interrogatory. 418.

The construction most favorable to the promisee must be taken. If a policy is ambiguous or capable of two meanings parol evidence is admissible of the nature of the risk, the situation of the parties and their contemporaneous acts and conversations. 390.

A fire policy on the assured's merchandise anywhere in the United States, "except on premises occupied for manufacturing purposes," only excludes places where the actual manufacture is carried on and not buildings adjacent to, but separate therefrom; for otherwise almost no property at all would be covered. 390.

Where a policy provided that an agent could waive any condition, an agent's knowledge that the establishment was idle when the policy was written does not avoid a condition against its ceasing operations. 363.

A provision in a fire policy that it should be void if the establishment ceased to be operated for more than thirty days unless consent is indorsed, is not waived by a rider attached reading "privilege of ceasing operations not exceeding thirty days without notice." 363.

A letter by the company to the insured stating that it disagrees with him as to the amount and value of the loss sufficiently shows a disagreement to require an appraisement provided by the policy, and it is not required in Ohio that the company first investigate and submit an ascertained amount to the insured. 281.

A plaintiff relying on an excuse for not performing a condition precedent (to appraise) ought properly to plead it in the petition. 281.

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INSURANCE (Life)—

Death while in the commission of an unlawful act is no defense if the act was not the proximate cause or the death a natural consequence, as where the insured stole hay and loaded it on his wagon and while driving off the wagon overturned upon him. 568.

A condition in a life policy waiving all objection to medical testimony and authorizing the attending physicians' statements to be evidence, merely unseals the physician's lips closed by his confidential relation and does not make his affidavit as to prior disease competent. 418.

A petition on a life policy need only plead performance of affirmative acts necessary to the right of action, such as giving notice, proofs of loss and the like; conditions subsequent must be pleaded in defense. 413.

INTOXICATING LIQUORS—

That the warrant for arrest (for selling in a dry district) was issued by the judge does not disqualify him, for an officer authorized to try a case must have some means of getting the prisoner before him. 76.

That the affidavit (for selling in a dry district) purports in the beginning to have been made before the judge, whereas it is certified to have been sworn to before a deputy clerk, is not ground to dismiss. 76.

A petition filed with the mayor to have a residence district declared wet does not prevent a judge hearing a later petition and deciding the district to be dry before the mayor has decided it to be wet, and its status can not be changed by the later decision. 76.

JUDGMENT—

Where two or more are charged with a joint tort, recovery can be had against one alone. 397.

A petition to set aside a judgment rendered against an infant, without having appointed a guardian *ad litem*, the answer not stating that it was for necessaries, need not show a defense to the original action. for this appears from the fact of infancy, and the mayor who holds the fund must pay it to the infant with interest. 328.

Entering judgment before the motion for a new trial is overruled is premature. *Young* v. *Shallenberger*, 53 O. S., 291, criticized. 156.

A judgment for plaintiff for a commission for exchanging and selling defendant's farm is no bar

to defendant's subsequent action for damages for misrepresenting the value of the property acquired, although it could have been set up as a counter-claim. 67.

JUDICIAL SALES—

Where property is *bona fide* sold at sheriff's sale at 2-3 the appraisement, the fact that within four months the sheriff's wife buys it with his money at a very slight advance does not show constructive fraud when attacked ten years later. 80.

JURY—

Disqualification (insanity in this case) of a juror at the time he is summoned is not ground for new trial unless it affirmatively appears to have existed at the time of trial. 483.

JUSTICE OF THE PEACE—

Enforcement of a justice's judgment will be enjoined where he failed to enter it on his docket until long after its rendition, as required by G. C., 10378. 461.

An affidavit to set aside a default judgment made by defendant's attorney is sufficient which states that defendant could not be present and asks the attorney to appear and that the latter was actually engaged in trial in another court and justifies the justice in setting aside the judgment. 52.

JUVENILE DELINQUENCY—

G. C., 1681, that a delinquent child charged with a felony may be recognized to the common pleas for trial, is not inconsistent with Section 1652 for sending him to the state reformatory, for it is permissive, and not mandatory. 442.

LANDLORD AND TENANT—

A lease of a store in giving the lessee the exclusive right to sell tobacco and cigars in the building is not by way of restriction, but of a grant and is not against public policy, and is enforcible against the lessor and other lessees having notice. 331.

Where an oil and gas lease is to be void if the lessee does not within six months drill on land adjoining or adjacent, drilling on land two miles away with eight farms intervening does not prevent forfeiture, although "adjacent" implies something intervening. 575.

LAW LIBRARY—

G. C., 3056, giving to the law library fines collected in the police court is not reconcilable with the later special act requiring fines collected in the municipal court, which is the successor of the police court, to be paid to the city treasurer (G. C., 1579-34) and the later special act must control, since both can not be obeyed. 541.

LIEN—

A title by adverse possession of a strip now claimed by the railroad, is not relinquished by the fact of a contract between the parties for the building of a switch, each to pay for the part on his own land, and the plat included the strip in the railroad company's land. 260.

MANDAMUS—

An official duty which does not inhere in the office, but could have been devolved on any other officer, is ministerial and its performance may be compelled by mandamus. 301.

Such is the duty of a municipal court judge to issue a warrant where the complaints and affidavits are regular, for as it could have been devolved on some other official his refusal to issue is controllable by mandamus. 301.

A controversy between a city and a telephone company as to the latter's right to a permit to lay conduits under certain streets, can not be determined by mandamus. 145.

The remedy to recover arrears of a policeman's pension is man-

damus, for being in the nature of a gratuity no liability to an action at law lies. 133.

Where a disabled policeman is suspended from the pension roll by a board having no authority to do so, a mandamus for arrears of pension can be granted only for six years past, mandamus being a civil action and by analogy G. C., 11222, applies. 133.

MASTER AND SERVANT—

If the adoption of a different instrumentality might have prevented the injury and it was one commonly used by employers under similar circumstances, it is a question for the jury whether there was negligence. 408.

Where the starting and stopping of machinery is controlled by employees in another room and there are no speaking tubes or phones to communicate with them and no rules relating to such communication are made, and an engineer oiling a machine, knowing that its operator was absent, is injured by its being started by the operator of another machine, the question of whether the employer was negligent in not providing such communication and not formulating rules to protect the engineer from the starting of the machinery is for the jury. 408.

An averment by an employee injured by cog-wheels that defendant permitted said cog-wheels to be exposed without any enclosure or protection, sufficiently charges violation of G. C., 1027, par. 2, "that they shall enclose with substantial railings or casing," etc. 334.

A city having given a contractor the right to use explosives in excavating for a sewer, the contractor's ignorance of the proximity of a gas main broken and ignited by him, is no defense, either to him or to the city, if by reasonable care he could have discovered it. 90.

One who let work to an independent contractor is liable for negligence of the latter's employees, if injury might have been anticipated as a direct and probable consequence of neglect of the employees. 90.

MORTGAGE—

Where O conveyed her property to K in trust to pay liens and give K relief and K mortgages the property and the mortgagee forecloses and issues an order of sale, whereupon O's father, for her protection, buys the mortgage and recalls the order of sale, a second order of sale issued on praecipe by O without consent of the father who owns the judgment is properly set aside by the court at the latter's request. 276.

A conveyance of land in trust to pay liens and relieve the grantor under a contract for re-conveyance on re-payment, is mere security and is in effect a mortgage, and a petition in effect asks a redemption although in terms asks a re-conveyance and a specific performance. 273.

A deed in trust to secure payment of a debt will be treated as a mortgage and where the debt is that of a third person for which the grantor received no consideration or the beneficiary no detriment, it can not be sustained as an executed gift where the grantor has retained possession of the land and did not intend the deed to be absolute. 182.

MOTOR VEHICLES—

A witness' statement that a motor was driven in excess of fifteen miles an hour is not to be disregarded because he says he can not say how fast it was going. 203.

Driving an automobile at a speed in excess of that prescribed in G. C., 12603 and 12604, is evidence of negligence where it causes a pedestrian in order to avoid being struck to step back in front of a moving street car which kills her. 199.

MUNICIPAL CORPORATIONS—

Section 3939, G. C., authorizing legislation by municipal corpora-

tion councils for the issue of bonds for street improvements without a vote of the people, is not repealed by implication by election 5649-2, *et seq.* 378.

The debt-creating power which has been conferred upon municipalities is in nowise affected by the tax limitations which have been imposed, and an issue of bonds to meet the costs of street improvements will not be enjoined, when. 378.

An abutting owner is entitled to damages from an unreasonable grade not only for the lot on which his house stands, but also for a lot on each side bought after he built, but put in one enclosure as a single homestead. 591.

A city's application under G. C., 3828, for assessment of damages by a street improvement is only for those resulting from the improvement as ordered by council, and damages for making a lower grade than are ordered are properly excluded. 591.

An abutting owner who builds before a grade is established for a street is not debarred from damages by the establishment of an unreasonable grade, although he did not build with reference to a reasonable grade. And his damages will be the difference in value between the actual and a reasonable grade. 591.

The new municipal code of 1902 by Section 231 took effect presently to carry into effect powers and duties, meaning thereby new powers and duties, but took effect at a later date for all other purposes, including the repeal of existing laws; hence an assessment levied between those dates is limited by existing laws and any amount in excess thereof will be enjoined. 269.

The trustees of the police relief fund have no jurisdiction to revoke a pension. This power resides in the mayor and police commissioners. 133.

MUTUAL BENEFIT SOCIETIES—

A member who has done all she needed to do to designate her beneficiary, but the secretary failed to make the entry on the record which he should have made, has accomplished her intention and such beneficiary is entitled. 313.

The grand-niece of a former husband of a member of a fraternal order is "related by marriage" under R. S., 3631-16 (then in force) and such relationship is not lost by death of such husband. 313.

NEGLIGENCE—

Contributory negligence to bar recovery must be an efficient cause of the injury so far that it would not otherwise have happened. Hence a charge that plaintiff can not recover if his negligence contributed in any way to the injury is erroneous, for he may recover notwithstanding, unless by ordinary care he could have avoided the consequences of defendant's negligence. 604.

If plaintiff's own negligence (a collision case) directly contributed to the injury in the slightest degree he can not recover. 604.

The doctrine of last chance does not apply where the negligence of both parties is concurrent, but only when defendant's negligence being later than plaintiff's is proximate. 475.

Defendant's liability for negligence is not defeated by the fact that but for the concurrent negligence of a third party the injuring force would not have been put in motion. 397.

It is not error to refuse to instruct that contributory negligence is a defense, in a case where defendant's negligence is gross. 90.

Evidence of "last chance" is properly excluded if such issue is not made in the pleading. 63.

A charge that if plaintiff's evi-

dence "suggests" contributory negligence he must remove the "suggestion" without requiring the suggestion to go to the extent of raising a presumption, does not impose too great a burden on him. 63.

The passing of a long noisy freight train on one track imposes the duty on a laborer on an adjoining track of keeping a more careful lookout for trains on his track, even though the nature of his work interferes with his looking out. 63.

NEW TRIAL—

Where in a contract case the verdict is too small to be reconcilable with the evidence and the charge, a new trial must be granted (G. C., 11576, sub. 5). 515.

An inadvertent statement of the plaintiff on the stand that he had got judgment before the justice below, is cured by the court explaining to the jury that such judgment was by default without a trial and not to be considered. 561.

An affidavit of a juror can not be received to prove misconduct of the jury. 508.

OFFICE AND OFFICER—

A resignation need not be in any particular words; it need only evince a purpose to relinquish the office and be communicated to the proper authority and be accepted in terms or an equivalent. 98.

A resignation to take effect at a future date, having been accepted, can not be withdrawn. 98.

PATENT—

If a patent is wholly valueless, this is a defense to the purchase price without first tendering it back. 477.

PHYSICIANS—

In a prosecution for practicing medicine without a license it is proper to exclude testimony as to the accused's course of preparatory study. And also to exclude testimony of the accused and others that his practice was not the practice of medicine, for the jury must determine this. 172.

Advertising to cure by chiropractic treatment or by magnetic healing is practicing medicine within the Ohio registration laws. 172.

The statutes (G. C., 1286, 1287 and 1294) providing for the examination and registration of those practicing medicine are constitutional. 172.

PLEADING—

As the prayer does not determine the nature of the action, the fact that a petition setting out an arbitration and a money award to plaintiff prays that the award be confirmed, does not deprive the court of power to render a money judgment. 583.

PUBLIC CONTRACTS—

That the sample furnished does not conform to the specifications does not prevent an award. 552.

A statute requiring the award to be to the lowest responsible bidder is narrower than one providing for the lowest and best bid, and where the lowest bidder has submitted two samples at different prices the higher priced one can not be accepted, though best, if the lower satisfies the call. 552.

An allegation "that the prosecuting attorney approved in writing the form and correctness of the contract" sufficiently complies with G. C., 2356, requiring him to endorse on the contract a certificate of its accord with the emergency statute. 152.

QUIET TITLE—

Where an heir owes the decedent more than his share in the estate, he inherits no interest in the real estate, and the other heirs are entitled to have the title

quieted against him and all claiming under him. 241.

RAILROADS—

Where a railroad, liable to pay half the cost of making an overhead highway, has passed into the control of another railroad which has assumed its liabilities, both roads are liable for such cost. 289.

G. C., 8897, charging half the cost of constructing a highway over or under an existing railroad upon the railroad, is not unconstitutional in not providing for a notice and hearing. 289.

A lot owner has such property right in a street as to entitle him to compensation if an additional railroad track with crossing-gates is to be constructed near enough to his property to impair access thereto, and the remedy in damages given by G. C., 8765 is not exclusive, but he is entitled to an injunction until compensated. 33.

RECEIVING STOLEN PROPERTY—

Ownership of the stolen property, as that of a named railroad, may be inferred from proof that it was taken from the premises, for the keeper may be assumed to be the owner. 558.

A conviction for knowingly buying stolen property will not be set aside because the proof showed receipt of similar stolen property at about the same time without making it certain on which of the several pieces the prosecution was based. 558.

RECORD—

Record of a lease containing an exclusive right to sell cigars in a building is notice to lessees of other stores in the building. 331.

REFERENCE—

A suit to construe and enforce a contract for the re-conveyance of land conveyed in trust to raise money and pay liens, taxes, repairs, etc., and for an accounting, is in equity; hence reference to a master is within the court's discretion. 273.

REFORMATORY INSTITUTIONS

G. C., 1652, that a juvenile delinquent sixteen years old or over who has committed a felony may be committed to the Ohio State Reformatory, is constitutional, although it does not provide for an indictment or trial by jury; for as to such persons the institution is not a prison, but a school. 442.

REMITTITUR—

It is proper for the court to enter judgment on ordering a remittitur with plaintiff's assent, whether it is satisfactory to defendant or not. 561.

RESCISSION—

Acquiescence in a wrong (as here, misrepresentations as to the condition and earnings of property of a corporation, inducing a purchase of its stock) will not preclude equitable relief unless voluntary and with full knowledge and for a reasonable length of time, so that enforcing a remedy would not be inequitable. 518.

Where there was no meeting of minds in making a land contract in that the buyer thought certain land which he desired for a particular purpose was included, an abatement in price would not be an adequate relief since it would not satisfy his object in buying; hence he will be granted a rescission. 504.

Where a contract for the exchange of real estate is rescinded for fraud, the *status quo* can be restored, although rents have been collected by the court, the parties, or by reference to a master. 161.

False representations as to the amount of rent charged and as to the existence of a sewer constitute fraud, for which a rescission will be granted. 161.

SALE—

A provision in a contract to buy flour that if the buyer re-sells he

shall use care in selecting the best markets and charge ten cents per barrel commission, does not affect the rule of damages prescribed in G. C., 8444, where the buyer has repudiated and put an end to the entire contract by refusal to receive. 515.

Retaining and using goods after inspection or reasonable opportunity to inspect waives any defect therein when there is no express warranty. 479.

Error in excluding evidence of a custom of trade that in a sale of fruit at different prices for first and second grades, if both grades are mixed all are to be considered as second grade, is rendered harmless by a verdict for the full amount, as this amounts to finding that all were of first grade. 479.

On refusal to carry out a contract to buy all the stock of a corporation, the seller's damages is not the full contract price, but the difference between contract and market prices at the time of the breach. 252.

A criminal statute (G. C., 12760) penalizing the sale of unwholesome provisions does not change the rules of evidence or of implied warranty, where damages are sought in a civil action. 129.

The implied warranty that eggs sold for shipment are sound is not proved to have been broken by the fact that four days later they are found to be decayed. 129.

SET-OFF—

The account books of a firm may be utilized in evidence to establish a set-off in favor of one partner who is sued where he has bought all the assets and assumed all liabilities of the firm. 483.

SEWER—

Where an assessment district consists wholly of farm lands, some of which are so near the sewer as to be able to use it by making a short extension, while others are very remote, a uniform assessment per acre will be enjoined as not in proportion to benefits, notwithstanding the solemn declaration of the officials that they had levied by benefits. 190.

SPECIFIC PERFORMANCE—

Where a will directed executors to have an appraisal and gives any devisee a right to elect to take at the appraisal, a consent by all the adult heirs, representing seven-tenths of the value, to a sale without appraisement, applies only to their several interests; but they will not be required to convey their seven-tenths to the buyer, for it might depreciate the value of the shares of the minors who are entitled to have a sale of the property as a whole. 59.

STATUTES—

If two statutes are irreconcilable the last must prevail, and a special act must control a general law. 541.

STATUTES CONSIDERED—

Section 3939, as to issue of bonds for street improvements, without vote of the people. 378.

STREETS—

G. C., 8892, giving a city power to require a street railway to bear a fair share of the city's part of the cost of separating grades where the street railway must go with the street, over or under, is constitutional when construed to mean that if the city and the street railway can not agree on the amount the ordinance fixing the amount is not a judgment, but merely like a creditor making out his bill for suit and leaving to court and jury to determine what is a fair amount. 497.

SUMMONS—

The requirement of G. C., 11281, that in an action for money the amount must be endorsed on the summons, has no application after answer and trial on the merits. 583.

A resident of the county who by fraud induced plaintiff to buy the stock owned by one corporation in another corporation, both corpo-

rations being located in another county, is a proper party under G. C., 11255, to a suit to rescind the transaction and recover payments made, because adversely interested; hence summons for the two corporations may issue to the other county. 116.

TAX—

A franchise tax (G. C., 5506) accruing after a receiver is appointed for a corporation is a first lien on the fund. 295.

TRIAL—

Where all parties acquiesce in a charge that the jury's view of the premises is evidence, the weight of evidence is not reviewable because all the evidence is not in the bill of exceptions. 58.

Where an answer admits the cause of action and sets up new matter in defense, it is proper to give the defendant the open and close. 529.

Considerable liberality should be allowed counsel in drawing inferences and even in invective where there is any support thereof in the evidence. 533.

A petition in an appeal case averring that plaintiff obtained judgment below, will be stricken off and perhaps costs required to be paid before another action. And if counsel in his opening makes the same statement the case would be continued, probably. 561.

That a witness was not examined in chief as to a usage, does not preclude a cross-examination as to the existence of such usage. 408.

TRUSTS—

A manager about to retire from a business and leasing the store over his employer's head will not be deemed to hold it in trust for the employer where it was agreed that on retirement he could engage in the same busines and that obtaining the lease should be fair and free for both. 428.

Income accumulated after the last semi-annual distribution day and before termination of the trust must be apportioned to the beneficiaries of the income, and that accumulated after termination of the trust must be added to the corpus of the estate and distributed with it according to the will. 490.

UNFAIR COMPETITION—

Although the words Cleveland Transfer Co. either above or in combination can not be protected as a trade name, one being geographical and the other descriptive, yet if a good will has become attached to them an infringement which would deceive the public will be enjoined. 486.

VENDOR AND PURCHASER—

A contract for the sale of real estate which is otherwise perfect shows a meeting of minds and is enforceable, although a blank space is left to be filled with a list of mortgages as collateral to secure the prescribed deferred payment. And so of the condition requiring insurance in a blank amount. 179.

VERDICT—

In a trial for first degree murder it is not error to fail to charge that the conviction could be for assault and battery where under the charge the jury could have reduced the degree to manslaughter, but found second degree, or where the case is too clear to justify a verdict for assault and battery. 508.

Where there are two defendants a verdict in favor of the defendant authorizes a judgment in favor of both defendants under the rule requiring a liberal construction of verdicts. 119.

WATER—

The rule exonerating an upper landowner who, by digging a hole, cuts off percolating water, does

not permit him to contaminate such water, as where his cess-pool pollutes his neighbor's spring; and injunction lies. 342.

A city is liable to a land owner for increasing the flow of surface water upon him by changing the grade of a street leading into the street on which he abuts. 168.

WILLS—

How distribution of income, accumulated before termination of trust, also after termination of trust, must be applied. 490.

WITNESS—

A woman is a competent witness against a man with whom she was living as his wife, although under some form of marriage, if she was previously married to and not divorced from another man still living. 230.

WORDS—

Rock, in a contract giving the right to blast, may include shale and earth packed solidly. 90.

WORKMEN'S COMPENSATION—

An award by the commission on a ground not applied for and so small as to indicate a mere gratuity, is equivalent to a denial of the claim made and is therefore appealable. 433.